IN THE SUPREME COURT OF FLORIDA

U. S. SPRINT COMMUNICATIONS COMPANY, Appellant, vs. JOHN R. MARKS, et al., Appellees.	CONSOLIDATED CASES Case No. 69,169
MICROTEL, INC., et al., Appellants, vs. JOHN R. MARKS, et al., Appellees.	Case No. 69,159

On Appeal From The Florida Public Service Commission

REPLY BRIEF OF APPELLANT AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

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SUMMARY

This Reply Brief of AT&T Communications of the Southern States, Inc. ("AT&T") addresses the arguments presented by the three Appellees in their Answer Briefs.[1] The arguments advanced by Appellees are not supported by the record or precedent, and do not overwhelm Appellants' challenges to Order No. 16343. Instead, Appellees' arguments only affirm that the toll monopoly areas must be terminated immediately because Order No. 16343 is inconsistent with the Legislative mandate and the concerns expressed by this Court; the PSC has disregarded its prior representation to this Court that the toll monopoly areas are an interim, transitional measure; and Order No. 16343 is unsupported by competent, substantial evidence, and defies reality.

ARGUMENT

I. APPELLEES' ANALYSIS OF PUBLIC INTEREST DETERMINATION TURNS THE LEGISLATIVE MANDATE ON ITS HEAD, AND MISCONSTRUES THIS COURT'S PREVIOUS DECISIONS AS TO PSC AUTHORITY.

Appellees contend, in defense to Appellants' challenge to the PSC's action indefinitely retaining the toll monopoly areas, that the PSC acted within the authority of Section 364.335(4),

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[1] Florida Public Service Commission ("PSC"); General Telephone Company of Florida ("General Telephone"); and United Telephone Company of Florida ("United Telephone").

Florida Statutes, and in conformance with this Court's second Microtel decision. Microtel, Inc. v. Fla. PSC, 483 So.2d 415 (Fla. 1986). It is argued by Appellees that Section 364.335, Florida Statutes, permits the PSC to allow for competition in long distance services, so long as the PSC determines that it is in the public interest to do so. PSC Answer Brief, p. 7; United Telephone Answer Brief, p 15. That is a distorted and inaccurate portrait of the effect of the 1982 legislative amendment to Section 364.335. As this Court has previously recognized, the Legislature made the fundamental policy decision that interexchange toll competition is in the public interest. Microtel Inc. v. Fla. PSC, 483 So.2d 415, 418 (Fla. 1986). Contrary to the PSC's assertion, the Legislature did not delegate authority to the PSC to permit such competition if and when the PSC found it to be in the public interest.

Appellees never come to grips with the fact that the Legislature has made the fundamental policy decision that there shall be interexchange toll competition. Instead, Appellees advance an argument that the PSC is acting in the public interest by retaining the toll monopoly areas, and that this Court decided in the second Microtel decision that the PSC had the requisite authority to create the toll monopoly areas. PSC Answer Brief, p. 7; General Telephone Answer Brief, pp. 15-17; United Telephone Answer Brief, pp. 9-10. That argument not only fails to address the ultimate issue, it also mischaracterizes this Court's previous decision on the scope of the PSC's authority. In that decision, this Court first reaffirmed that the Legislature had

made the fundamental policy decision that interexchange toll competition is in the public interest. Microtel, Inc. v. Fla. PSC, 483 So.2d 415, 417 (Fla. 1986). The Court then permitted the toll monopoly areas as a transitional measure only, and invited Appellants to return to the Court if the PSC took the position that it had authority to make the toll monopoly areas permanent. As stated by the Court:

> "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 service only."

Microtel, Inc. v. Fla. PSC, 483 So.2d 415, 417 (Fla. 1986).

This language can hardly be construed as constituting this Court's approval of the PSC's creation of the toll monopoly areas. More appropriately, it reflects a serious concern on the part of this Court that in order for the PSC to comply with the legislative mandate there must be a transition to competition and that transition must be accomplished within a given period of time. Otherwise, the PSC would be acting beyond its statutory authority. Indeed, this Court's previous decision was based upon the PSC's repeated representations to the Court that the toll monopoly areas were being actively opened to competition; that is, there was a transition taking place. In the Court's opinion, this would have been consistent with the legislative mandate to foster competition. Id. p. 418-419. Thus, what the Court was approving was the PSC's stated intention of taking the necessary steps to open up the toll monopoly areas to full competition by September 1, 1986. But, in Order No. 16343, not only does the

PSC retain the toll monopoly areas, it fails to set forth any systematic plan for moving from toll monopoly to toll competition within the reasonably forseeable future.

Bottom line, Appellees fail to explain how the retention of the toll monopoly areas is consistent with the Legislature's fundamental policy decision that there be toll competition and this Court's decision approving a limited transitional plan. The justification offered by the Appellees is that the PSC in its wisdom has determined that the State is not currently ready for full toll competition, and the toll monopoly areas are a reasonable measure to give the LECs time to get ready for competition. PSC Answer Brief, pp. 12-13; General Telephone Answer Brief, p.21; United Telephone Answer Brief, pp. 13-19. However, that is not what Order No. 16343 states. Not only is this position inconsistent with the legislative mandate, it is not reflective of the Order's requirement that the advocates of competition -- not the LECs or even the PSC -- must show that the LECs are ready for competition. Order No. 16343, p. 15.

Moreover, Appellees' argument that toll monopoly areas are in the public interest begs the question as to whether the PSC has the authority to thereby restrict competition. As General Telephone correctly notes, the only authority granted to the PSC is to "foster" competition. General Telephone Answer Brief, pp. 20-21. How then can toll monopoly areas, which are the antithesis of competition, ever be construed to foster competition? Quite simply they cannot, nor are they intended to do that. It is now abundantly clear that the toll monopoly areas

are designed to protect the LECs from competition. Yet, the decision that there will be interexchange toll competition has already been made by the Legislature, and the PSC cannot unilaterally reverse that fundamental policy decision.

II. APPELLEES' ARGUMENT THAT TOLL MONOPOLY AREAS ARE NOT PERMANENT IS SPECIOUS.

Appellees argue that because any interested party can petition the PSC to terminate the toll monopoly areas by showing "significantly changed circumstances," the toll monopoly areas are not permanent, and, therefore, the Appellants are not entitled to take advantage of this Court's invitation to seek redress from Order No. 16343. PSC Answer Brief, pp. 8-11; General Telephone Answer Brief, pp. 17-20; United Telephone Answer Brief, pp. 11-13. Although the PSC carefully avoided the use of the term "permanent", even a casual reading of the PSC's order leads the reader to the inescapable conclusion that the PSC is shutting the door on any further activity on the PSC's part to open the toll monopoly areas to competition.[2] Appellees' argument is inconsistent with the following language:

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[2] The PSC, in its Answer Brief, pp. 10-11, goes so far as to suggest that the toll monopoly areas are like rates and that the process of establishing toll monopoly areas is analogous to ratemaking because rates are not set permanently. But, contrary to the PSC's suggestion, rates are set for an "indefinite duration" -- and only will be changed when circumstances have changed significantly. Moreover, what this attempt at an analogy fails to recognize is that there are certain standards established for when rates will be changed, e.g., costs exceeding revenues, while no such standards are available to determine when the toll monopoly areas are no longer appropriate.

"Technological and regulatory changes may dictate a modification of this decision at some point in the future. We will not speculate on the timing of these changes."

Order No. 16343, p. 15 (emphasis added).

This is precisely what the Court was concerned about when it invited Appellants to return. By leaving the possible termination of the toll monopoly areas to undefined and indefinite events lying for the most part outside the purview of the PSC is tantamount to the PSC abandoning to the Fates the concept of moving to toll competition. Thus, whether the toll monopoly areas are retained permanently, indefinitely, or until there are significantly changed circumstances, the result is the same; there will be no systematic introduction of competition into the toll monopoly areas by this Commission.

What Appellees seek to obfuscate by their arguments that there is a transition taking place within the industry is that Order No. 16343 has imposed a new time frame for retaining the toll monopoly areas: They will remain in effect until an interested party can demonstrate that competition within the toll monopoly areas is in the public interest. Order No. 16343, p. 15. This is inconsistent with the PSC's legislatively mandated responsibility to foster competition. Instead of the PSC actively fostering competition, which the Appellees concede the PSC is required to do, those advocating competition are now required to wait an indeterminate period of time, and then take a shot-in-the-dark that the PSC would agree that competition is now warranted because there are "significantly changed circumstances". To make matters worse, the PSC has provided no

standards as to what will constitute "significantly changed circumstances" except a vague reference to unnamed and indefinite "technological and regulatory changes." Order No. 16343, p. 15. Thus, despite Appellees' attempts to shore up Order No. 16343 with references to "public interest" and "an industry in transition", Order No. 16343 does not in any way reflect "a well reasoned and carefully crafted response to the legislative direction and the public interest" as this Court thought the toll monopolies were intended to be. Microtel, Inc. v. Fla. PSC, 483 So.2d 415, 418-19 (Fla. 1986).

III. IF THE PSC HAS BEEN GRANTED AUTHORITY TO CREATE TOLL MONOPOLY AREAS, THEN THE LEGISLATURE HAS MADE AN UNLAWFUL DELEGATION OF ITS AUTHORITY.

If, as the Appellees contend, the PSC has authority to establish toll monopoly areas because the Legislature did in fact delegate authority to the PSC to establish toll monopoly areas, then the Legislature has made an unlawful delegation of its authority. In their Initial Briefs, Appellants addressed the issue of unlawful delegation of legislative authority. Only Appellee General Telephone has responded to this issue. General Telephone, Answer Brief, pp. 23-24. General Telephone argues that the Legislature has made the fundamental policy decision in favor of competition, and that "the toll monopoly area is the vehicle used to implement competition in a reasonable and prudent manner to effectuate the existing fundamental policy of competition." General Telephone Answer Brief, p.24. If, for the

sake of argument, that is so, then the Legislature has made an unlawful delegation because it failed to set any minimal standards and guidelines for creating the toll monopoly areas. Thus, if the PSC can establish that certain areas of the State are to be free from competition, in the guise of advancing the legislative mandate, but without reference to any ascertainable standards and guidelines, then the Legislature has given the PSC the power to establish fundamental policy.

As this Court stated in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978);

> "Under the fundamental document adopted and several times ratified by the Citizens of this State, the Legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient. . . . Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy."

Id. at 924.

Additionally, the Court stated:

> "Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of non-delegation of legislative power to be viable in this State. Under this doctrine, fundamental and primary policy decisions shall be made by members of the Legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."

Id. at 925.

Nowhere in Chapter 364, Florida Statutes, did the Legislature set forth any minimal standards or guidelines to be used by the PSC in implementing the fundamental policy of toll

competition on a staged basis. Thus, if General Telephone of Florida's contention is correct, the Legislature has made an unlawful delegation of legislative power, and the PSC's creation of toll monopoly areas has been authorized by an unconstitutional statute.

IV. APPELLEES HAVE FAILED TO DEMONSTRATE THAT ORDER NO. 16343 IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Appellees argue that the PSC's decision to retain the toll monopoly areas was supported by competent substantial evidence. PSC Answer Brief, p. 14; General Telephone Answer Brief, p. 24; United Telephone, p. 19. The Appellees' defense of Order No. 16343 fails from a fundamental misconstruction of the PSC's responsibility in this area, but it also fails because Order No. 16343 is based upon submissions made by the LECs that are conclusory and speculative, and, ultimately, defy reality. At best, the LECs' submissions reflect the LECs' view that competition is not in the public interest. Yet, that has always been their view. But, the decision as to what constitutes the public interest has always been within the province of the Legislature, and the Legislature has declared in favor of competition. Thus, the mere recitation of the LECs' opinions that toll monopoly areas are in the public interest cannot provide the PSC with the level of evidentiary proof necessary to retain the toll monopoly areas. Duval Utility Company v. Fla. PSC, 380 So.2d 1028, 1031 (Fla. 1980).

Whether the PSC's decision comports with the essential requirements of law depends upon whether the decision is supported by competent substantial evidence. As stated by this Court:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonable inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. (Citations omitted.) In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. (Citation omitted.) We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." (Citations omitted.)

De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

Measured by this standard, the PSC's decision that the LECs have sustained their burden of proof that retention of the toll monopoly areas is in the public interest must be reversed as being arbitrary and capricious.

Moreover, and contrary to the opinion testimony submitted by the LECs that abolition of the toll monopoly areas will result in harm to the LECs and their ratepayers, there is competent substantial evidence available to the PSC that in all other geographic areas or services in which competition has been introduced, the disastrous results typically predicted by the LECs have not taken place. Yet, that evidence was inexplicably ignored by the PSC. Instead, the PSC chose to rely on speculation and supposition which, by the PSC's own assessment,

was inadequate, insufficient and incomplete. Order No. 16343, p.15. But, the PSC cannot base its decision upon evidence that it deems unreliable and imperfect. As stated by this Court in Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601 (Fla. 1959):

> "Our administrative evidentiary standard is competent substantial evidence. It is clear that the use of unreliable evidence as the sole foundation of an essential portion of the Commission's findings fails to meet this standard."

Id. at 608.

CONCLUSION

Appellees have failed to rebut the arguments advanced by Appellants in their Initial Briefs that the PSC acted without authority in retaining the toll monopoly areas on a permanent basis. Additionally, Appellees have presented no supportable arguments for why Order No. 16343 should not be reversed. Accordingly, Order No. 16343 must be reversed, and the toll monopoly areas must be terminated immediately.

Respectfully submitted,

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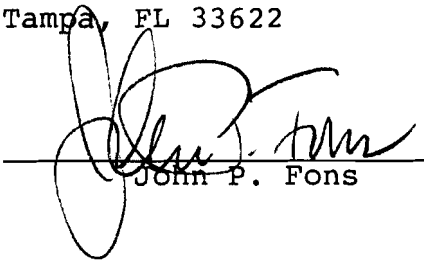

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