HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314
(904) 222-7500
FAX (904) 224-8551
FAX (904) 425-3415

JAMES S. ALVES
BRIAN H. BIBEAU
KATHLEEN BLIZZARD
ELIZABETH C. BOWMAN
RICHARD S. BRIGHTMAN
PETER C. CUNNINGHAM
RALPH A. DeMEO
THOMAS M. DeROSE
WILLIAM H. GREEN
WADE L. HOPPING
FRANK E. MATTHEWS
RICHARD D. MELSON
MICHAEL P. PETROVICH
DAVID L. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPLE
DOUGLAS S. ROBERTS
GARY P. SAMS
ROBERT P. SMITH
CHERYL G. STUART

GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
ROBERT A. MANNING
ANGELA R. MORRISON
GARY V. PERKO
KAREN M. PETERSON
R. SCOTT RUTH
W. STEVE SYKES
T. KENT WETHERELL, II

OF COUNSEL
H. ROBERT FOKES

Writer's Direct Dial No.
(904) 425-2313

August 11, 1997

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket 970841-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation in the above docket are the original and 15 copies of MCI's Response to GTE Florida Incorporated's Motion to Dismiss and Supporting Memorandum of Law.

By copy of this letter this document has been provided to the parties on the attached service list.

Very truly yours,

Richard D. Melson

ACK ✓
AFA
APP
CAF
CMU Nuton
CTR
EAG
LEG 2
MAS 5
OPC
RCH 1
SEC
WAS
OTH

RDM/cc
Enclosures
cc: Service List

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
08127 AUG 11 97
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of MCI Telecommunications Corporation Against GTE Florida, Incorporated, For Anti-Competitive Practices Related to Excessive Intrastate Switched Access Pricing	)	Docket No. 970841-TP
	)	Filed: August 11, 1997

MCI'S RESPONSE TO GTE FLORIDA INCORPORATED'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW

MCI Telecommunications Corporation (MCI) filed its Complaint against GTE Florida, Incorporated (GTEFL) for anti-competitive practices on July 9, 1997. On July 29, 1997, GTEFL filed its Motion to Dismiss MCI's Complaint for lack of jurisdiction and for failure to state a claim on which relief can be granted. MCI hereby responds to the Motion to Dismiss as follows:

STANDARD FOR DISMISSAL

In order to sustain GTEFL's motion to dismiss, GTEFL must show that MCI's Complaint fails to state a cause of action for which the Commission can grant the relief requested. For this purpose, the Commission must take all of the allegations in the Complaint as true, and must consider them in the light most favorable to MCI. See, e.g., In re: Petition for Arbitration of Dispute with BellSouth, PSC-97-0072-FOF-TP (January 23, 1997) at 3; Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So. 2d

881, 883 (Fla. 1972); Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The Commission cannot, as GTEFL suggests (GTEFL Motion at 9-10), ignore MCI's allegations regarding the use of the $130 million windfall from excessive access charges to subsidize services of GTEFL and its long distance affiliate, nor can it ignore the allegations regarding the non-arms'-length relationship between GTEFL and that affiliate. These allegations are not "digressions" -- they are part and parcel of MCI's complaint that GTEFL's imposition of excessive access charges is a prohibited anti-competitive behavior under Chapter 364.

STATEMENT OF CASE

In its Complaint, MCI alleged that it is being grossly overcharged by GTEFL for switched access and that GTEFL is using the $130 million windfall from its access overcharges to engage in anti-competitive behavior, including unfairly locking-in its current local customers and subsidizing its affiliate GTE Long Distance's entry into the long distance market. MCI requested that the Commission exercise its jurisdiction under Section 364.3381(3), Florida Statutes, to investigate anti-competitive practices by GTEFL. MCI further requested that the Commission exercise its jurisdiction under Sections 364.3381(3) and 364.01(4)(g), Florida Statutes, to prohibit GTEFL from continuing to engage in these anti-competitive practices.

MCI alleges that the intrastate switched access prices that GTEFL charges MCI are excessive and yield supracompetitive

profits. To originate or terminate an intrastate toll call for an MCI customer call utilizing the local exchange facilities of GTEFL, MCI is charged approximately $.0539 (average originating FGD rates) or $.0670 (average terminating FGD rates) per minute of use (MOU). Yet the Commission recently set a cost-based price of $.00325 per MOU for transporting and terminating a local call which uses interconnection at GTEFL's tandem switching facilities. Because these facilities are used in the same way to originate and terminate long distance calls, GTEFL's switched access prices represent a mark-up above cost of over 1500%.

GTEFL's market share for originating and terminating intrastate interexchange calls in its telephone exchange area is virtually 100%. Thus, while Section 364.337, F.S., and the 1996 Act have eliminated the legal monopoly on the placement of local exchange transport and switching facilities in GTEFL's telephone exchange area, GTEFL retains a "de facto" monopoly in the provision of exchange access services purchased by MCI and other IXCs.

Based on GTEFL's 1996 switched access demand data, it is apparent that GTEFL receives approximately $130 million per year in excessive profits from the prices GTEFL charges MCI and other IXCs who purchase GTEFL's switched access services.

MCI's Complaint alleges that GTEFL is utilizing this approximate $130 million per year windfall from its monopoly exchange access service to subsidize the funding of discounts for

its intraLATA toll and vertical services in order to preempt the competitive erosion of its customer base for local exchange and interexchange services. In addition, GTEFL is utilizing this $130 million windfall to subsidize the activities of its long distance affiliate in the competitive interLATA, interexchange market. These long distance services are being jointly marketed with GTEFL's local services as "GTE" services.

MCI's Complaint also alleges that with the advent of potential competition for its local exchange services, GTEFL has been taking actions to solidify its customer base by offering steep discounts on toll and vertical services, waiving non-recurring charges on vertical services and second residential access lines, and offering substantial toll price reductions by converting competitive 1+ toll routes to "Local Calling Plans" for its residential customers.

While the offering of these price breaks to GTE's local exchange service customers is not, in and of itself, an anti-competitive practice, when coupled with the extraction of monopoly rents of approximately $130 million from GTEFL's monopoly exchange access customers, the practice clearly falls within the statutory proscription against anti-competitive behavior.

In short, the large margin on access gives the GTEFL an unfair competitive advantage, not because it is more efficient or provides

better service, but because it is abusing its monopoly position over an essential input into the service of its competitors.

Accepting these allegations as true, as the Commission is required to do in considering GTEFL's motion to dismiss, it is clear that MCI's Complaint does state a claim on which relief can be granted under Chapter 364.

ARGUMENT

I. The Commission Is Authorized To Reduce Access Charges When Necessary To Prevent Anti-Competitive Conduct.

In its Motion to Dismiss, GTEFL argues that Section 364.163, Florida Statutes, removes any Commission authority to regulate access charges except as explicitly set forth in that section. This argument ignores the fundamental rule of statutory construction that statutes should be read in pari materia. The Legislature did not enact Section 364.163 in isolation. It was enacted as part of a comprehensive package which began restructuring how the telecommunications industry would be regulated in Florida.

This enactment included a mandate that the Commission prevent anti-competitive behavior. Section 364.01(4)(g), F.S., provides that:

> (4) The Commission ***shall*** exercise its exclusive jurisdiction in order to:
>
> * * *
>
> (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive

behavior....

Emphasis added. The new Chapter 364 also expressly authorized the Commission to investigate allegations of anti-competitive behavior upon complaint or upon its own motion. Section 364.3381(3), F.S., provides that:

> The Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing or similar anti-competitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

Clearly Section 364.163, F.S., prevents the Commission from establishing intrastate switched access charges for GTEFL under rate-base rate-of-return regulatory processes. However, nothing in that section explicitly or implicitly precludes the Commission from exercising its jurisdiction to investigate and prevent anti-competitive actions and practices simply because those practices happen to involve excessive access charges.

GTEFL correctly notes that under the basic rules of statutory construction, specific provisions control over general ones. However, GTEFL misapplies the rule by incorrectly concluding that the Commission's authority over anti-competitive behavior is inconsistent with Section 364.163. Only if Section 364.163 could not be construed consistently with Sections 364.01(4)(g) and 364.3381(3) would it be necessary to decide which controls. Section 364.163 established an access rate that GTEFL may not exceed, i.e., the cap. If a general statute

suggested that the Commission was authorized to raise access charges above the cap, then certainly that general statute would be in conflict with the specific one and Section 364.163 would control. However, there is nothing in Section 364.163 that states that the Commission may not reduce access. Therefore, an interpretation that it may do so under its contemporaneously granted authority to prevent anti-competitive behavior is not inconsistent with Section 364.163.

In its Motion to Dismiss, GTEFL states misleadingly: "If the Commission had complete authority to adjust access rate levels, there would be no need to grant it the purely ministerial discretion to assure the prescribed reductions." (GTEFL Motion at 8) MCI has never suggested that the Commission has "complete authority to adjust access rate levels" under Sections 364.01(4)(g) and 364.3381(3). Instead, the Commission only has a narrow opening to address anti-competitive access rates. Unless MCI can prove that charging a competitor a 1500% mark-up for a monopoly service and using the supracompetitive profits they generate to unfairly compete constitutes anti-competitive behavior, this Commission will not have the authority to reduce GTEFL's access rates. This is hardly plenary jurisdiction.

The revisions to Chapter 364 were part of a comprehensive scheme to bring more competition to the telecommunications industry. The Legislature was well aware that this was a bold departure from the traditional regulation of telecommunications.

Accordingly, in addition to setting out a basic regulatory framework, the Legislature included general provisions granting the Commission the authority to address the innumerable unforeseen obstacles to effective competition that might arise.

As mentioned above, Sections 364.01(4)(g) and 364.3381(3) give the FPSC explicit authority over anti-competitive behavior. In addition, Section 364.01(4)(c) states that the FPSC shall exercise its jurisdiction to: "Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate and service regulation." Section 364.01(4)(d) provides that the Commission shall: "Promote competition by encouraging new entrants into telecommunications markets." Section 364.01(4)(i) provides that the Commission shall: "Continue its historical role as a surrogate for competition for monopoly services provided by the local exchange telecommunications companies."

All of these statutes, including 364.163, are part of the Legislature's scheme to transform the telecommunications market. Section 364.163 can be and should be interpreted consistently with the goals of Chapter 364, i.e., to eventually achieve true competition by reducing regulatory restrictions and allowing market forces to work by ensuring fairness to competitors. Section 364.01(3). In furtherance of this goal, this Commission no longer exercises its traditional rate of return authority over

access charges of price-regulated LECs. However, when GTEFL engages in pricing behavior that threatens the underlying goal of true competition, it is ludicrous to suggest that the Commission must ignore the explicit mandate that it prevent anti-competitive conduct.

GTEFL also argues that "if the Legislature had believed the access rates of the LECs (or any subset of the LECs) to be 'anticompetitive,' they could and would have ordered steeper and more immediate reductions in those rates." (GTEFL Motion at 5) This statement ignores the fact that GTEFL's use of excessive access charges to subsidize activities of its long-distance affiliate in an anti-competitive manner was not possible until the Telecommunications Act of 1996 freed GTEFL from the consent decree prohibition on GTE offering integrated local and long distance service. This occurred well after the close of the 1995 legislative session, and the Florida Legislature could not have contemplated these activities when it established minimum required access charge reductions. (MCI Complaint, ¶21)

II. It is Necessary to Hold a Hearing in this Matter To Determine Whether GTEFL is Using The Excess Profits From its Monopoly Switched Access Charges to Unfairly Compete Against MCI.

GTEFL argues that there is no need for a hearing in this matter because MCI's allegations of unfair competition are irrelevant to its claim that GTEFL is engaged in anti-competitive

behavior. Of course, the opposite is true. It is the very use of its supracompetitive profits, earned by overcharging for a monopoly service provided to its competitors, to subsidize competitive services that forms the core of MCI's complaint. The Commission should hold a hearing to determine whether this practice inhibits competition and constitutes anti-competitive behavior.

Amazingly, GTEFL seems to argue that MCI's complaint fails to state a claim under Section 364.3381(1) and (2), and, therefore, it should be dismissed. (GTEFL Motion, at 9-10) Of course, MCI filed its Complaint under 364.3381(3) and 364.01(4)(g), not 364.3381(1) and (2). As described above, MCI is alleging that GTEFL's behavior constitutes anti-competitive conduct. MCI has alleged specific conduct by GTEFL, which if proven to be true at a hearing, would justify such a finding by this Commission.

Further, the statutory imputation requirement that requires ILEC-provided toll service and other non-basic services to cover the direct costs of providing the service and, to the extent not included in the direct cost, the imputed charges is not sufficient protection against the anti-competitive effects of overpriced access charged by a competitor to subsidize competitive services. See 364.051(6)(c).

When an IXC competes with ILEC for toll service, the ILEC extracts a monopoly rent for the underlying access service. The net

effect of this pricing is that the ILEC's margin on the access component of an IXC-provided toll call exceeds the IXC's margin on that call. This gives the ILEC an unfair competitive advantage. The IXC must earn some margin on the non-access component of the toll call in order to remain in business. The ILEC, on the other hand, can meet the statutory imputation standard and stay in business without any margin on the non-access component of its toll calls -- the margin on the "imputed access charge" component is sufficient to make the overall service profitable to the ILEC. Viewed in another way, the ILEC can effectively cross-subsidize its toll service with monopoly profits from access. This competitive problem is exacerbated as ILECs begin to compete in the interLATA and interstate toll markets as GTEFL is doing.

GTEFL also argues in its Motion to Dismiss that access charge revenues are used to help keep basic local service affordable. (GTEFL Motion at 10-11) While there is an historical connection between the two, in its Universal Service Order issued on December 27, 1995, in Docket No. 950696-TP, this Commission recognized that the currently existing implicit subsidy mechanisms were not matched with the universal service need. Universal Service Order, pp. 22-25. This Commission stated: "The appropriate solution is to identify the amount required to fund a US subsidy, not the amount of support for US purportedly being generated. Determining the presence and amount of a subsidy requires the use of an incremental cost standard." Id. at 25. Even assuming that a portion of the

windfall from access services still supports universal service, it appears clear that access charges produce revenues far above the amount needed to cover access costs and any required universal service support, thereby still giving GTEFL excess profits from access charges.

CONCLUSION

The large margin on access gives GTEFL an unfair competitive advantage, not because it is more efficient or p.ovides better service, but because it is abusing its monopoly position over an essential input into the service of its competitors. GTEFL is using its excess profits on access to unfairly compete against MCI. The Commission should hold a hearing to resolve the factual issue of whether GTEFL is engaging in the alleged anti-competitive behavior.

RESPECTFULLY SUBMITTED this 11th day of August, 1997.

HOPPING GREEN SAMS & SMITH, P.A.

By: _____
Richard D. Melson
P.O. Box 6526
Tallahassee, FL 32314
(904) 425-2313

and

THOMAS K. BOND
MCI Telecommunications Corporation
Suite 700
780 Johnson Ferry Road
Atlanta, GA 30342
(404) 267-6315

ATTORNEYS FOR MCI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by hand delivery this 11th day of August, 1997.

Martha Brown
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

GTE Florida Incorporated
Anthony P. Gillman
Kimberly Caswell
c/o Richard Fletcher
106 E. College Ave., Ste. 1440
Tallahassee, FL 32301-7704

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin
Davidson, Rief & Bakas, P.A.
117 S. Gadsden Street
Tallahassee, FL 32301

Attorney