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IN THE SUPREME COURT OF FLORIDA

AT&T Communications of the Southern States, Inc., et al.,
Appellants,

v.

John R. Marks, et al.,

Appellees.

Case No. 69,732

On Appeal From the Florida Public Service Commission

ANSWER BRIEF OF INTERVENOR-APPELLEE GENERAL TELEPHONE COMPANY OF FLORIDA

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GLOSSARY OF TERMS

Access: The facilities of a Local Exchange Company (LEC) such as General Telephone Company of Florida (GTFL) which allow Interexchange Carriers (IXC) to originate and complete long-distance calls. In general, IXCs cannot provide access facilities for intrastate calls.

Access Charges: Those charges paid by IXCs to LECs for the use of local facilities to originate and terminate long-distance calls. These charges are necessary to compensate the local exchange company for the role its local network plays in the transmission of a long-distance call.

Equal Access Exchange Area (EAEA): A geographic area established by the Florida Public Service Commission to provide the benefits of competition from a customer's perspective in lieu of an interexchange carrier's viewpoint. In an EAEA, the LEC must gather all traffic throughout the area to one point so it can be picked up by the various IXCs. This promotes competition in areas (rural) which are not extremely profitable for IXCs. There are twenty-two (22) EAEAs in Florida.

Interexchange Carrier (IXC): A long-distance carrier that provides long-distance service on its own facilities where permissible or through the resale of another carrier's service such as WATS or MTS. IXCs can resell both LEC services and other competing IXC services.

Local Access and Transport Area (LATA): A geographic area created at the time of the divestiture of the Bell system. Southern Bell and GTFL can only provide service within LATAs. InterLATA traffic is not allowed. AT&T-C and other IXCs can carry long-distance traffic between LATAs. The issue as to whether there is competition within a LATA--which is permitted in Florida--was reserved to the states.

Local Exchange Carrier (LEC): A company such as General Telephone Company of Florida which provides local calling and access services. LECs also provide EAEA and intraLATA long-distance service in competition with various IXCs.

Resale/Reseller: A long-distance company which purchases the services of another carrier such as WATS at wholesale prices and resells that service to its customers at a markup. All long-distance carriers compete in this fashion today on intraEAEA traffic.

Toll Monopoly Area (TMA): The use of the word "monopoly" in this term is a misnomer per Order No. 16343 as competition exists within a TMA on a resale basis. The TMA merely provides that all long-distance calls within an EAEA must be hauled on LEC-provided transmission facilities. The TMA designates the method by which competition takes place within an EAEA.

Transmission Facilities: Those facilities and switches owned and controlled by a LEC or IXC which carry a long-distance call.

Wide Area Telephone Service (WATS): Long-distance service charged on a per hour of use basis. WATS is less expensive than regular long-distance service (MTS) for a large user. WATS contains a substantial discount, allowing IXCs to resell the service at a higher price than WATS, but at a lower price than MTS long-distance service.

I. Introduction

General Telephone Company of Florida (hereinafter referred to as "GTFL") submits this Brief as an Intervenor-Appellee in response to the Joint Initial Brief filed by Appellants, AT&T Communications of the Southern States, Inc. (AT&T-C), MCI Telecommunications Corporation (MCI) and Microtel, Inc. (Microtel).[1] This case concerns whether the Florida Public Service Commission ("Commission") has the requisite statutory authority under Sections 364.335 and 364.337, Fla. Stat. (1985),[2] to control the pace at which competition is introduced in this state and the methods utilized to foster a competitive environment which is in harmony with public interest concerns. This Court has already ruled in Microtel, Inc. v. Florida Public Service Comm'n., 483 So.2d 415, 418 (Fla. 1986), that while the above statutes embody the legislative decision that there will be competition in the long-distance market in Florida, that the statutes do not require "instant, unlimited competition" for all long-distance services. Indeed, this Court held that the transition to full competition must be done in a manner to satisfy the public interest.

This appeal is taken from Order No. 16804 issued on November 4, 1986, wherein, the Commission extended the partial access facilities bypass restriction for an additional interim period of time, until the Commission implements appropriate rate structures which will alleviate

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[1] The enumerated parties will be collectively referred to herein as "IXCs" or "Appellants".

[2] Any further references are to Fla. Stat. (1985) unless otherwise indicated.

the cause of uneconomic bypass. (A.5).[3] The partial restriction allows the IXCs to construct access facilities if they can prove to the Commission that the local exchange carrier (LEC) cannot offer such facilities at a competitive price and in a timely manner. Therefore, the bypass restriction is far from absolute - it only restricts Appellants from taking advantage of a temporary pricing anomaly for the benefit of all of society.

GTFL will present argument herein that will relate to two fundamental points. First, GTFL will demonstrate that the bypass restriction has been in effect since 1983 and no IXC has ever taken an appeal regarding this item even though the opportunity to do so has been available on numerous occasions. Therefore, GTFL submits that the IXCs have waived any appellate remedies concerning the authority of the Commission to implement the bypass restriction because that item was not the purpose of this proceeding. The implementation issue was tried and resolved in final orders which are now not subject to appeal some three years after the fact. The only proper issue before the Court at this time is whether the extension of the restriction is based on competent and substantial evidence. Second, GTFL will demonstrate that the Commission possesses the requisite statutory authority to implement the interim access facility bypass restriction under Sections 364.14, 364.335 and 364.337. Accordingly, Order No. 16804 should be affirmed in all respects.

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[3] "R.____" refers to pages of the record. "Tr.____" refers to pages of the hearing transcript. "A.___" refers to pages of Appellee's Appendix submitted herewith pursuant to the provisions of Fla. R. App. P. 9.220. Said appendix contains relevant portions of the record for the Court's convenience.

II. Statement of the Case and Facts

GTFL has reviewed the "Statement of the Case and Facts" section as contained in the Joint Brief and basically, has no objection to the specific facts that were mentioned by Appellants. However, GTFL feels compelled to point out to the Court one extremely important element of the bypass restriction which is not dwelled upon by the IXCs in their presentation. At page 2 of the Joint Brief, the IXCs state as follows:

> The PSC contends that the alternate access restriction, which is commonly called "the bypass restriction" and has the effect of requiring the IXCs to purchase all of their access requirements from the LECs, is necessary in order to maintain universal service and to protect the LECs' revenues. At the same time, this bypass restriction does not apply to customers/end users who may provide their own access facilities which bypass the LEC access facilities. (Emphasis added)

Different versions of the foregoing quote are peppered throughout Appellant's Joint Brief. A reading of the above quote from Appellant's Joint Brief would lead to the conclusion that the IXCs have to purchase all access requirements from the LECs. The problem presented is that the above quote is not a correct statement of the bypass restriction for two reasons.

First, the bypass restriction does not prohibit the IXCs from installing bypass access facilities in all instances. The order under review which extends the restriction and every order before it, allows the IXCs to install such facilities if the IXCs can prove the following two items: 1) That the LEC cannot offer the access facilities at a competitive price and 2) that the LEC cannot provide the access

facilities in a timely manner. (A.3 and 6). If the IXCs can make the foregoing showing, they are free to install facilities.

Second, the foregoing exception to the bypass restriction makes the IXC's allegation, that they are being treated differently from private customers, not entirely true. The basis for allowing IXCs to build access facilities under certain circumstances has to do with the difference between economic and uneconomic bypass. Uneconomic bypass is that situation where a user puts in its own access facilities even though its cost of installation will be more than the utility's cost. This type of bypass is uneconomic because while the LECs cost to construct the plant is less than the customers, the customer will bypass because the LEC's rate for the use of its facilities is not reflective of its true costs. Existing access rates are overinflated with subsidies imposed to hold down the level of local rates. Economic bypass is the situation where the user can put in the plant in a more efficient manner.[4]

Under the bypass restriction, the IXCs are only prohibited from engaging in uneconomic bypass. The record and the Joint Brief reveals the major concern is the subsidies which are included in access charge rates to keep down the level of local rates. In its simplest form, the IXCs argue the access rates are too high. In this regard, the Court should note that the IXCs are basically in the same position as the unregulated end user. The IXCs are free to make a decision whether it is economic to bypass the LEC's access facilities.

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[4] A third type of bypass is where the customer bypasses regardless of cost for the sake of ownership and control. The IXCs cannot do this unless it is also economic.

If it is economic to do so, the Commission will allow such facilities to be constructed and owned by the IXCs. Therefore, the IXCs can bypass on the same terms as regular users as shown by the following quote from Order No. 16804:

> It is important to note that we do not desire to prohibit all bypass. Bypass should only be restricted in an effort to prevent uneconomic bypass that by definition is detrimental to the general body of ratepayers. IXCs should be able to provide access facilities bypass; however, what we require is that it be demonstrated that it is economic bypass. (A.6).

III. Summary of Argument

Since the Florida Legislature made the decision to start the process of implementing competition in the long-distance market by modifying Sections 364.335(4) and 364.337, the Commission has been grappling with instituting the proper tools and techniques pursuant to its statutory authorization to make competition work for the benefit of the public - not the competitors. Many of the decisions and anachronisms from the precompetitive environment have to be modified for the competitive era in order to avoid hurting those individuals - the public - for whom competition was created.

In this case, the subject is the partial access bypass facility restriction. During the precompetitive days, the federal and state regulators loaded local exchange carrier long-distance rates with costs from local service in order to keep down local rates. With the advent of competition, these subsidies created a price anomaly which could be taken advantage of if the IXCs put in their own access facilities. The end result would be substantially increased local service rates.

In order to avoid this situation until the competitive playing field was leveled, the Commission ordered the IXCs to use LEC access facilities unless they could show they could do it cheaper and in a more timely manner. In its simplest terms, the Commission did not want the IXCs to install facilities which were not economically justified to the detriment of society. The restriction is interim in nature until the subsidies are reconsidered and access services are properly priced by the Commission.

The IXCs take exception to the Commission's use of the bypass restriction to bring about competition in a manner which is most favorable to the public. GTFL will present two basic arguments herein to support the Commission's position. First, GTFL will demonstrate that the bypass restriction has been in effect since 1983 and has never been appealed even though final orders have been issued. GTFL submits the IXCs have waived any right to raise the authority of the Commission to implement the restriction by their prior inaction. Second, GTFL will show that the Commission's bypass restriction is authorized by statute and the decision is supported by competent and substantial evidence.

IV. Argument

A. The Appellants have failed to preserve any point of error for judicial review regarding the Commission's authority to implement the partial bypass restriction.

1. Introduction

The Court should note that the bypass restriction was created in 1983 through several different orders - none of which were ever appealed by the IXCs who were parties to each docket. In the case under review, the legal authority to implement a bypass restriction was not the purpose of the hearing. The sole purpose of the hearing which led to the entry of Order No. 16804 in November, 1986, was whether the bypass restriction should be extended for an additional period of time to complete the transition to full competition. No IXC raised the legality of the restriction until the post-hearing phase of the proceeding and then it was pursued only by AT&T-C. AT&T-C never saw fit to raise this issue in the prehearing order which establishes the issues to be litigated in Commission proceedings. (A.9). AT&T-C's basic position in this proceeding reveals no issue regarding the authority of the Commission to implement the restriction. (A.13). The only issue in the case concerned whether the restriction should be removed. (A.14). AT&T-C's answer to the issue did not raise a legal question. (A.15). Further, the prehearing order reflects that AT&T-C tried to interject additional issues into this proceeding. (A.17). None of the additional issues concerned the legal authority of the

Commission to use the restriction. GTFL submits the legality of the restriction is not properly before the Court.

2. Regulatory Background

Prior to the 1982 amendment to Section 364.335(4), the provision of long-distance intrastate traffic was a joint effort of the LECs. After the statutory amendment, intrastate long-distance traffic was open to all companies who could pass the Commission certification requirements which are set forth in Sections 364.335 and 364.337. Section 364.337 specifically gives the Commission authority to prescribe different requirements for a certificate that authorizes one telephone company to compete with another telephone company, if such action is deemed to be in the public interest. In Microtel, Inc. v. Florida Public Service Comm'n., 464 So.2d 1189, 1191 (Fla. 1985),[5] this Court held that Sections 364.335 and 364.337, taken together, provide for a two-step certification process. The first step which is governed by Section 364.335 pertains to whether the Commission should issue the certificate at all. The second step concerns the special requirements which will be imposed on the IXC pursuant to Section 364.337.

In exercising the foregoing statutory authority, the Commission restricted IXC certificates as they pertained to the provision of access facilities. AT&T-C's certificate is a prime example, since AT&T-C is the largest interEAEA long-distance carrier in the state. Order No. 12788 issued on December 16, 1983, which granted AT&T-C intrastate authority, states in pertinent part as follows:

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[5] Hereinafter referred to as Microtel I.

III. Bypass

> The changing environment of the telecommunications industry has raised concerns about the interexchange company bypassing the local exchange company to provide interexchange service. We know bypass is a concern; we do not know the possible extent of bypass or the cost of bypass. Since there are so many unknowns, we find it appropriate to prohibit AT&T from accessing end users (subscribers) for intrastate service other than by interconnection with the local exchange company's distribution facilities, unless expressly authorized by the Commission. AT&T must advise the Commission when in a particular market it appears more economical to construct bypass facilities than to interconnect with the facilities of the local exchange company. The Commission will then analyze the bypass proposal for acceptance or rejection. (Emphasis added) (A.21).

AT&T-C never appealed the above order which specifically restricted its ability to engage in access facilities bypass. That order is final and is not subject to collateral attack in this proceeding.[6] Further, this Court cannot amend AT&T-C's certificate in this proceeding. Any appellate remedies concerning the certificate have been waived.

During the same period of time, the Commission issued its landmark decision in Order No. 12765 on December 9, 1983. (A.25). Order No. 12765 contained the Commission's master plan for phasing in competition over a period of time so competition would result in benefits to the

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[6] The exact same facilities access restriction was placed in each Appellants certificate issued by this Commission except for MCI. See: Re: Application of Microtel, Inc., 82 F.P.S.C. 8:201, 211 (1982); Re: Petition of MCI Telecommunications Corporation, 83 F.P.S.C. 7:415, 420 (1983); Re: Application of AT&T Communications of the Southern States, Inc., 83 F.P.S.C. 12.209, 212 (1983); Re: Application of Satellite Business Systems, 84 F.P.S.C. 1:262, 265 (1984); Re: Application of GTE Sprint Communications Corp., 84 F.P.S.C. 1:270, 271 (1984); and Re: Application of United States Transmission Systems, 84 F.P.S.C. 2:164, 167 (1984).

using and consuming telephone customer. The Commission made the following findings regarding the bypass restriction:

> The appropriate rate structure to counter the threat of uneconomic bypass will be developed according to the plan described above. We are instituting extensive reporting procedures to develop data needed for this purpose. In addition, bypass technologies and the economics of bypass are subject to further study. In light of the ongoing efforts by this Commission to implement this plan, we find that IXCs shall not be permitted to construct facilities to bypass the LECs unless it can be demonstrated that the LEC cannot offer the facilities at a competitive price and in a timely manner. (A.44).

None of the IXCs appealed Order No. 12765. That order is now final and not the proper subject of this appeal.

The next Commission decision on this topic was Order No. 13750 issued on October 5, 1984, and which addressed toll transmission monopoly areas and the bypass restriction. The IXCs appealed the Commission's establishment of the toll transmission monopoly to this Court, but the access bypass restriction was never an active briefed issue. The Court affirmed the Commission's use of the transmission monopoly in Microtel, Inc. v. Florida Public Service Comm'n., 483 So.2d 415 (Fla. 1986).[7]

The foregoing chronology of Commission cases leads to the order which is the subject of this appeal. The purpose of the hearing which led to the entry of the order under review was whether the bypass

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[7] Hereinafter referred to as Microtel II.

restriction should be extended or eliminated due to current conditions. The Commission found as follows:

> Upon consideration, we find it appropriate to retain the bypass restriction until we implement an appropriate rate structure for the recovery of NTS costs from IXCs and end-users. Therefore, IXCs shall not be permitted to construct access facilities to bypass the LECs unless it can be demonstrated that the LECs cannot offer the access facilities at a competitive price and in a timely manner.
>
> From the outset of this docket we have recognized that proper pricing is the correct tool for combating uneconomic bypass. The lack of proper pricing affects the ability of the LECs to offer facilities at competitive prices. However, as we have continuously stated, an effective access charge plan with the proper pricing and structure requires a substantial amount of time to design, implement and refine. It was because of this time-lag that we imposed the bypass restriction. (A.5).

The question of whether the Commission had authority to implement the restriction was never raised until the post hearing phase of the case when AT&T-C interjected the issue. (Tr.259). It is GTFL's position that the authority of the Commission to utilize the bypass restriction was litigated over three years ago and was never contested on appeal. Indeed, the IXCs appealed Order No. 13750 which included the bypass restriction to this Court, but never raised such item as being unlawful to the Court.

Each of the orders mentioned above constituted final agency action and advised the parties as to their rights to judicial review as required by Section 120.59 of the Administrative Procedure Act. There was no appeal within the time allowed by law. Therefore, this Court has no jurisdiction over the actual orders which created and

implemented the partial bypass restriction. Carrollwood State Bank v. Lewis, 362 So.2d 110, 113 (Fla. 1st DCA 1978), Bank of Port St. Joe v. Dept. of Banking and Finance, 362 So.2d 96, 98 (Fla. 1st DCA 1978) and State ex rel. Florida Dept. of Natural Resources v. District Court of Appeal, Second District, 355 So.2d 772, 773 (Fla. 1978). AT&T-C's attempt to interject this issue into this case cannot cure past missed opportunities to appeal this issue when the restriction was first implemented. Appellant's Joint Brief should be disregarded with the exception of whether there was competent and substantial evidence to support an extension of the restriction.

B. The Commission's Extension of the Partial Access Bypass Restriction Does Not Constitute an Unjustified Attempt to Protect the Public Interest.

The Appellants in this proceeding make the argument that the Commission's extension of the bypass restriction cannot be justified by "some roving commission to protect the public interest."[8] GTFL submits that such an argument ignores the explicit statutory authority of the Commission and this Court's previous decisions concerning Sections 364.335(4) and 364.337.

In Microtel I, this Court was presented with its first opportunity to construe the 1982 statutory amendments which permit long-distance competition in Florida. This Court concluded that "...the legislature had made the fundamental and primary policy decision that there be

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[8] Joint Brief, page 13.

competition in long-distance telephone service." 464 So.2d at 1191. The main issue in Microtel I concerned whether an IXC (not a LEC) could keep other IXCs out of the field. In answering the foregoing question in a negative manner, the Court reached certain conclusions regarding Sections 364.335 and 364.337. First, the Court noted that the Commission must be guided by the public interest in granting certificates and any restrictive conditions associated therewith. Second, the Court declared that:

> The clear legislative intent to foster competition also illuminates the public interest standard of section 364.335(4). We are of the opinion that adequate standards and guidelines are provided in this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed. (Emphasis added) 464 So.2d at 1191.

Webster's New Collegiate Dictionary defines the word "foster" as: "to promote the growth or development of: encourage."[9] Thus, in Microtel I, the Court noted that the status of competition was one which would grow and develop over the years. Competition in all facets of the long-distance market was not an event that would take place overnight.

Microtel II, which concerned the IXCs' first appeal of the interim toll transmission monopoly, followed the foundation laid by the Court in Microtel I. The Court specifically held that certificates should not be issued in a manner contrary to the public interest and that the

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[9] Webster's New Collegiate Dictionary (1981).

statutory amendments do not require "instant, unlimited competition." 483 So.2d at 418.

Based on the foregoing two cases, GTFL is at a loss to understand how the IXCs can allege that the Commission does not have specific statutory authority to implement the restriction. The Commission is merely setting the stage so that fair competition can be had in the long run for the benefit of the IXC, LEC and ratepayer alike. The LECs proved and the Commission found that the transition was not over and that further steps needed to be taken before the restriction was lifted.

The instant situation is a far cry from the facts contained in State Department of Transportation v. Mayo, 354 So.2d 359 (Fla. 1978), which Appellants rely on for authority that the Commission cannot protect the public interest. In Mayo, the Commission implemented minimum rates for certain truckers based on statutes concerning its safety authority. The Commission felt minimum rates would increase compliance with necessary vehicle maintenance procedures. The Court reversed the Commission on the grounds that the public interest could not be a justification for using ratemaking as a means to enforce safety, when the statute specifically exempted the carrier from the Commission's rate-fixing powers. In this case, the Commission has a statute which uses the term public interest and two Supreme Court decisions which recognize the Commission's authority to phase-in competition to ensure the maximum benefits from competition.

Due to the specific statutory authority contained in Sections 364.335 and 364.337, the Appellant's reliance on Florida Power & Light Co. v. Florida Public Service Comm'n., 471 So.2d 526, 8 F.L.W. 116 (Fla. 1983) is also misplaced.[10] First, there is statutory authority in the instant appeal where authority was lacking in the Florida Power case. Therefore, such citation is not on point. Second, Appellants use the Florida Power case in an attempt to make some sort of correlation regarding the role of federal-decision-making upon the two cases. GTFL submits that such a comparison is nothing more than an attempt to cloud the issue before the Court. The key issue here is that statutory authority exists to support the bypass restriction while none was present in Florida Power. The accompanying role of federal policy has no bearing on the matter.

GTFL submits that the following quote from Microtel II best sums up the authority of the Commission to utilize the bypass restriction as a tool to protect the public interest.

> ...Third, section 364.335(4), as amended, provides that PSC may grant a certificate in the public interest. It does not mandate that such certificates be issued contrary to the public interest. We reiterate our conclusion in Microtel, Inc. that the legislature has made the fundamental and primary decision that there will be competition in intrastate long distance telephone service,

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[10] GTFL notes that the foregoing decision is not a reported opinion and was withdrawn by the Court.

> but do not read the statute or Microtel, Inc. so expansively as to require instant, unlimited competition in all long distance services.
> 483 So.2d at 418.

C. Section 364.14 Gives the Commission Ample Authority To Impose the Bypass Restriction on the IXCs.

At page 16 of the Joint Brief, Appellant's argue that the Commission has no authority under Section 364.14 to impose the bypass restriction on the IXCs, because such section applies to rates and practices of a telephone company as applied to its ratepayers. Appellants then cite the Court to United Telephone Company v. Florida Public Service Comm'n., 496 So.2d 116 (Fla. 1986) as additional support for their position.

Appellant's argument is fraught with error. First, the United case stands for the proposition that Section 364.14 cannot be used to alter practices or contracts between utility companies. GTFL agrees. However, there is no practice or contract between utility companies in this case. Here, the Commission is telling AT&T-C and the other IXCs that it is an unreasonable practice to subject IXC ratepayers to the detrimental effects of IXCs engaging in uneconomic bypass. Second, the IXCs act as if Section 364.14 only applies to LECs and is not applicable to IXCs. Such is not the case. Each IXC in this state is a "telephone company" as that term is defined in Section 364.02(4) and Chapter 364 controls their operations. Section 364.14 provides as follows:

> (2) Whenever the commission finds that the rules regulations, or practices of any telephone company are unjust or unreasonable, or that the equipment, facilities, or service of any telephone company are inadequate, inefficient, improper, or insufficient, the commission shall determine the just, reasonable, proper, adequate, and efficient rules, regulations, practices, equipment, facilities, and service to be thereafter installed, observed, and used and shall fix the same by order or rule as hereinafter provided. (Emphasis added).

Section 364.14 is direct support for the Commission's position that an IXC practice of bypassing LEC access facilities is detrimental to IXC ratepayers as a whole and should not be permitted. Section 364.14 gives the Commission the right to determine what are the proper practices to follow and the facilities to utilize in rendering long-distance service. The United case, supra, directly supports this contention.

> ...The federal courts have interpreted their counterpart to Florida's section 364.14 as only empowering federal regulatory commissions to alter those practices which are unjust, unreasonable or discriminatory as applied to ratepayers. See, e.g., Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 355, 76 S.Ct. 368, 372, 100 L.Ed. 388 (1956) (section 206(a) is designed to give commission power to protect the public interest, not to protect the economic interests of utility companies); Metropolitan Edison Co. v. Federal Energy Regulatory Commission, 595 F.2d 851, 855 (D.C.Cir. 1979) (regulatory authority to correct "unjust, unreasonable, unduly discriminatory or preferential" practices extends only to those practices unjust in reference to the public, i.e., the ratepayers, not utility companies). 496 So.2d at 119.

The Court should disregard this argument of the Appellants for the reasons aforenoted.

D. The Commission's Bypass Restriction Does Not Constitute an Invasion Into Discretionary Management Decisions.

At page 19 of the Joint Brief, Appellant's argue that the Commission cannot interfere with legitimate management decisions unless it has clear legislative authority to do so. GTFL concurs with the general principle that the Commission cannot encroach on management decisions unless an abuse of discretion or bad faith is demonstrated. However, the bypass restriction is not synonymous with a management decision as to where the company buys typewriters as alleged by the IXCs. The issue in this case is the implementation of competition in the state of Florida in such a manner as to create as much benefit to the public as possible. The Legislature has provided the necessary statutory authority to support the Commission's regulation in this area.

Initially, it must be noted that any sort of governmental regulation has a direct effect on the ability of management to run the business as it pleases. For example, Section 364.345 prohibits a telephone utility from selling its business unless it obtains advance Commission approval and a favorable public interest finding is entered. In this instance, management cannot do whatever it wants.

The same principle applies to the bypass restriction. Section 364.335(4) gives the Commission authority to control the pace and methods which are utilized to bring competition into being in the state of Florida. Microtel II has affirmed the ability of the Commission to structure competition so it is developed for the benefit of the public.

In this case, the Commission found that uneconomic bypass of LEC access facilities by the IXCs was detrimental to the public interest under existing conditions and should not be permitted. Therefore, the Commission's action fits squarely within Appellant's own parameters as to when the Commission can have an effect on management decisions. The language of Section 364.335(4) and Microtel II supply the clear expression of legislative authority.

E. The Commission's Order is Supported By Competent and Substantial Evidence and This Court Cannot Substitute Its Opinion for That of the Commission.

It is well settled that the Commission's decisions must be supported by competent and substantial evidence. Duval Utility Company v. Flordia Public Service Commission, 380 So.2d 1028 (Fla. 1980); Citizens of Florida v. Hawkins, 356 So.2d 254 (Fla. 1978); and City of Plant City v. Mayo, 337 So.2d 966, 974 (Fla. 1976). In the Duval case, supra, the Court defined competent and substantial evidence as follows:

> Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or]...such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.' De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). 380 So.2d at 1031 (Fla. 1980).

GTFL submits that the Briefs of the IXCs on this point do nothing more than reargue the evidence. Such a tactic is uncontrovertible proof that the Commission's decision is supported by competent and substantial evidence. The only fact which the IXCs cannot accept is

the ultimate conclusion which the Commission reached after considering all the evidence in this matter.

Now, the IXCs are asking this Court to reach a different decision based on the exact same facts. This, the Court cannot do. It is well established in Florida that the Court will not substitute its opinion for that of the Commission merely because a different result could have been reached based on the evidence. This Court recently stated its position on this issue in Gulf Power Company v. Florida Public Service Commission, 453 So.2d 799, 803 (Fla. 1984) as follows:

> We have repeatedly stated the standard of judicial review by which we are guided when we review PSC orders. We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order. Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983); Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982); Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973).
>
> The PSC was presented with conflicting evidence. It understood Gulf's proposal, identified its concerns, and gave Gulf every opportunity to explain why its customers should support more of Plant Daniel than the pro rata share of those units committed to their service. Gulf did not provide an answer that was satisfactory to the PSC.

See also: Citizens v. Public Service Commission, 448 So.2d 1024 (Fla. 1984) and General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063, 1067 (Fla. 1984). Here, the Commission did not accept the IXCs' evidence that a removal of the bypass restriction would not be detrimental to the public interest. Such a conclusion is based on the following facts.

The bypass restriction was created in late 1983 to avoid the unnecessary and improper dislocation of LEC revenues due to a pricing anomaly which was created before competition was allowed in the long-distance market. Previous regulatory decisions and practices resulted in large portions of local costs being recovered in toll and access charge rates. The Commission recognized the problem this cross-subsidy was creating and that it would take a transitionary period of time to rectify the situation. The plan was to remove the subsidy without directly impacting the local ratepayer to the extent possible. In order to accomplish this goal, the Commission ordered implementation of time-of-day pricing, contract rates, flat rate capacity charge and access billing to end use customers. The rates for switched access, private line and FX have not been restructured. The Commission recognized that the foregoing items could not be instituted overnight and ordered the bypass restriction. (Tr.14 and 89). The same problems which existed in 1983 are still present today. (Tr.90).

The evidence of record reveals that the transitionary process is not complete and that the subsidy problem and resulting pricing anomaly are still present. The restriction was extended until the process is complete. This decision was no doubt based in part on the potential effects of what happens when a customer leaves the public network. This result was testified to by AT&T-C witness Follensbee:

(By Mr. Parker) Q. You are aware that when a customer leaves the network that that customer is apt not to come back, is that correct?

(By Mr. Follensbee) A. Which network are you referring to, sir?

Q. Switched network, any network; IXC network, LEC network.

A. Never come back, no sir, I would not agree with that.

Q. I said likely, Mr. Follensbee. Let me refer you to Page 5 of your testimony: "As a result, when a large customer leaves the network he is probably gone for good."

A. At this time, given the technology, that's true.

Q. And if the local exchange carrier was to lose originating or terminating access to an IXC bypass facility, would that LEC probably have lost that customer for good, also?

A. For that particular service, yes.

Q. And, in line with your testimony a few pages later, this would place a higher cost burden on the rest of the ratepayers, is that correct?

A. That's correct. (Tr. 154-155).

The competent and substantial evidence of record demonstrated that the bypass restriction was necessary to protect the public interest until the transitionary period is complete.

V. CONCLUSION

The Commission created the bypass restriction in late 1983 to protect the public interest and to foster the implementation of competition in the state of Florida. The Commission reexamined its policy and decided it was necessary to continue the restriction for an additional interim period of time. That decision is supported by statutory authority, case law and substantial evidence. The Court should affirm Order No. 16804 in all respects.

Respectfully submitted this the 9th day of March, 1987.

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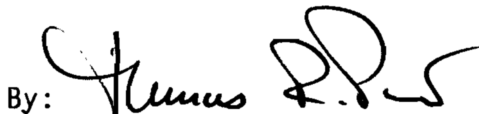
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of General Telephone Company of Florida's Answer Brief of Intervenor-Appellee in Case No. 69,732 has been served on the following by depositing the same in the United States mail, postage prepaid, this 9th day of March, 1987:

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