

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger whereby MCI Worldcom will acquire control of Sprint and its Florida Operating Subsidiaries, ASC Telecom, Inc. d/b/a Alternatel (IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and ALEC Certificate No. 4732), Sprint Communications Company Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365).

DOCKET NO. 991799-TP  
ORDER NO. PSC-00-0421-PAA-TP  
ISSUED: March 1, 2000

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION FOR LEAVE TO INTERVENE AND  
NOTICE OF PROPOSED AGENCY ACTION  
APPROVING JOINT APPLICATION FOR TRANSFER OF CONTROL

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the proposed agency action discussed herein, approving the joint application for transfer of control, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal

DOCUMENT NUMBER-DATE

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FYSC-RECORDS/REPORTING

proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code.

A. BACKGROUND

On December 1, 1999, MCI WorldCom, Inc. (MCI WorldCom) and Sprint Corporation (Sprint), hereinafter, MCI WorldCom/Sprint, filed a Joint Application for Acknowledgment or Approval of Merger (Joint Application), pursuant to Section 364.33, Florida Statutes. The application seeks authority to transfer control of the following Sprint operating subsidiaries in Florida to MCI WorldCom: Sprint-Florida, Inc. (holder of LEC Certificate No. 22 and PATS Certificate No. 5365); Sprint Communications Company, Limited Partnership (holder of PATS Certificate No. 5359, ALEC Certificate No. 4732, and IXC Certificate No. 83); ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398; and Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822).

It is noted that this transaction is between the parent companies. The subsidiary companies of Sprint listed above will continue to operate in Florida under their existing certificated names and tariffs on file with this Commission.

On December 13, 1999, the Telecommunications Resellers Association (TRA) filed a Motion for Leave to Intervene. On January 20, 2000, MCI WorldCom/Sprint filed a response.

We also note that on January 21, 2000, we received a comment letter regarding our consideration of this matter from the Rainbow/Push Coalition expressing some concerns about the merger. The Coalition, however, did not petition to intervene in this proceeding.

B. MOTION FOR LEAVE TO INTERVENE

1) TRA's motion

As previously stated, on December 13, 1999, TRA filed a Motion for Leave to Intervene, pursuant to Rule 25-22.039, Florida Administrative Code. In its Motion, TRA states that it is a national trade organization representing telecommunications service providers and suppliers. It further states that several of its members are authorized to provide local and interexchange service in Florida. As such, TRA argues, its members have substantial and material interest in the matters raised in this proceeding.

According to TRA, the proposed merger between MCI WorldCom and Sprint may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network services provided by Sprint or MCI. TRA states that to the extent that the merger will result in a narrowing of competitive network service providers, the merger could have direct consequences for TRA members and the resale industry.

TRA states that it typically represents small companies who are without the resources to intervene in proceedings such as this one, and as such, rely on TRA to represent their interests. TRA further states that there are no other parties to this proceeding who can adequately represent TRA's concerns or provide the unique perspective of its members. TRA maintains that it wishes to intervene for the specific purpose of monitoring the proceeding and submitting a brief. It states that it does not intend to sponsor any witnesses, engage in discovery, or cross-examine any witnesses. Therefore, it argues, its intervention will not unduly broaden the issues or prejudice any parties.

2) MCI WorldCom/Sprint's response

On January 20, 2000, MCI WorldCom/Sprint filed their response to TRA's motion. As a preliminary matter, they state that they were never served with TRA's motion, and point out that the motion does not contain a certificate of service, in violation of Rules 28-106.104(2)(f) and (4), Florida Administrative Code. Notwithstanding, they argue that the motion should be denied because TRA lacks the necessary standing to intervene in this proceeding.

MCI WorldCom/Sprint argue that under Florida law, to establish standing, a person must demonstrate 1) an injury in fact that is substantial and immediate, not merely speculative or conjectural, and 2) that the injury is of a type which the governing statute is designed to protect. They state that TRA has met neither of these requirements. They further state that the potential injury that TRA alleges is speculative and conjectural, and that Section 364.33, Florida Statutes, is not designed to protect against the type of competitive and economic injury that TRA alleges.

Specifically, MCI WorldCom/Sprint state that TRA filed its motion pursuant to Rule 25-22.039, Florida Administrative Code, which provides, in pertinent part, that petitions to intervene:

must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

MCI WorldCom/Sprint argue that TRA did not, and could not, allege any constitutional, statutory, or rule provision which gives it the right to intervene in this proceeding, so therefore, it must argue that its substantial interests will be affected by this proceeding.

MCI WorldCom/Sprint assert that the two-pronged standing test in Agrico Chemical Co. v. Dept. Of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981), to determine substantial interest is applicable. They state that to demonstrate standing under Agrico, a person must demonstrate that:

- a. it will suffer an injury in fact which is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing; and
- b. its substantial injury must also be of a type or nature which the proceeding is designed to protect.

MCI WorldCom/Sprint argue that in order to meet the first prong of the test, the petitioner must show that his rights and interests are immediately affected and thus, are in need of protection. See Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988). Additionally, they state, the alleged injury cannot be speculative or conjectural. See Village Park Mobile Home Association v. Dept. Of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987). While TRA may be interested in the outcome of the merger, the companies argue such an interest is not enough to satisfy Agrico. Indeed, they maintain that while TRA's motion makes general allegations of injury, "the lack of specificity makes it impossible to determine exactly what type of harm TRA contends." They argue that TRA's allegations are nothing more than mere speculation or conjecture and that TRA simply assumes that the merger will adversely impact the provision of network services. Thus, the companies argue that TRA's

allegations of potential economic or competitive harm do not rise to the level of a present, actual injury in fact as required by Agrico.<sup>1</sup>

MCI WorldCom/Sprint also argue that the substantiality of TRA's alleged injury is belied by its requested relief, not for an evidentiary hearing, but only to monitor the proceeding and submit a brief. They state that intervention is not necessary to "monitor" the proceeding, and since no party has requested an evidentiary hearing, there will be no opportunity to submit a brief. Therefore, they argue, TRA has in effect "conceded the insubstantiality of its interest."

MCI WorldCom/Sprint further argue that TRA does not meet the second prong of the Agrico test because TRA's asserted interests do not fall within the "zone of interest" this proceeding is designed to protect. They state that this proceeding is a request for approval of the transfer of majority organizational control of Sprint, pursuant to Section 364.33, Florida Statutes. Section 364.33 is not a merger review statute, they argue, but only authorizes us to determine who should be allowed to own and operate telecommunications facilities in Florida. The only determination of public interest, they state, is whether the public interest is served by the acquiring company's ownership and operation of telecommunications facilities in the state. Therefore, MCI WorldCom/Sprint conclude that the same conclusion must apply in this case as in the WorldCom case, where we stated:

Section 364.33, Florida Statutes, gives us jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers. It does not give us the ability to protect the competitive interests asserted by GTE and CWA. GTE and CWA have, therefore,

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<sup>1</sup> MCI WorldCom/Sprint cite to PSC Order No. PSC-98-0702-FOF-TP, issued May 20, 1998 in Docket No. 971604-TP, In re: Request for approval of transfer of control of MCI Communications Corporation, wherein we stated that "[s]peculation as to the effect that the merger of MCI and WorldCom will have on the competitive market amounts to conjecture about future economic detriment," and that "[s]uch conjecture is too remote to establish standing."

failed to demonstrate that the injuries each has alleged is a substantial injury of a type or nature which a proceeding under Section 364.33, Florida Statutes, is designed to protect.

Order No. PSC-98-0702-FOF-TP at 16 (citations omitted).

3) Decision

Initially, we note that MCI WorldCom/Sprint did not file their response until 38 days after TRA filed its motion. MCI WorldCom/Sprint state, however, that they were never served with a copy of the motion and that no certificate of service is attached to the motion as required by Rules 28-106.104(2)(f) and (4), Florida Administrative Code. We have verified that, indeed, no certificate of service is attached to the motion on file with us, and based upon MCI WorldCom/Sprint's allegation that they were never served, we shall accept MCI WorldCom/Sprint's response.

Additionally, we agree with MCI WorldCom/Sprint that the two-pronged test set forth in Agrico is the appropriate test for determining substantial interest. See PSC Order No. PSC-98-0702-FOF-TP at 13, relying upon Agrico Chemical Company, 406 So. 2d 478. We find that TRA has not demonstrated that its substantial interests will be affected by this proceeding conducted pursuant to Section 364.33, Florida Statutes. 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).

With regard to the first prong of the Agrico test, we also agree with MCI WorldCom/Sprint that TRA has not alleged facts sufficient to demonstrate injury in fact sufficient to warrant a Section 120.57, Florida Statutes, hearing.<sup>2</sup> TRA alleges that its members who rely on wholesale network services provided by Sprint or MCI WorldCom will be adversely impacted by the narrowing of the network service provider market. Essentially, TRA seems to argue that we should retain the status quo so that its members do not lose a provider of network services. We do not believe that the

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<sup>2</sup> In fact, TRA has not requested a hearing, but only wants to monitor the proceeding and file a brief.

"loss" of a competitor in the market, in itself, demonstrates harm to TRA. Companies drop out of markets quite frequently for a variety of reasons. Although the loss of a competitor may have an impact on other market participants, TRA's allegations are speculative.

Accordingly, we find that TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive market amounts to conjecture about future economic detriment. Such conjecture is 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). We find that this standard is equally applicable whether TRA is arguing its substantial interests as a competitor or as a customer.

Although it is sufficient to deny standing for failing to meet one prong of the Agrico test, we also find that TRA'S allegations are not of a type designed to be protected by proceedings to approve a transfer of control pursuant to Section 364.33, Florida Statutes. Section 364.33, Florida Statutes, Certificate of necessity prerequisite to construction, operation, or control of telecommunications facilities, states:

A person may not begin the construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organization control or controlling stock ownership, without prior approval. This

section does not require approval by the commission prior to the construction, operation, or extension of a facility by a certificated company within its certificated area nor in any way limit the commission's ability to review the prudence of such construction programs for ratemaking as provided under this chapter.

We agree with MCI WorldCom/Sprint that this section is not a merger review statute. Section 364.33, Florida Statutes, gives us jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers. TRA has, therefore, failed to demonstrate that the injury alleged is a substantial injury of a type or nature which a proceeding under Section 364.33, Florida Statutes, is designed to protect. Agrico, 406 So. 2d 478 (Fla. 2nd DCA 1981). See also PSC Order No. PSC-98-0702-FOF-TP.

C. JOINT APPLICATION FOR ACKNOWLEDGMENT OR APPROVAL OF MERGER

As previously discussed, this transaction is between the parent company MCI WorldCom, Inc. and Sprint Corporation. The Florida operating subsidiaries of Sprint, ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and ALEC Certificate No. 4732), Sprint Communications Company Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365), will continue to hold the same, unmodified certificates, and will continue to operate under the applicable certificates and tariffs until a change is requested. At this time, however, the companies are not requesting any change relating to a Florida subsidiary or any transfer of control of a Florida certificate. The only transfer involves majority control of the parent companies.

In accordance with our authority under Section 364.33, Florida Statutes, to approve the acquisition or transfer of majority organizational control or controlling stock ownership of a telecommunications company providing service in Florida, we have reviewed the Joint Application and find that it is appropriate to approve it. We based our review and decision upon an analysis of the public's interest in efficient, reliable telecommunications



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services. Our decision herein does not address the potential impact of the transfer on the competitive market in Florida, or on the companies' or their competitors' interests. We emphasize, however, that our approval of the Joint Application pursuant to the our authority under Section 364.33, Florida Statutes, does not preclude us from addressing any concerns that may arise regarding this transaction to the appropriate federal agency or agencies.

Based on the foregoing, it is

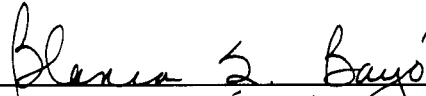
ORDERED by the Florida Public Service Commission that the Telecommunications Resellers Association's Motion for Leave to Intervene is hereby denied. It is further

ORDERED that MCI WorldCom, Inc. and Sprint Corporation's Joint Application for transfer of control is hereby granted. It is further

ORDERED that the provisions of this Order, approving the joint application for transfer of control, are issued as proposed agency action, and shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if the proposed agency action portions of this Order become final and effective, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 1st day of March, 2000.

  
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BLANCA S. BAYO, Director  
Division of Records and Reporting

( S E A L )

DMC

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

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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, approving the Joint Application for transfer of control, is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 22, 2000.

In the absence of such a petition, this Order shall become final and effective upon the issuance of a Consummating Order.

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 renewed within the specified protest period.

Any party adversely affected by the Commission's final action denying intervention 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 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 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.

M E M O R A N D U M

February 29, 2000

RECEIVED- MPSC

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RECORDS AND  
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CLEMONS) *DMC AK*

RE: DOCKET NO. 991799-TP - JOINT APPLICATION OF MCI WORLDCOM, INC. AND SPRINT CORPORATION FOR ACKNOWLEDGMENT OR APPROVAL OF MERGER WHEREBY MCI WORLDCOM WILL ACQUIRE CONTROL OF SPRINT AND ITS FLORIDA OPERATING SUBSIDIARIES, ASC TELECOM, INC. D/B/A ALTERNATEL (IXC CERTIFICATE NO. 4398), SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP (HOLDER OF PATS CERTIFICATE NO. 5359 AND ALEC CERTIFICATE NO. 4732), SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP D/B/A SPRINT (HOLDER OF IXC CERTIFICATE NO. 83), SPRINT PAYPHONE SERVICES, INC. (HOLDER OF PATS CERTIFICATE NO. 3822), AND SPRINT-FLORIDA, INCORPORATED (HOLDER OF LEC CERTIFICATE NO. 22 AND PATS CERTIFICATE NO. 5365).

*0421-PAO*

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Attached is an ORDER DENYING MOTION FOR LEAVE TO INTERVENE AND NOTICE OF PROPOSED AGENCY ACTION APPROVING JOINT APPLICATION FOR TRANSFER OF CONTROL, to be issued in the above-referenced docket. (Number of pages in order - ~~11~~).

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DMC/anc

cc: Division of Communications (Williams)  
I: 991799o.dmc

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mailed -*

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