BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition of MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC for approval for name change and transfer of CLEC Certificate No. 5228 from IDS Telcom LLC to IDS Telcom Corp.; for waiver of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection in connection with the sale of customer-based and other assets from IDS Telcom LLC to IDS Telcom Corp.; and for acknowledgment of registration of IDS Telcom Corp. as intrastate interexchange telecommunications company effective February 8, 2005.	DOCKET NO. 050111-TP ORDER NO. PSC-05-0382-FOF-TP ISSUED: April 12, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER GRANTING MOTION TO DISMISS
AND REINSTATING ORDER NO. PSC-05-0251-PAA-TP AS A FINAL ORDER

BY THE COMMISSION:

I. Case Background

On February 8, 2005, MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC (collectively, MCG) filed a Joint Petition pursuant to Sections 364.345 and 120.542, Florida Statutes, and Rules 25-24.815 and 25-24.455(4), Florida Administrative Code, requesting approval of a name change and transfer of competitive local exchange telecommunications company (CLEC) Certificate No. 5228 of IDS Telcom LLC (Old IDS) to IDS Telcom Corp. (New IDS). The Petition also requested a waiver of Rule 25-4.118, Florida Administrative Code, as it relates to the transfer of assets and customers (local and long distance) of Old IDS to New IDS. On March 4, 2005, Order No. PSC-05-0251-PAA-TP was issued granting the request for transfer of and name change on IDS Telcom LLC's CLEC certificate to IDS Telcom Corp. Additionally, the Order granted a waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code. On March 11, 2005, Phyllis Heiffer (Ms. Heiffer) filed a Petition for Formal Proceeding and Objection to Application seeking a formal proceeding and evidentiary hearing on the aforementioned proposed action granting transfer of certificate and name change.

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On March 16, 2005, MCG filed a Motion to Dismiss Ms. Heiffer's Petition for Formal Hearing and Objection to Application, Request for Expedited Processing and Request for Oral Argument. On March 22, 2005, Ms. Heiffer filed her response in opposition to the Motion to Dismiss.

Herein, the movant, MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC, is referred to as MCG, but we also reference Old IDS and New IDS by necessity, because it is the transfer occurring between IDS Telcom LLC (Old IDS) and IDS Telcom Corp. (New IDS) to which Ms. Heiffer specifically objected.

We note that on April 5, 2005, after we had already taken a vote on this matter, the Petition and Protest were withdrawn. We note that the Petition was withdrawn with prejudice. A vote had, however, already been taken in this matter; thus, our decision is set forth in this Order.

We are vested with jurisdiction over this matter pursuant to Sections 364.337(1) and 364.345, Florida Statutes.

II. Oral Argument

MCG requested oral argument, because it believed an oral argument presentation would aide us in our deliberation on matters raised in MCG's Motion to Dismiss, which was filed simultaneously with the Request for Oral Argument. At the Agenda Conference, however, we noted that neither Ms. Heiffer nor her counsel were present. Upon so noting and MCG's indication that it no longer felt that oral argument would be necessary, we declined to receive oral argument.

III. Motion to Dismiss

A. Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. In accordance with the pertinent case law, we have construed all material allegations against MCG in making our determination on whether Ms. Heiffer has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

B. Arguments

1. Ms. Heiffer's Protest

Ms. Heiffer contends that she is the former National Account Manager for Old IDS, and that she was fired December 28, 2001. Thereafter, in January 2002, Old IDS sent her a "cease and desist" letter and aggressively pursued legal action against her to attempt to prevent her from using the book of business that she had developed while working at Old IDS to engage work for other telecommunications companies. Ms. Heiffer alleges that Old IDS sought enforcement under an invalid "non-competition/nonsolicitation" clause in her employment agreement. After extensive litigation, Ms. Heiffer states that the court found that the "non-competition/nonsolicitation" clause was, in fact, unenforceable, and that the court granted Ms. Heiffer a permanent injunction against Old IDS with the following specific terms:

> . . . IDS parties are hereby enjoined from oral or written communication which conveys any impression that Phyllis Heiffer is restricted in her employment by any enforceable restrictive covenants with the IDS parties; from disconnecting the local and long distance service of any customers who elect to follow Phyllis Heiffer from IDS Telcom LLC to another carrier, and from changing the long distance carrier codes and freezing accounts of any customers who have elected to follow Phyllis Heiffer from IDS Telcom LLC to another carrier; and from otherwise interfering in any way with Phyllis Heiffer's business relationships, her ability to solicit any customers for telecommunications services, and her future employment opportunities. This injunction shall not preclude IDS from competing in the industry with Phyllis Heiffer.

Exhibit II to Protest; Final Judgment in Case No. 02-00749 CACE 14 at ¶ 3.

As a result of that legal proceeding, Ms. Heiffer contends that she incurred legal fees in excess of $450,000. This claim is unliquidated and disputed. A pending judicial proceeding scheduled for April or May of this year will resolve that dispute.

In addition, Ms. Heiffer contends that Old IDS has a valid, contractual obligation to pay her $253,395.33 in deferred compensation upon the transfer of assets of Old IDS to New IDS. While Old IDS acknowledged this obligation, Ms. Heiffer alleges that the company has made no provision for such payment in spite of the currently pending transfer. Ms. Heiffer, therefore, argues that this transfer is likely being pursued in order to impair Ms. Heiffer's ability to satisfy her claims against the company, in violation of the Uniform Fraudulent Transfers Act, Chapter 726, Florida Statutes.

Thus, based on the foregoing allegations, Ms. Heiffer protests Order No. PSC-05-0251-PAA-TP, requests that approval of the transfer and waiver be rescinded, and alleges she has standing to make this request, because:

> The managerial capacity and quality of New IDS is suspect due to the integration of the management team of Old IDS who have demonstrated a disregard of their

> financial and contractual obligations to former employees and creditors, and whose past conduct has resulted in a permanent injunction against Old IDS.

Protest at p. 6.

2. MCG's Motion to Dismiss

MCG maintains that Ms. Heiffer's protest must be dismissed, because she does not have a "substantial interest" which will be affected by the proposed action in this case, and because she had not stated a cause of action upon which this Commission could grant relief.

MCG states that under Rule 28-106.201(2)(b), Florida Administrative Code, a party petitioning for a formal hearing under Section 120.57, Florida Statutes, before this Commission regarding a disputed matter must demonstrate a "substantial interest" that will be affected by the Commission's determination. Without a showing of such "substantial interest," MCG maintains that legal standing is lacking to bring such a Petition. MCG cites Agrico Chemical Co. v. Department of Environmental Protection, 406 So.2d 478 (Fla. 2d DCA 1981), where the Court defined "substantial interest" and set forth a two-prong test for determining if legal standing exists in an administrative hearing proceeding under Section 120.57, Florida Statutes. The Agrico test requires that, in order to establish standing, one must show: (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

MCG contends that Ms. Heiffer has failed to demonstrate that she will suffer an injury at all that would be of sufficient immediacy to warrant a hearing. MCG argues that Ms. Heiffer's concerns that she has not received sufficient assurance that her claims will be paid is speculative, at best, particularly since MCG emphasizes that both claims are disputed and may never become due and owing. MCG contends that such speculative claims fail to meet the first prong of the Agrico test and, thus, are insufficient to establish standing.[1]

MCG further contends that Ms. Heiffer's allegations do not meet the second prong of the Agrico test, because the alleged injuries are not the type this proceeding was designed to address. MCG contends that the public interest test employed to address MCG's initial Petition does not contemplate consideration of allegations by a former employee, but instead, focuses on consideration of the benefits to the general public. As support, MCG refers to the case of Microtel, Inc. v. Florida Public Service Commission, 464 So. 2d 1189 (Fla. 1985), wherein Microtel contested the Commission's certification of another carrier. Microtel had argued that the statute providing for certification was unconstitutional, because it gave the Commission too much discretion in the certification process. The Court concluded, however, that Chapter 364 did provide the Commission with appropriate standards and guidelines to use in granting a certificate.[2] MCG argues that Section 364.337(1), Florida Statutes, clearly provides the

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[1] *Citing* Village Park Mobile Home Association, Inc. v. Department of Business Regulation, 506 So.2d 426, 430 (Fl. 1st DCA 1987)(allegations regarding future value and marketability of homes too speculative to meet injury in fact standard).

[2] MCG also references Teleco Communications Co. v. Clark, 695 So. 2d 304 (Fla. 1997), wherein the Court concluded that the Commission can only act to the extent provided in Chapter 364, Florida Statutes.

standards applicable in certification proceedings, which MCG believes is the relevant consideration. MCG also maintains that Section 364.01(4), Florida Statutes, sets forth the factors that the Commission should consider when determining the public interest and the scope of the Commission's authority. MCG contends that Section 364.01(4), Florida Statutes, demonstrates that the interest the Commission should consider is the advancement of competition among telecommunications providers and whether the public has access to affordable telecommunications services. MCG argues that Ms. Heiffer's allegations do not fall within the scope of the Commission's public interest consideration; instead, the allegations are contractual matters more appropriately resolved in court.[3]

MCG emphasizes that Ms. Heiffer's allegations do not question IDS's service to customers. MCG also notes that the only allegation that might arguably fall within the scope of the "technical, financial, and managerial capacity" test for certification is Ms. Heiffer's allegations that the conduct of Old IDS's management towards her calls into question the management capability of the management team for New IDS. MCG argues, however, that while New IDS will have access to the management team of Old IDS, the Old IDS team will not oversee New IDS after the transaction is complete. Instead, New IDS will have an entirely new management team. MCG contends that Ms. Heiffer's allegations do not call into question the qualifications of these new management team members.

MCG argues that Ms. Heiffer's other allegations pertain solely to her own financial claims against the company. MCG notes that we addressed a somewhat similar case in Docket No. 020054, wherein the Commission dismissed Verizon's protest of the transfer of licenses from Winstar Wireless to Winstar Communications, LLC. In dismissing Verizon's protest, MCG emphasizes that this Commission concluded that Verizon's assertions that it would not be paid amounts due under an interconnection agreement with the old company if the transfer was completed amounted to allegations of possible future injury "resulting from its dealings with the new company." We concluded that such conjecture about future economic detriment was too remote to establish standing. Motion to Dismiss at p. 8; citing Commission Order No. PSC-02-0744-FOF-TP, issued May 31, 2002. MCG asks us to reach the same conclusion in this matter.[4]

Finally, MCG argues that the Commission is without authority to review claims under the Uniform Fraudulent Transfer Act, Chapter 726, Florida Statutes.

For all these reasons, MCG asks that Ms. Heiffer's protest be dismissed.

3. Ms. Heiffer's Response in Opposition

In response, Ms. Heiffer contends that her claims do fall within the zone of interest covered by Chapter 364, Florida Statutes. Ms. Heiffer contends that her allegations call into question whether approving the transfer will hinder competition and harm a segment of the

[3] *Citing* Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., 291 So. 2d 199 (Fla. 1974); and Florida Power and Light v. Glazer, 671 So. 2d 211 (Fla. 3rd DCA 1996).

[4] MCG also cites Ameristeel Corp. V. Clark, 691 So. 2d 473 (Fla. 1997), for the proposition that where intervention is based upon economic competition, such economic competition must be clearly outlined in the statute as being a required consideration.

telecommunications workforce. Ms. Heiffer further contends that her allegations show that the transfer will not enhance the status of the telecommunications workforce, but will, instead, allow Old IDS to avoid its financial obligations to former and current employees. Ms. Heiffer argues that such concerns fall squarely within the scope of the public interest test contemplated by Section 364.345, Florida Statutes, as they are "public interest" concerns. Ms. Heiffer adds that MCG's attempts to "marginalize" her allegations as being those of a "disgruntled ex-employee" do not take away from the fact that Old IDS was engaging in anticompetitive behavior against Ms. Heiffer and that the transfer is being used to avoid her pending claims in violation of the provisions of the Uniform Fraudulent Transfers Act.

Ms. Heiffer further argues that the Legislature clearly contemplated that such claims are part of the public interest consideration, as they go to the question of whether the transfer will enhance the economic status of the telecommunications workforce, consistent with Section 364.01(3), Florida Statutes. Ms. Heiffer recounts the history of the cessation of her employment with the company, maintaining that it was purely the result of IDS attempt to avoid payment of deferred compensation obligations through a transaction with Access One. Ms. Heiffer further notes that the CEO of New IDS is Ken Baritz, who was also associated with Access One. Thus, Ms. Heiffer believes that the transaction at issue in this case is, again, an attempt to avoid payment of deferred compensation to employees and former employees.

In addition, Ms. Heiffer argues that fraudulent transfers do not promote the public interest. Ms. Heiffer argues that she is not asking the Commission to award damages, as MCG implies, but that the transfer should not occur without provisions ensuring the creditors, such as herself, are not left without a means to satisfy their claims. Ms. Heiffer notes that this is also not the first complaint filed against IDS for improperly diverting assets. Ms. Heiffer references Docket No. 030765-TP, wherein Keith Kramer protested certification of Home Town Telephone, because the principals of Home Town were principals of Old IDS who were attempting to gain certification to divert assets from Old IDS to Home Town.[5]

Finally, Ms. Heiffer argues that MCG's Motion does not recognize the injunction that is in effect against Old IDS that would prevent them from hindering her ability to solicit and move customers from Old IDS to another carrier.

For all these reasons, Ms. Heiffer contends that the Motion to Dismiss should be denied.

C. Decision

Applying the standard for a motion to dismiss set forth above, Ms. Heiffer does not have a right, under the law or the facts, to the relief requested in her petition, because she does not have standing in the matter. Ms. Heiffer has not demonstrated that her substantial interests will be affected by this proceeding conducted pursuant to Section 364.345(2), Florida Statutes, Rule 25-4.118, Florida Administrative Code, Section 364.2337(4), Florida Statutes, and Rule 25-24.455(4), Florida Administrative Code.

[5] We note that Mr. Kramer's Protest was subsequently withdrawn and certification was approved.

When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that he does, in fact, have standing to participate in the case. Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979). To establish standing, the petitioner must first allege, and then prove: (1) that he will suffer an injury in fact, which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature that the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). Both prongs of the Agrico test must be met to establish standing. See Order No. PSC-00-0421-PAA-TP, issued March 1, 2000, and Order No. PSC-98-0702-FOF-TP, issued May 20, 1998. In this instance, neither prong has been met.

As to the first prong, regarding injury in fact of a sufficient immediacy to entitle her to a Section 120.57, Florida Statutes, hearing, Ms. Heiffer has neither adequately alleged that an injury in fact will occur nor that an injury would occur that would be of sufficient immediacy to warrant a hearing. Ms. Heiffer alleges that the transfer will impair competition, but she specifically refers to competition in the telecommunications workforce. Ms. Heiffer can only speculate, however, as to the potential harm to the communications workforce based upon her own employment experiences with Old IDS. Such speculation as to the impact on the communications workforce has been considered and rejected by this Commission in past cases as being too speculative to meet the first prong of the Agrico test. See Order No. PSC-98-0702-FOF-TP (dismissing GTEFL's and the Communications Workers of America's protests of an Order approving the transfer of control of MCI to WorldCom).

Furthermore, Ms. Heiffer's allegations regarding the integration of the Old IDS and New IDS management teams does not identify an injury, in fact, to Ms. Heiffer, as Ms. Heiffer is not a current employee of either company, and the dispute regarding her financial claims against the company is apparently still pending. Her allegations that the transfer will impair her ability to pursue legal action against the company also appear highly speculative, as do the related allegations that the Commission has not taken into consideration that the transfer of assets and customers will leave creditors, like Ms. Heiffer, without sufficient funds to satisfy their claims. Opposition at p. 6. The anticipated legal claims of a potential creditor do not rise to the level necessary to establish standing under the Agrico test. Such conjecture is simply too remote to establish standing. See Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997)(threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57, Florida Statutes hearing); citing Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988)(some degree of loss due to economic competition is not of sufficient immediacy to establish standing). See also Order No. PSC-96-0755-FOF-EU; citing Order No. PSC-95-0348-FOF-GU, March 13, 1995; International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225-1226 (Fla. 3rd DCA 1990); and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987)(speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).

As for the second prong, this portion of the Agrico test has also not been met. We acknowledge Ms. Heiffer's contention that the impact on the telecommunications workforce is a matter of the "public interest" that should be considered within the context of any public interest determination under Sections 364.345(2) and 364.337(2), Florida Statutes. However, this is an overly broad reading of our public interest considerations in this context. While the phrase "public interest" is undefined and subject to a broad reading, the phrase should not be read so broadly as to extend the Commission's authority to grant relief (and thus to convey standing to Ms. Heiffer in this instance) to matters that extend well beyond this Commission's regulatory authority over telecommunications companies, as provided in Chapter 364, Florida Statutes.

We note that Sections 364.345(2) and 364.337(2), Florida Statutes, do not define the public interest tests contemplated by those provisions, nor have we previously defined the scope of those public interest tests. However, sufficient guidance can be gleaned from Chapter 364, particularly those provisions addressing the scope of our jurisdiction over CLECs and certification in the first instance of a competitive local exchange provider.

For instance, as it pertains to the transfer, Section 364.337(1), Florida Statutes, provides, in pertinent part:

> (1) . . . the Commission shall grant a certificate of authority to provide competitive local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served. . . . It is the intent of the Legislature that the commission act expeditiously to grant certificates of authority under this section and that the grant of certificates not be affected by the application of any criteria other than that specifically enumerated in this subsection.

Thus, while Section 364.345(2), Florida Statutes, generally contemplates a public interest test when any telecommunications certificate is transferred, Section 364.337(1), Florida Statutes, clearly sets forth specific criteria for consideration of an initial application for a CLEC certificate. We find it unlikely that the Legislature contemplated we would conduct a significantly broader review when a company obtains a certificate via a transfer as opposed to obtaining one through the initial application process. As such, we find that the public interest test to be conducted when a CLEC certificate is transferred is essentially the same consideration applied to an initial application for a CLEC certificate. This interpretation is consistent with the well-established maxim of statutory interpretation that when construing two statutes together, the more specific provision controls over the general provision.

We also acknowledge Ms. Heiffer's reference to Section 364.01(3), Florida Statutes, and the Legislature's finding that ". . .it is in the public interest that competition in telecommunications services lead to a situation that enhances the high-technological skills and the economic status of the telecommunications workforce. . . ." However, we emphasize that Section 364.01(3), Florida Statutes, sets forth Legislative findings that changes in regulation that promote competition will ultimately benefit the public through increased benefits, including

benefits to the telecommunications workforce. It is not a directive to this Commission to specifically consider the impact on the telecommunications workforce in the context of the transfer of a CLEC certificate; rather, it is the subsequent subsection, Section 364.01(4), Florida Statutes, that sets forth the contexts and considerations for this Commission's exercise of its jurisdiction.

Ms. Heiffer's allegations do not question MCG's technical or financial ability to operate as a CLEC. Ms. Heiffer does appear to question the management capability of the company, but the allegations appear to go to the management's dealings with company employees, as opposed to their actual ability to operate a telecommunications company for the benefit of the general public. Considering the statutory provisions noted above, it is unlikely that the Legislature intended the Commission to look beyond the management's ability to operate the company to how they manage their employees.

As for the public interest test in the context of a waiver, our authority regarding competitive local exchange companies is limited to ". . . establishing reasonable service quality criteria, assuring resolution of service complaints, and ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace." Section 364.337(5), Florida Statutes. *Emphasis added by staff.* Ms. Heiffer's protest does not call into question Old IDS's service quality, does not pertain to unresolved service complaints, nor does it raise as an issue the fair treatment of telecommunications providers. Ms. Heiffer also does not allege that Old IDS has either changed her provider without her authorization or any customer's provider without their authorization. Rather, Ms. Heiffer's complaint pertains specifically to her relationship with Old IDS as a former employee, and the implementation of employment contract terms. Any other allegations raised regarding impacts on the telecommunications workforce in general are apparently derived entirely from Ms. Heiffer's own experiences with the company and are, ultimately, equally beyond the scope of the "public interest" consideration applied to the transfer and waiver at issue here.

With regard to Ms. Heiffer's contention that no provision or assurance has been made to address the specifics of the injunction she obtained against Old IDS, the provisions of that injunction are not impacted by our granting of the waiver of Rule 25-4.118, Florida Administrative Code. The waiver only allows the transfer of current Old IDS customers to New IDS. It does not allow the transfer of customers of another carrier without their authorization, nor does it impair Ms. Heiffer's ability to solicit customers of New IDS. Furthermore, Order No. PSC-02-0251-PAA-TP in no way impaired, or even addressed, the operation of Rule 25-4.083, Florida Administrative Code, pertaining to Preferred Carrier (PIC) freezes.

With regard to Ms. Heiffer's allegations that the transfer will render it difficult, if not impossible, for creditors of Old IDS to collect on claims, this consideration is clearly not within the scope of the public interest test to be conducted. First, Ms. Heiffer's concern pertains to the transfer of financial assets, including the customer base, from Old IDS to New IDS. Section 364.345, Florida Statutes, only addresses this Commission's authority to approve the transfer of a telecommunications certificate, and Order No. PSC-05-0251-PAA-TP only approved the transfer and name change on the certificate. Thus, the aspect of the corporate transaction that

appears to concern Ms. Heiffer the most was not even part of this proceeding. Second, as it pertains to the customer base, the new company requested, and was granted a waiver of Rule 25-4.118, Florida Administrative Code, for the limited purpose of transferring the customer base of Old IDS to the New IDS. Granting the waiver did not approve such transfer, as the Commission is without the statutory authority to require prior approval. The waiver simply allows the transfer to occur without the potential complication of slamming complaints being incurred by the new company. This proceeding was simply not designed to address the concerns raised by Ms. Heiffer.

Finally, with regard to the allegations that the transfer is in violation of the Uniform Fraudulent Transfer Act, this Commission is not charged with interpretation and implementation of Chapter 726, Florida Statutes; rather, that is a matter for a court of competent jurisdiction. Thus, this allegation does not enable Ms. Heiffer to meet either the first or second prong of the Agrico test. Not only is the allegation speculative, it does not appear to present an injury contemplated to be addressed by this proceeding.[6]

For all of the foregoing reasons, we find that Ms. Heiffer has failed to establish that she has standing in this matter.[7] As such, she cannot state a cause of action upon which relief can be granted. Therefore, MCG's Motion to Dismiss is granted, and Order No. PSC-05-0251-PAA-TP shall be reinstated as a final order. Thereafter, this Docket shall be closed.

It is therefore

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC is hereby granted. It is further

ORDERED that Order No. PSC-05-0251-PAA-TP is hereby reinstated and consummated as a final order. It is further

ORDERED that this Docket shall be closed.

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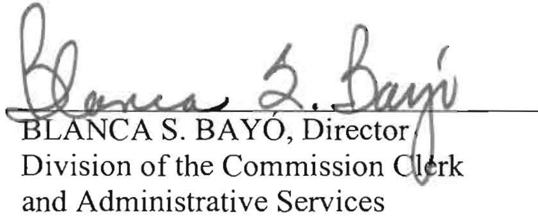
[6] It is not readily apparent that our action in this matter impairs Ms. Heiffer's ability to proceed under Chapter 726 in any way.

[7] We note that while Ms. Heiffer has failed to meet both prongs of the Agrico test, were we to determine that Ms. Heiffer had failed to meet either prong, such finding would still result in a failure to establish standing in this matter.

By ORDER of the Florida Public Service Commission this 12th day of April, 2005.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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.