

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Orange County Circuit
Court Referral of Issues in Case
No. CI 96-1812 (Wellington
Property Management, Inc. and
Emerson Communications
Corporation vs. Parc Corniche
Condominium Association, Inc.
and Orange County, Florida) to
the Florida Public Service
Commission for review and
determination of what issues, if
any, the Commission has
jurisdiction over.

DOCKET NO. 971659-TP
ORDER NO. PSC-98-0699-FOF-TP
ISSUED: May 20, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION ORDER
DETERMINING PSC JURISDICTION,
ORDER GRANTING MOTION FOR ENLARGEMENT OF TIME,
AND ORDER REQUIRING WELLINGTON AND EMERSON TO FILE
AN APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission (PSC) that the portion of this Order addressing PSC
jurisdiction is preliminary in nature and will become final unless
a person whose interests are substantially affected files a
petition for a formal proceeding, pursuant to Rule 25-22.029,
Florida Administrative Code.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

I. BACKGROUND

Wellington Property Management, Inc. (Wellington), is the management company for Parc Corniche Condominium Association, Inc. (Parc Corniche). Wellington also owns some of the units in the condominium. Emerson Communications Corporation, Inc. (Emerson), installed telephone lines in the Parc Corniche Condominium in 1989. Emerson alleges that it owns the lines and has a license agreement with Wellington for the use of telephone lines in the condominium. Emerson and Wellington are both owned by Emerson Financial Corporation. Emerson bills individual condominium unit owners for the use of the telephone lines in the condominium. Based on Commission records, neither Emerson nor Wellington are certificated to be a provider of telephone services in Florida. On January 31, 1996, Parc Corniche met and voted to adopt amendments to the Declaration of Condominium. Ballot Item #6 amended the Declaration to state that the cable television and telephone lines in the condominium building are part of the common elements and are, therefore, owned and controlled by Parc Corniche.

Thereafter, on March 11, 1996, Wellington and Emerson filed a complaint in Orange County Circuit Court to declare the amendments invalid. On November 4, 1997, Judge W. Rogers Turner of the Ninth Judicial Circuit abated action in the Circuit Court for a determination by the Commission of its jurisdiction over the issues raised by Wellington and Emerson in their complaint.

In addition to the order abating the Circuit Court proceeding, the Commission received a complaint filed by Parc Corniche, the defendant below, for a determination of ownership of cable television and telephone lines at Parc Corniche Condominium. The Commission notified Wellington and Emerson of the filing of the PSC complaint and directed Wellington and Emerson to file a response by January 15, 1998. By Motion For Enlargement of Time filed January 20, 1998, Wellington and Emerson requested an extension of time within which to file the response. On January 30, 1998, the response was filed. Also, on February 12, 1998, Parc Corniche filed a Memorandum of Law in Support of Complaint.

II. COMMISSION JURISDICTION

As stated above, Wellington and Emerson filed a complaint in the Circuit Court in Orange County to enjoin Parc Corniche from declaring ownership of the cable television and telephone lines serving the Parc Corniche owners. In the order abating action in the Circuit Court, the Judge outlined the specific issues for Commission determination as follows:

1. Whether Wellington and Emerson are "telecommunications companies" within the meaning of Section 364.02(7), Florida Statutes.
2. Whether Wellington and Emerson obtained a Certificate of Necessity as required by Section 364.33, Florida Statutes and Rule 25-4.004, Florida Administrative Code.
3. Whether Wellington and Emerson have authority to own the television and telephone lines.

In the abatement order, the Circuit Court recognized our exclusive authority to determine Issues 1 and 2, above. The Court also recognized we may not have authority over the television cable referred to in Issue 3, above, citing Devon-Air Villa Homeowners Association No. 4 Inc. v. Americable Associates, Ltd., 490 So. 2d 60 (Fla. 3d DCA 1986).

We agree with the Circuit Court that we do not have jurisdiction over the cable television lines. See, Devon and Section 364.02(12), Florida Statutes, explicitly excluding cable television companies from PSC jurisdiction. In addition, we do not have jurisdiction to determine any disputes filed pursuant to Chapter 718, Florida Statutes, on the validity of Parc Corniche's amendments of its Declaration of Condominium on January 31, 1997. However, pursuant to Section 364.01, Florida Statutes, and applicable rules, the Commission does have exclusive jurisdiction over all of the telephone lines in the building up to the "demarcation point." Rule 25-4.0345(1)(b), Florida Administrative Code, defines the "demarcation point" as the point of physical interconnection between the telephone network and the customer's premises wiring. Paragraph 2 of that Section of the Rule further provides that for a single line system in a multi-customer building, the demarcation point is at a point within the customer's premises. Rule 25-4.0345(1)(d), Florida Administrative Code, defines "inside wire" as all the wire, other than complex equipment wire, on the customer's side of the demarcation point. Pursuant to Rule 25-4.0345(3), Florida Administrative Code, inside wire is not regulated.

A. "Telecommunications Companies"

Parc Corniche filed a memorandum of law in support of their argument that it is unlawful for Emerson and Wellington to own the lines in the condominium based on Teleco Communications Company v.

Clark, 695 So.2d 304 (Fla. 1997). At first reading this case appears to be on point and to support Parc Corniche's position. In Teleco, an inside wire maintenance company charged a condominium association for the lease and maintenance of telecommunications equipment and wire in a condominium. The Florida Supreme Court affirmed the Commission's findings that the property management company was a telecommunications company within the meaning of Chapter 364, Florida Statutes, and affirmed the Commission's decision to order the transfer of the wire to the condominium association. At that time, which was prior to the 1995 rewrite of Chapter 364, Florida Statutes, there existed no authority for the maintenance company to own or operate the wire or to be certificated as a telecommunications company. Today, however, after the 1995 amendments to Chapter 364, Florida Statutes, such a company could be authorized to own and charge for the use of telephone lines and equipment. This is the case in this docket. The current statute defines a "telecommunications company" as any company that offers two-way telecommunications service to the public for hire within Florida by the use of a telecommunications facility. Section 364.02(12), Florida Statutes. A "telecommunications facility" is defined to include real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire. Section 364.02(13), Florida Statutes. Based on the information we have obtained through the pleadings, it appears that Wellington and Emerson may be operating as telecommunications companies.

B. Requirement for Certificate of Necessity and Authority to Own Telephone Lines

Wellington and Emerson have not been issued a Certificate of Necessity by this Commission. The mere fact that Wellington and Emerson have not obtained a certificate does not, *per se*, preclude them from ownership of the lines at Parc Corniche Condominium as Parc Corniche argues. At this time, however, we are without sufficient information to make a ruling on the ownership of the lines at the condominium. A determination on the lines will be made as part of the application process discussed in a later part of this Order.

C. Conclusion

Based on the applicable statutes, rules and the analysis above, we respond to the Circuit Court as follows:

1. Wellington and Emerson may be telecommunications companies under Florida law. We do not have enough information, however, to make a final determination at this time. Emerson and

Wellington have agreed to cooperate in the PSC application process to determine the need for certification. An application package was sent to counsel for Emerson and Wellington on April 2, 1998.

2. Neither Wellington nor Emerson have certificates from the Commission.

3. Wellington and Emerson would have been precluded from owning telecommunications lines under Teleco Communications Company v. Clark, 695 So.2d 304 (Fla. 1997), and Chapter 364, Florida Statutes, as written prior to the 1995 amendments and as applied in the Teleco decision. The rewrite of the statutes opened telecommunications services in Florida to competition and permitted the entry into the market of entities previously precluded. Thus, depending on the services, equipment and lines provided by Wellington and Emerson, they may be permitted to own the lines up to the demarcation point and to provide telecommunications services. However, this issue will not be addressed by the PSC until their application is received and processed. We intend to exercise jurisdiction over the telephone lines in the Parc Corniche condominium, but we do not have jurisdiction to rule on any issue related to cable television lines.

II. MOTION FOR ENLARGEMENT OF TIME

On December 26, 1997, Parc Corniche filed a complaint at the PSC. Wellington and Emerson were directed to file a response by January 15, 1998. On January 20, 1998, Wellington and Emerson filed a Motion for Enlargement of Time within which to file their response to the complaint. Parc Corniche raised no objections to the late-filing of the motion or the response. Wellington and Emerson referred to the intervening holidays as basis for the need for fifteen additional days for preparation of the response. On January 30, 1998, Wellington and Emerson filed a response. We find that an extension of fifteen days is not unreasonable. Accordingly, the Motion for Enlargement of Time is hereby granted.

III. PSC COMPLAINT FILED BY PARC CORNICHE

In its complaint filed on December 26, 1997, Parc Corniche urges the Commission to take jurisdiction over the Circuit Court action and declare that Wellington and Emerson do not have authority to claim ownership of the cable television and telephone lines at Parc Corniche Condominium. Our jurisdiction in this matter is fully discussed in an earlier part of this Order and need not be reiterated here. Similarly, our lack of jurisdiction over the cable television lines is fully discussed above.

It would be premature to rule on the issue of the ownership of the telephone lines until there is a more complete record on the telephone lines, equipment and service in the condominium. Without further information, we would not have the facts necessary to determine whether there is any equipment between the connection with the local exchange carrier and the demarcation point, or the actual location of the demarcation point. Accordingly, we will defer any ruling on the ownership of the telephone lines until the application process is complete and we have conducted a complete review of the telephone lines, equipment and service at the condominium.

Based on the foregoing, we grant Parc Corniche's request for the Commission to take jurisdiction over issues in dispute in Circuit Court, except for those related to the cable television lines or Chapter 718, Florida Statutes. We will address the ownership of the lines based on an analysis of the lines, equipment and service at the condominium as part of the application process required below.

IV. APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY REQUIRED

Based on the information received to date, it appears that Wellington and Emerson may own, control and charge for telecommunications facilities and that they do so without the benefit of a Certificate of Necessity issued by this Commission. Therefore, an application package was mailed to counsel for Wellington and Emerson on April 2, 1998. Wellington and Emerson are hereby ordered to file an application for a Certificate of Convenience and Necessity within thirty (30) days of the issuance of this Order. The resolution of the ownership of the lines and a determination of whether any penalties for operating without a certificate may be appropriate will be made in conjunction with the certification process.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that pursuant to Section 364.01, Florida Statutes, the Florida Public Service Commission has exclusive jurisdiction over all of the telephone lines in the Parc Corniche Condominium building up to the demarcation point. It is further

ORDERED that the questions posed to the Florida Public Service Commission by Judge W. Rogers Turner of the Ninth Judicial Circuit are answered as set forth in the body of this Order. It is further

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ORDERED that the portion of this Order in which the Commission asserts its jurisdiction is issued as Proposed Agency Action and shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 21540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

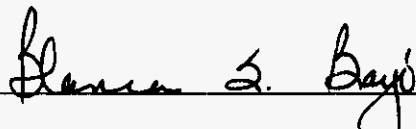
ORDERED that the Motion for Enlargement of Time filed by Wellington Property Management, Inc., and Emerson Communications Corporation, Inc., is hereby granted. It is further

ORDERED that the relief requested in the Complaint filed by Parc Corniche Condominium Association, Inc., is hereby granted to the extent set forth in the body of this Order. It is further

ORDERED that Wellington Property Management, Inc., and Emerson Communications Corporation, Inc., shall file an application for a Certificate of Convenience and Necessity within thirty (30) days of the issuance of this Order. It is further

ORDERED that this docket shall remain open pending the completion of the application process and resolution of all pending issues.

By ORDER of the Florida Public Service Commission this 20th day of May, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein addressing jurisdiction is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order addressing jurisdiction may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 10, 1998.

In the absence of such a petition, the portion of this order addressing jurisdiction shall become effective on the day subsequent to the above date, as provided by Rule 25-22.029(6), Florida Administrative Code. Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is reviewed within the specified protest period.

If the proposed agency action portion of this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater 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 of the effective date of this order, pursuant to Rule 9.110, Florida Rules of

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Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the other rulings in this order, which are preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.