BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of MICROTEL, INC. for relief from AT&T OF THE SOUTHERN STATES, INC. unjust discrimination in the provision of private line service	DOCKET NO. 900016-TI ORDER NO. 24070 ISSUED: 2/5/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
BETTY EASLEY
GERALD L. GUNTER
FRANK S. MESSERSMITH
MICHAEL McK. WILSON

FINAL ORDER DISMISSING PETITION BY MICROTEL, INC.

BY THE COMMISSION:

I. BACKGROUND

On January 5, 1990 Microtel, Inc. (Microtel) filed a Petition charging AT&T Communications of the Southern States, Inc.'s (ATT-C) with unjust discrimination in the provision of private line service. On January 29, 1990 ATT-C responded with a Motion to Dismiss. Subsequent to the filing of Microtel's petition and ATT-C's Motion to Dismiss the parties met and agreed to have the dispute decided pursuant to the "informal proceedings" provisions of Section 120.57(2), Florida Statutes. Thus, the parties agreed to a Joint Stipulation of Material Facts and Issue Presented, which was filed with the Commission. Counsel for each side appeared before the full Commission for Oral Argument on September 10, 1990. With the filing of post-argument briefs, the matter is now properly before the Commission for a decision.

II. ATT'S MOTION TO DISMISS

There exists an issue of law as evidenced by the parties' stipulated facts and issue presented which are set forth in this Order below. Therefore, it is inappropriate to dismiss Microtel's Complaint on the grounds alleged in ATT-C's Motion to Dismiss. Accordingly, ATT-C's Motion to Dismiss is denied.

III. MICROTEL'S COMPLAINT

A. Stipulated Facts

On or about April 20, 1989, the State of Florida Department of General Services ("DGS") issued Invitation to Bid ("ITB") Number DGS 88/89-096. ATT-C, Microtel and MCI all responded to the ITB. ATT-C was awarded a contract pursuant to the ITB.

On or about June 5, 1988, ATT-C filed original tariff Section B7 entitled "Special Service Arrangements" to provide the service that was the subject of the ITB and the contract with DGS. The Commission considered ATT-C's tariff at its June 27, 1989 Agenda Conference. Microtel appeared at that Agenda Conference in opposition to the ATT-C tariff. The Commission approved the tariff in Order No. 21512 issued in Docket No. 890761-TI on July 5, 1989.

Under Tariff Section B7.1, ATT-C offers to the State of Florida "an Interoffice Channel (including Primary Service Function) between the Company's serving offices on a city pair basis" pursuant to the terms of the ITB. The State initially obtained from ATT-C four T1.5 circuits between the following city pairs:

(a) Tallahassee - Pensacola;
(b) Tallahassee - Panama City;
(c) Ft. Myers - Orlando; and
(d) Ft. Myers - Tampa.

On August 2, 1989, Microtel's Manager of Traffic Engineering, Mr. Drew Fonoroff, wrote to Mr. Carl Rahas of ATT-C transmitting "four base line T-1.5 Accunet orders for a total of five T-1's...." These circuits were requested for the same city pairs listed above, and the letter stated: "ATC is ordering these facilities under the ATT-C Florida intrastate tariff. ATC expects to pay the same rates for these city pair T-1's as the Florida State Government." Microtel later canceled the orders for Tallahassee-Pensacola and Tallahassee-Panama City pairs.

On September 25, 1989, Mr. Rahas responded to the orders in a letter to Ms. Lynda Del Camino, Microtel's Circuit Order Coordinator. ATT-C declined to provide the requested service. Mr. Rahas stated in part as follows:

> "Unfortunately, Section B7.1 does not permit the provision of service which Microtel has requested. However, ATT-C will be happy to provide the requested facilities under the

provisions of the general Channel Services tariff currently in effect including those applicable rates and charges stated therein."

B. Stipulated Issue

Did ATT-C's refusal to provide Microtel with the three Accunet T1.5 circuits upon the terms and conditions requested amount to impermissible discrimination under Florida Law?

C. Microtel's Argument

Microtel argues that, as the State's dominant interexchange common carrier, ATT-C has the obligation to charge everyone who uses its common facilities a fair and just price for the telecommunication services provided. Microtel contends that, as a common carrier, ATT-C must provide similarly situated customers substantially identical services at the same price.

Microtel asserts that ATT-C unlawfully discriminates because it would charge Microtel at least 60% more than it would charge the State for a T1.5 circuit between Ft. Myers and Orlando, even though Microtel was and is ready, willing, and able to take the service upon the same terms and conditions as the State. To support its position, Microtel argues that the discrimination is unjust because under the ITB and ATT-C's tariff:

1). The State could take as few or as many city-pair circuits as it wanted for a limited time;

2). Each circuit had to be priced individually for the State, thus each circuit had to be profitable for ATT-C;

3). Microtel, like the State is under no obligation to take any circuits from ATT-C;

4). While ATT-C argues that the invitation to bid, as a process, distinguishes the State from Microtel, ATT-C cites no authority for the proposition that the bid process is a valid basis for discrimination;

5). Valid discrimination criteria are typically things which affect the cost of providing the service.

Microtel asserts that failure to treat ATT-C's tariffed service as a common carrier offering will undermine the Commission's ability to prevent unjust discrimination and predatory pricing. Microtel contends that the most effective way to prevent predatory pricing by ATT-C as the dominant carrier is to require all offerings to be available for resale.

It is Microtel's position that the Commission's existing tariff system requires from every IXC only the following:

1) the filing of a tariff reflecting the operative discriminating factors that qualify the would-be customer to purchase the service upon the stated terms and conditions; and

2) the provision of the service upon the stated terms and conditions to anyone who qualifies.

Microtel concludes that ATT-C has unjustly discriminated against Microtel, and that ATT-C should be required to honor Microtel's service request upon the terms and conditions requested.

D. ATT-C's Argument

ATT-C characterizes the case: "Simply stated, this case involves ATT-C's refusal to honor Microtel's request for three Accunet T1.5 circuits on two (2) city pair routes at the rates specified in Section B7.1 of ATT-C's Intrastate Channel Services Tariff. Section B7.1 constitutes a Special Service Arrangement for the State of Florida provided in response to the Florida Department of General Services' Invitation to Bid."

ATT-C notes that the tariff at issue constitutes a Special Service Arrangement for Florida State Government, and that the tariff was filed in response to a competitive bid situation. ATT-C notes that the only stipulation which the Commission placed on the tariff was that the "proposed rates cover the relevant costs for providing those services," and that ATT-C has met that burden. ATT-C contends that Microtel argued against the tariff at The Commission's May 27, 1989 Agenda Conference and proposed the

standards which it reargued at Oral Argument in this dispute. ATT-C argues that those obligations were not imposed on ATT-C with respect to this Special Service Arrangement. It is ATT-C's position that Microtel's attempt to require ATT-C to alter its tariff after-the-fact should be denied and is beyond the scope of the issue before this Commission.

ATT-C contends that Sections 364.08 and 364.09 of the Florida Statutes set forth the standards to be employed in adjudicating claims of this nature. Section 364.08(1), Florida Statutes makes it unlawful for a utility to:

> . . . extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service. (Emphasis added by ATT-C).

Section 364.09 prohibits a telephone company from charging any person greater or lesser compensation for any service than it charges:

> . . . any other person for doing a like and contemporaneous service with respect to communications by telephone under the same or substantially the same circumstances and conditions (Emphasis added by ATT-C).

ATT-C argues that within the context of these statutory criteria, the Commission has ruled that competitive circumstances may justify differentials in pricing of services, and that competition and threat of customer loss may constitute a sufficient difference in circumstances and conditions to justify special pricing considerations.

ATT-C contends that Microtel has failed to substantiate its claim of impermissible discrimination. It is ATT-C's position that in declining Microtel's request ATT-C simply applied the terms of its tariff, which was approved by this Commission. ATT-C argues that the tariff specifically incorporates the terms of ITB No. DGS 88/89-096 and that in the event of conflict the terms of the ITB are to control.

ATT-C then contrasts Microtel with the State of Florida and

concludes that Microtel and the State of Florida are not similarly situated customers with respect to the service in question; and therefore, there was no impermissible discrimination against Microtel.

IV. DECISION

After a review of the arguments in this case, we find that Microtel is attempting to create a new standard and then apply that standard to ATT-C's Tariff Section B7 to find that ATT-C has impermissibly discriminated against Microtel. Placed in the context of prior Commission Orders, there appears to be nothing extraordinary about the structuring of the instant tariff offering which would necessitate a general reevaluation of contract service agreements. Ironically, Microtel's own Tariff No. 4, Section 4, issued August 3, 1990, appears to provide for similar arrangements. Additionally, Microtel appears to have made substantially similar policy arguments at the Commission's May 27, 1989 Agenda Conference when the Commission voted to approve the instant tariff offering.

Under Florida Law and this Commission's Orders, the stipulated facts do not appear to evince impermissible discrimination against Microtel by ATT-C since Microtel and the State of Florida are not "under like circumstances" which is the standard required by Section 364.08(1), Florida Statutes.

The ITB process and ATT-C's expectation of future business from the State distinguish the circumstances presented by Microtel's and the State's requests for service under Section B7 of ATT-C's tariff. Microtel characterizes the expectation of future business as an undisclosed subjective expectation on the part of ATT-C and would have the Commission require such expectations to be memorialized in the tariff. However, the Florida Statutes do not require similarly situated parties and like circumstances to be defined in writing in advance.

Additionally, Section B7, from which Microtel attempted to acquire service, is only a portion of the total package of the State of Florida's contract with ATT-C. Microtel's request was not for the same package under the same terms and conditions as the State. There is no impermissible discrimination by ATT-C for refusing to provide Microtel with only a portion of the package at the package rates because Microtel and the State are not similarly

situated under these circumstances. Thus, ATT-C's refusal to provide service to Microtel at the rate available to the State under Section B7. 1 of ATT-C's tariff does not violate the mandates of Sections 364.08-09, Florida Statutes.

Therefore we find that ATT-C did not impermissibly discriminate against Microtel by refusing to allow Microtel to purchase service under Section B7.1 of ATT-C's Intrastate Channel Services Tariff.

As this resolves the issue stipulated by the parties in this docket, this docket should be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that January 29, 1990, Motion to Dismiss Microtel, Inc.'s January 5, 1990 Petition is hereby denied. It is further,

ORDERED that ATT-C's refusal to provide Microtel with the three Accunet T1.5 circuits upon the terms and conditions requested did not amount to impermissible discrimination under Florida Law. It is further,

ORDERED that Microtel's Petition for Relief is hereby dismissed. It is further

ORDERED that this Docket is closed.

By ORDER of the Florida Public Service Commission, this 5th day of FEBRUARY, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)
CWM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.