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IN THE SUPREME COURT OF FLORIDA

Consolidated Cases

US SPRINT COMMUNICATIONS COMPANY,

Appellant,

-v.-

JOHN R. MARKS, et al.,

Appellee.

Case No. 69,169

MICROTEL, INC.,

Appellant,

-v.-

JOHN R. MARKS, et al.,

Appellee.

Case No. 69,159

REPLY BRIEF OF US SPRINT COMMUNICATIONS COMPANY ON APPEAL FROM THE PUBLIC SERVICE COMMISSION

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REPLY BRIEF OF US SPRINT COMMUNICATIONS COMPANY
ON APPEAL FROM THE PUBLIC SERVICE COMMISSION

Pursuant to Florida Rules of Appellate Procedure 9.210 and 9.420(d), US Sprint Communications Company ("US Sprint") hereby submits its reply brief in the above-captioned cases. This reply brief responds to the answer briefs submitted on December 15, 1986, by the Florida Public Service Commission ("Commission" or "PSC"), General Telephone Company of Florida ("General"), and United Telephone Company of Florida ("United") [collectively, "appellees"].

INTRODUCTION

The three appellees in this case do not dispute that the legislature "has made the fundamental and primary decision that there will be competition in intrastate long distance telephone service."1/ Rather, the appellees uniformly asserted that the decision of the Commission to continue its prohibition upon facilities-based intraEAEA toll competition is an acceptable means of implementing the legislative mandate for toll competition.2/

This Court, contrary to appellees' assertions, has approved only a definite and limited implementation period. In Microtel II, this Court approved the Commission's two year schedule for implementing full toll competition, crediting the Commission with an attempt to carry out an "orderly transition to full competition in long distance service."3/ By its action here on review, the Commission has sought to transform this Court's approval of a two-year implementation period into a perpetually renewable option to circumvent the legislative will. As discussed herein and in the initial brief submitted in this appeal by US

1/ Microtel, Inc. v. Florida Public Service Commission, 483 So.2d 415, 418 (Fla. 1986) ["Microtel II"].

2/ "Answer Brief of Appellee Florida Public Service Commission" at 7-13 (December 15, 1986) ["Commission Answer Brief"]; "Answer Brief of Intervenor-Appellee General Telephone COmpany of Florida" at 15-24 (December 15, 1986) ["General Answer Brief"]; "Answer Brief of Appellee, United Telephone Company of Florida" at 9-13 (December 15, 1986) ["United Answer Brief"].

3/ Microtel II, 483 So.2d at 419.

Sprint, the Commission's decision below flies in the face of the pro-competive mandate of the legislature as well as this Court's decisions in Microtel I[4/] and Microtel II.

The appellees also argued that the Commission properly found that continuation of toll monopoly areas (or "TMAs") would promote the public interest by avoiding adverse financial impact upon the local exchange carriers (or "LECs") and their ratepayers.[5/] In advancing that argument, the appellees have ignored the fact that the legislature did not afford the Commission the option of denying competitive entry based upon a finding of adverse effect upon LECs or their ratepayers. As this Court recognized in Microtel I, the issue of competitive entry was settled by the legislature. The standards and guidelines contained in section 364.335 for market entry by toll carriers pertain to the fitness of individual applicants. Yet, in focusing upon the criteria set forth in section 364.337(2), the Commission essentially inserted additional standards in section 364.335 and departed from the pro-competitive policy of the legislature.

Finally, the appellees argued that the Commission's decision was supported by competent substantial evidence. As discussed in US Sprint's initial brief and in Section II of this reply brief, the LEC proponents of retaining TMAs were charged

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4/ Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985) ["Microtel I"].

5/ Commission Answer Brief at 12-13 and 15-21; General Answer Brief at 9-12, 18-19, and 26-30; United Answer Brief at 13-19 and 21-25.

with the burden of proof in the proceeding below. In its decision, the Commission found in favor of the LECs, primarily upon the assumption that elimination of TMAs would reduce LEC toll revenues and cause local telephone rates to rise, while rejecting the LECs' attempts at quantification. The Commission's decision was not supported by competent substantial evidence and the proponents of TMAs clearly failed to supply the preponderance of evidence necessary to justify continuation of TMAs.

ARGUMENT

I. THE COMMISSION HAS ATTEMPTED TO BLOCK FULL TOLL COMPETITION RATHER THAN IMPLEMENT IT IN FULFILLMENT OF THE LEGISLATIVE MANDATE

All parties to this appeal agree that the legislature has articulated a policy of competition in the provision of toll telephone service. The primary point of contention is whether the Commission's decision below represents a reasonable effort to implement the pro-competitive legislative policy, or whether it constitutes an unauthorized restriction on the toll competition already approved by the legislature. US Sprint submits that the Commission's decision to continue toll monopoly areas for an indefinite period cannot be regarded as a step toward toll competition, nor can the Commission's narrow exception for resellers of LEC services suffice to fulfill the legislative directive. Moreover, in protecting local exchange carrier interests at the expense of a competitive toll market, the Commission has applied an incorrect statutory standard and thereby has exceeded the authority granted to it by the legislature.

A. THE COMMISSION'S DETERMINATION TO ESTABLISH TMAs WAS A FINAL DECISION

The appellees addressed at length the issue of whether the Commission's continuation of toll monopoly areas was a permanent prohibition or a transitional measure designed to implement the legislative mandate of toll competition.[6/] Not surprisingly, all appellees maintained vociferously that the Commission's decision did not establish permanent toll transmission monopolies.[7/] Nonetheless, the attempt at artful wording in the Commission's order must not be allowed to obscure the plain effect of the Commission's decision, which is to create permanent TMAs. Indeed, if an agency were permitted to thwart legislative policy merely by holding out the possibility of future reconsideration, the statutory limitations upon the power of an agency would be rendered meaningless.

In its decision below, the Commission referred to its earlier order, observing that "we viewed TMAs as an interim measure, to be reviewed prior to September 1, 1986."[8/] Noting that "[t]hat review is now complete," the Commission then concluded that "[a]s the industry exists today, it is not in the public interest to abolish TMAs."[9/]

6/ Commission Answer Brief at 7-13; General Answer Brief at 15-19; United Answer Brief at 11-13.

7/ For example, General and United emphasized the Commission's reference in its order to the "present transitional nature of the market" and "the public interest at present." General Answer Brief at 19; United Answer Brief at 11.

8/ "Order" at 15, A. 15.

9/ *Id*.

The Commission indicated that changed circumstances will be a prerequisite for abolition of toll monopoly areas, stating that "[t]echnological and regulatory changes may dictate a modification of this decision at some point in the future."10/ By establishing changed circumstances as a prerequisite for modification of its decision, the Commission acted consistently with the doctrine of administrative finality followed in Florida.11/ Clearly, under that judicial doctrine, the Commission's decision was a final order, as permanent as any agency decision, and the Court should reject appellees' argument that TMAs were not maintained on a permanent basis.

Discussion in the Commission's answer brief demonstrates that the Commission's decision was no less "permanent" in effect than any other decision of the Commission. The Commission stated in its brief:

10/ "Order" at 15, A. 15.

11/ This Court has held that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification." Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 339 (Fla. 1966). The power of an agency to modify an earlier decision "may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification . . . is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified." Id. See also Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249, 253 (Fla. 1982); Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 (Fla. 1979); Revell v. Florida Department of Labor and Employment Security, 371 So.2d 227, 230 (Fla. 1979); Hollingsworth v. Department of Environmental Regulation, 466 So.2d 383, 385-386 (Fla. 1st DCA 1985); Marell v. Hardy, 450 So.2d 1207, 1210-1211 (Fla. 4th DCA 1984); and Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648 (FLA. 3rd DCA 1982).

> Regulation of utilities, including rate regulation, is a continuous process of constant adjustments to previous decisions. Even so-called 'permanent rates' are not permanent. Rather they are rates to remain in effect for some undefined period of time until reevaluation is requested or is initiated by the regulatory agency. [Citation omitted][12/]

Just so, the Commission's decision continued TMAs indefinitely unless and until the Commission eliminates them in response to a request or upon its own initiative.[13/]

While continuing to deny that its decision established permanent TMAs, the Commission nonetheless attempted to justify its decision with a surprising interpretation of this Court's opinion in Microtel II. The Commission stated:

> The fact that the Commission had set a time certain for reexamining the issue of TMAs [toll monopoly areas] was not a determining factor in the Court's decision [in Microtel II] finding the Commission had authority to establish TMAs.[14/]

Moreover, the Commission represented the Microtel II opinion as a holding "that the Commission has jurisdiction to order TMAs for an indeterminate period upon a showing that it is in the public interest."[15/] The Commission's characterization of Microtel II is contradicted by the plain language of that opinion, which indicates that this Court relied upon the fact that the "monopoly concept" underlying the creation of TMAs was "limited in

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12/ Commission Answer Brief at 11.

13/ A. 15.

14/ Commission Answer Brief at 12.

15/ Id.

time."[16/] That crucial redeeming element of the Commission's earlier decision has been abandoned by the Commission in the decision that is the subject of this appeal. The Commission is no longer implementing the legislative directive to establish a competitive toll market; instead, the Commission has postponed intraEAEA toll competition indefinitely. Accordingly, the Commission's decision should be reversed.

B. ALLOWING RESALE BUT NOT FACILITIES-BASED INTRA-EAEA TOLL COMPETITION IS INCONSISTENT WITH THE LEGISLATIVE MANDATE FOR FULL COMPETITION

In its brief, the Commission also represented that TMAs "are monopolies in a very limited sense" and that competition has not been foreclosed because carriers may compete with a local exchange company's toll service by reselling the LEC's WATS or MTS services.[17/] On its face, the Commission's argument is inconsistent with the statutory change effected by the legislature in 1982.[18/]

16/ Microtel II, 483 So.2d at 416. This Court emphasized that:

> . . . the PSC plan contemplates reexamination of the toll monopoly concept in September 1986 when the beneficiaries of the monopoly will have to justify its retention. Thus, the monopoly concept is limited in time. . . . We do not read the orders under review as contemplating, nor do we understand it to be PSC's position, that toll monopolies will continue beyond an interim period during which the transition is made from total monopoly on all services to monopoly in local services only.

Id. at 418-19.

17/ Commission Answer Brief at 12.

18/ See discussion in "Initial Brief of US Sprint Communications Company on Appeal from the Public Service Commission" at 11-13 and 28-30.

In abolishing the "first-in-the-field" principle with respect to toll facilities, the legislature clearly directed that toll carriers be allowed to compete using their own networks. The Commission's decision to permit only resale toll "competition" within EAEAs contravenes the legislative mandate by continuing the prior restriction upon duplication of toll facilities.

Moreover, resale of LEC services cannot reasonably be regarded as "competition" in intraEAEA toll markets. It is surprising that anyone with even a basic knowledge of economics or business practices could seriously contend that the resale of goods or services purchased at retail can provide effective competition to the original supplier. The application of simple logic compels the conclusion that the carrier controlling the franchised monopoly service to be resold will be impervious to effective competitive challenge. Operation of the usual market forces can hardly be expected when firms are limited to reselling services of their primary competitor in order to "compete" against those very services.[19/]

The Commission's protection of the local exchange carriers forces facilities-based interexchange carriers to choose between paying the financial penalty associated with carriage of

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19/ Although there may be some opportunity to resell WATS service to toll customers whose usage is not high enough to warrant WATS subscription, it is clear that the potential market is limited. Moreover, the LECs obviously retain ultimate control over the profits and market penetration of resale "competitors" due to the LECs' control of WATS prices.

unauthorized intraEAEA toll traffic or constructing their networks in technically inefficient configurations.[20] Under the Commission's decision, only local exchange carriers may transmit intraEAEA toll calls using their own facilities. Thus, for example, a carrier with toll facilities linking Boca Raton and Key West may use those facilities to carry interstate and interEAEA traffic, but not to carry toll calls between Boca Raton and Key West. Instead, the TMA requirement would force that carrier to either divert such calls to LEC toll facilities or suffer a financial penalty. The inevitable result of the Commission's prohibition is economic distortion caused by the inefficient network configurations forced upon interexchange carriers.[21]

C. THE COMMISSION IS NOT AUTHORIZED TO PROHIBIT COMPETITIVE TOLL ENTRY IN ORDER TO PROTECT LOCAL EXCHANGE CARRIERS

All three appellees argued that allowing facilities-based intraEAEA competition would deprive local exchange carriers of revenues, thereby causing local exchange rates to rise.[22] Indeed, that supposition was the fundamental rationale for the Commission's decision. As discussed herein and in US Sprint's initial brief, the record does not establish any such harm, either to the LECs or to their local ratepayers. There is, however, a more fundamental question of whether, in basing its

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20/ Cornell, Tr. at 574.

21/ Id.

22/ Commission Answer Brief at 16-19; General Answer Brief at 9-12 and 27-30; United Answer Brief at 13-17 and 21-25.

decision upon potential local rate impact, the Commission has applied the wrong statutory standard to consideration of entry by competing toll carriers.

As US Sprint pointed out in its initial brief, "the effect on telephone service rates charged to customers of other companies" is one of the factors listed in section 364.337(2) for tailoring the regulatory requirements and exemptions applied to competing telephone companies. Virtually the same provisions were enacted subsequently in a new section, section 364.339(3) of the Florida Statutes, governing competitive provision of shared tenant service.[23/] Those standards are not, however, contained in section 364.335, the statute governing certification of competitive toll telephone companies.

This Court has already rejected the notion that the public interest standards of section 364.335 encompass protection of existing companies from toll competition.[24/] Clearly, the Commission has applied an incorrect statutory standard in focusing upon the elements of section 364.337(2), governing the type and level of regulation applied to competing carriers, when in fact it was obliged to act pursuant to section 364.335.

This Court has deemed it significant that the legislature failed to include in a statute language found in other parts of the same chapter.[25/] Application of that principle of

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23/ Ch. 86-270 § 1, 1986 Fla. Sess. Law Serv. 314 (West). See "Initial Brief of US Sprint Communications Company on appeal from the Public Service Commission" at 35-37.

24/ Microtel I, 464 So.2d at 1191.

25/ Department of Business Regulation, Division of Pari-Mutuel Wagering v. Hyman, 417 So.2d 671, 673 (Fla. 1982).

statutory construction establishes that the Commission inappropriately considered the factors enumerated in section 364.337(2) when it denied facilities-based carriers the authority to enter intraEAEA toll markets.

In limiting toll competition based upon its equation of local exchange carrier interests with the interests of the general public, the Commission has usurped to itself the legislative function of addressing major public policy issues. Moreover, the Commission has made that determination in a manner directly contrary to the previous expression of the legislature. The Commission, therefore, has exceeded its statutory authority, and its decision establishing permanent toll monopoly areas should be reversed.

II. THE COMMISSION COULD NOT FIND THAT THE LOCAL EXCHANGE CARRIERS MET THEIR BURDEN OF PROOF AFTER REJECTING THE LECs' FINANCIAL PROJECTIONS AS UNRELIABLE

The appellees all maintained that the Commission's order was supported by competent substantial evidence, charging appellants with an attempt to induce the Court to reweigh the evidence.[26/] The appellees essentially addressed the issue of evidentiary sufficiency in a vacuum, ignoring the legislative policy in favor of toll competition. The appellees ignored, as well, the facial inconsistency of the Commission's order.

Despite the fact that the LEC proponents of TMAs were charged at the outset of the proceeding with the burden of proof,

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26/ Commission Answer Brief at 14-21; General Answer Brief at 24-26; United Answer Brief at 19-25.

the Commission found in favor of the LECs while rejecting their estimates of potential financial loss. In its order, the Commission held that the data on estimated revenue impact provided by General and Southern Bell, the only local exchange carriers to attempt such assessment, were deficient and failed to "include some essential assumptions necessary for a complete calculation of revenue impact."[27/]

Had the Commission accepted the LEC evidence, it could not have made the finding that LECs and local ratepayers would suffer significant financial harm from the introduction of facilities-based intraEAEA toll competition. Utilization of the very data adduced by the LEC proponents of TMAs established only minimal, if any, adverse financial impact upon either LECs or their local exchange rates.[28/]

Having rejected all potentially relevant financial data, the Commission nonetheless found that "local rates for all consumers will ultimately go up" if facilities-based intraEAEA toll competition is permitted.[29/] Surely there can be no clearer proof of the evidentiary deficiency of the Commission's decision than the fact that the key element, potential adverse local rate impact, was decided in favor of the parties whose evidence had been rejected.

27/ A. 11.

28/ *See* discussion in the "Order" at 11-15, A. 11-15.

29/ "Order" at 8, A. 8.

As discussed in US Sprint's initial brief, the LEC proponents of continuing TMAs clearly failed to carry the burden of proof with which they were charged. Moreover, the decision of the Commission is unsupported by substantial competent evidence because the Commission rejected the only evidence that attempted to establish impact upon local exchange carriers and their ratepayers. In that respect, the Commission's decision is on the same footing as the order recently reversed by this Court in MCI Telecommunications Corp. v. Florida Public Service Commission, 491 So.2d 539 (Fla. 1986).

In MCI, this Court observed that the Commission itself "recognized that 'the data presented in this proceeding was imperfect.'"[30/] As in the MCI case, no evidence below "establishes the impact, if any," that the alternative to the Commission's action (i.e., the elimination of TMAs) "would have on Florida's ratepayers."[31/] There is not competent substantial evidence sufficient to carry the burden of further delaying toll competition and the Commission's decision therefore should be reversed.

30/ MCI, 491 So.2d at 541.

31/ Id.

CONCLUSION

For all of the reasons set forth herein and in US Sprint's initial brief on appeal in this proceeding, US Sprint respectfully submits that this Court should reverse the Florida Public Service Commission's decision in the proceeding below and order the Commission to permit facilities-based long distance carriers to engage immediately in the offering and provision of intraEAEA toll service.

Respectfully submitted,

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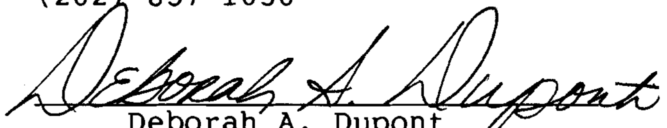

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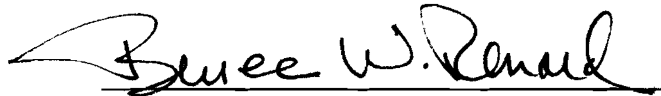

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