BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint application for approval of indirect transfer of control of telecommunications facilities resulting from agreement and plan of merger between AT&T Inc. (parent company of AT&T Communications of the Southern States, LLC, CLEC Cert. No. 4037, IXC Registration No. TJ615, and PATS Cert. No. 8019; TCG South Florida, IXC Registration No. TI327 and CLEC Cert. No. 3519; SBC Long Distance, LLC, CLEC Cert. No. 8452, and IXC Registration No. TI684; and SNET America, Inc., IXC Registration No. TI389) and BellSouth Corporation (parent company of BellSouth Telecommunications, Inc., ILEC Cert. No. 8 and CLEC Cert. No. 4455); and BellSouth Long Distance, Inc. (CLEC Cert. No. 5261 and IXC Registration No. TI554).	DOCKET NO. 060308-TP ORDER NO. PSC-06-0711-FOF-TP ISSUED: August 24, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER DENYING PROTESTS

BY THE COMMISSION:

Case Background

On March 31, 2006, AT&T Inc., BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively referred to as "Joint Applicants") submitted a joint application for approval of indirect transfer of control of telecommunications facilities from BellSouth Corporation to AT&T Inc. resulting from an Agreement and Plan of Merger jointly executed by the two companies. By Order No. PSC-06-0531-PAA-TP, issued June 23, 2006, we approved the transfer of control ("PAA Order").

On July 14, 2006, ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), NuVox Communications, Inc. (NuVox), XO Communications Services, Inc. (XO), and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC (Xspedius) (collectively "Joint CLECs") filed a protest of the PAA Order. Also on July 14,

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2006, Time Warner Telecom of Florida, L.P. (Time Warner Telecom) filed a protest of the PAA Order and Request for Formal Proceeding.

On July 18, 2006, Joint Applicants[1] filed a Response in Opposition for Lack of Standing to Joint CLECs' and Time Warner's Protests and Petitions for a Formal Proceeding.

On July 25, 2006, Joint CLECs filed a Response to 'Opposition for Lack of Standing'.

STANDARD OF REVIEW

When a petitioner files a protest to a proposed agency action, he has the burden 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 prove standing, the petitioner must demonstrate that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and that his substantial injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478, 482 (Fla. 1st DCA 1981).

Joint CLECs Petition

Joint CLECs allege that the Joint Applicants failed to meet the "public interest" standard stated by us and that we failed to consider all that 364.01, Florida Statutes, requires. Joint CLECs contend that 364.01, Florida Statutes, requires us to:

- Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure availability of the widest possible range of consumer choice in the provision of all telecommunications services;
- Promote competition by encouraging innovation and investment in telecommunications markets;
- Encourage all providers of telecommunications services to introduce new or experimental telecommunications services;
- Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior.

Joint CLECs argue that we fail to address these statutory requirements and how they will be affected by the transfer. *Joint CLEC Petition* pg. 6 ¶ 16. In addition, Joint CLECs contend that the Applicants were required to demonstrate that the proposed merger will not harm competition by "for example, reducing competitive alternatives, increasing market concentration,

[1] The July 18 filing by the Joint Applicants included two additional entities: TCG South Florida and AT&T of the Southern States, LLC. For ease of reference, we have referred to all of these entities collectively as "Joint Applicants".

and increasing prices throughout the state." *Joint CLEC Petition* pg. 6 ¶ 17. Joint CLECs claim that "[t]hough several parties have sought to intervene in this docket and to formally oppose the merger or to oppose the merger without certain conditions, the Commission has not considered the positions of such parties."[2] *Joint CLEC Petition* pg. 8 ¶ 20.

Joint CLECs claim that their substantial interests are affected by our approval of the transfer "without a thorough investigation as to how the proposed transaction will affect competitors, the competitive marketplace, and the ultimate provision of telecommunications services to end users." *Joint CLEC Petition* pg. 10 ¶ 23. Next, Joint CLECs claim that with the approval of the transfer, one of the most vigorous competitors to BellSouth's monopoly power will be silenced. The transfer will result in a huge market consolidation that will reduce consumer choice, on both a retail and wholesale level and harm Joint CLECs' ability to compete in the consolidated market. *Joint CLEC Petition* pg. 11 ¶ 24. Joint CLECs then cite to Order No. PSC-98-0562-PCO-TX ("BSE Order") in which we found MCI to be an appropriate party in a certification proceeding because MCI "alleged an immediate threat of harm."

Time Warner Petition

Time Warner also alleges that we have failed to examine the transfer in light of the other relevant provisions of 364.01, Florida Statutes. Time Warner claims that the assertions made by Joint Applicants concerning the merger and relied upon by us have not been tested "by production of evidence, cross-examination of witnesses or review of those assertions." *Time Warner Petition* ¶ 6. Time Warner claims that as a competitive local exchange carrier, its substantial interests will be affected by losing further market power and competitive influence over segments of the marketplace.

Next, Time Warner alleges that "[i]f special access services are classified as broadband access, Time Warner could be without access to a competitive environment or without any effective remedy or jurisdictional review at the [Commission]. This lack of ability to access jurisdictional review would be detrimental to Time Warner's competitive abilities in Florida." *Time Warner Petition* ¶ 9c. Time Warner also claims that "[w]ithout a specific merger condition obligating AT&T and BellSouth to peer their IP networks, the Applicants could block access to their immensely large base of customers . . . . BellSouth and AT&T *could* refuse to accept terminating and transit traffic on their IP network or make onerous demands for peering [which] *could* result in the loss of customers who would move to an IP network with the greatest amount of coverage." *Time Warner Petition* ¶ 9d. (emphasis added).

Joint Applicants' Response

Joint Applicants state that Joint CLECs and Time Warner bear the burden of establishing standing by proving that: (1) they will suffer injury in fact that is of sufficient immediacy to

[2] We considered the concerns of these interested parties and determined that the appropriate way to address their concerns was through comments to the FCC. See *Staff Recommendation*, filed June 12, 2006, in Docket No. 060308-TP.

entitle the petitioner to a Section 120.57 hearing, and (2) the substantial injury is of a type or nature that the proceeding is designed to protect. See Agrico, 406 So. 2d at 482. If a protesting party fails to make either showing under the Agrico test, their protests and petitions must fail. See Order No. PSC-00-421-PAA-TP at 7. Joint Applicants states that based on our precedent "general assertions of future competitive harm" are insufficient to establish standing. In addition, the alleged competitive injury sought to be remedied is not the type of injury that a transfer of control proceeding is designed to protect. See Order No. PSC-98-0702-FOF-TP, issued, in Docket No. 971604-TP[3] ("MCI Order"); Order No. PSC-00-0421-PAA-TP, issued March 1, 2000, in Docket No. 991799-TP[4] ("Sprint Order"); Order No. PSC-06-0033-FOF-TP, issued January 10, 2006, in Docket No. 050551-TP[5] ("Nextel Order").

Joint Applicants question the "undue competitive advantages" raised by Joint CLECs and claim that such harm is unlikely since the Joint Applicants remain subject to the same nondiscriminatory wholesale access and interconnection obligations as they are today. *Joint Applicants Response* pg. 9. Consequently, because of our ongoing regulatory oversight over BellSouth, we will have the ability to address any actual claims that may arise after the merger. *Joint Applicants Response* pg. 9.

Next, Joint Applicants summarize the holdings of previous transfer of control proceedings and assert that those same holdings are applicable to this proceeding. Joint Applicants allege that the competitive harm alleged by Joint CLECs and Time Warner is insufficient to satisfy the degree-of-injury prong of the Agrico test. *Joint Applicants Response* pg. 9 citing MCI Order at 14 ("Speculation as to the effect that the merger . . . will have on the competitive market amounts to conjecture about future economic detriment."); Sprint Order at 7 ("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."); Nextel Order at 5 ("The 'injury in fact' must be both real and immediate and not speculative or conjectural.").

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[3] In re: Request for approval of transfer of control of MCI Communications Corporation (parent corporation of MCI Metro Access Transmission Services, Inc., holder of AAV/ALEC Certificate 2986, and MCI Telecommunications Corporation, holder of IXC Certificate 61, PATS Certificate 3080, and AAV/ALEC Certificate 3996) to TC Investments Corp., a wholly-owned subsidiary of WorldCom, Inc. d/b/a LDDS WorldCom.

[4] 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 (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).

[5] In re: Joint application for approval of transfer of control of Sprint-Florida, Incorporated, holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corporation to LTD Holding Company, and for acknowledgment of transfer of control of Sprint Long Distance, Inc., holder of IXC Registration No. TK001, from Sprint Nextel Corporation to LTD Holding Company.

Joint CLECs' Response to Joint Applicant's Response

On July 25, 2006, Joint CLECs filed a Response to 'Opposition for Lack of Standing' claiming that the Joint Applicant's Response is in the nature of a motion to dismiss and as such Joint CLECs are entitled to respond. Joint CLECs explain that our order cited by the Joint Applicants involved a petition to intervene in a wastewater certificate proceeding. When the utility responded to the petition to intervene, the intervening parties filed a memorandum in opposition to the response. We ruled that the memorandum in opposition was an unauthorized reply.

Joint CLECs contend that, in this case, the Joint Applicants have filed an affirmative pleading seeking to dismiss the protest. Consequently, Joint CLECs' Response is not an unauthorized reply, but a response to a motion. Joint CLECs state that in ruling on the Joint Applicants' motion to dismiss we must take all of Joint CLECs' allegations as true, and in doing so it is clear that the standing requirements have been met. *Joint CLEC Response* pg. 3 ¶ 10.

Joint CLECs allege that they meet the "injury in fact" prong of the Agrico test, because "this transaction will create a critical resource imbalance in the State of Florida between CLECs and the newly-created mammoth incumbent." *Joint CLEC Response* pg. 5 ¶ 16. Joint CLECs state that the merged company will have little incentive to make the needed elements available at fair and reasonable prices.

Next, Joint CLECs argue that they meet the "zone of interest" test because we have articulated that a public interest standard as enumerated in section 364.01, Florida Statutes, should be applied in transfer proceedings. *Joint CLEC Response* pg. 6 ¶ 21, citing Nextel Order.

Joint CLECs claim that the Joint Applicants cannot rely on the Sprint Order because it was vacated by Order No. PSC-00-1667-FOF-TP and as such it is a nullity and cannot be relied upon for any purpose.[6] Joint CLECs then attempt to distinguish the MCI Order and the Nextel Order because of the magnitude of the impact of this transaction on local exchange competition and the loss of a vigorous competitor from the market. The MCI Order is also distinguishable because it involved the consolidation of two CLECs, not an incumbent.

Again, Joint CLECs claim that the BSE Order most closely fits the instant facts, because the merger and consolidation of two huge telecommunications giants poses an immediate threat of harm to Joint CLECs. *Joint CLEC Response* pg. 12 ¶ 35.

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[6] We disagree. While a vacated order may not have precedential value, the analysis and reasoning does has value. See Smith v. State Farm Mutual Automobile insurance Co., 964 F.2d 636, 638 (7th Cir. 1992)(noting that while vacated decisions may have no weight as authority, that is distinct from the weight that any document might have because of the quality of its reasoning.); HOA v. HO, 1994 Fla. Div. Adm. Hear. LEXIS 5298 (stating that "[a]lthough this court's decision was vacated as moot, it has no precedential value, however, the analysis and reasoning has value." citing County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979)

Joint CLECs contend that the Joint Applicants' Response is in the nature of a motion to dismiss and should be treated as such. Regardless of whether Joint Applicants filed a response/motion, any protest to a Proposed Agency Action seeking a 120.57, Florida Statutes, hearing must meet the substantial interest test. See Rule 28-106.201(2), Florida Statutes. As stated above, section 120.569, Florida Statutes, requires the agency to carefully review petitions for legal sufficiency, including a review of whether the petitioner has demonstrated that it has standing under the statutes involved. So, while the pleadings by all parties have illuminated the issues surrounding standing, we have examined the protests in light of the requirements of Rule 25-106.201, Florida Administrative Code, and applicable law.

TEST FOR SUFFICIENCY OF PETITION

In order to meet the standard for a valid protest under Rule 28-106.201(2), Florida Administrative Code, a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he 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 this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." Agrico, 406 So. 2d at 482. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987)(speculation on the possible occurrence of injurious events is too remote).

A. Degree of Injury

We find that Joint CLECs and Time Warner have failed to meet the first prong of the Agrico test. Joint CLECs' and Time Warner's allegations fail to demonstrate that either will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. The alleged injuries raised by Joint CLECs and Time Warner are mere speculation as to perceived future economic harm. See *Joint CLEC Petition* pg. 11 ¶ 24; *Time Warner Petition* ¶ 9. Such speculation is too remote to establish standing. See MCI Order (finding that GTE failed to demonstrate that its substantial interests will be affected either as a competitor or as a customer); citing 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 Bd. 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).

1) Sufficient Immediacy

Joint CLECs and Time Warner claim that their substantial interests are affected by the loss of a competitor and the resulting resource imbalance. *Joint CLEC Petition* pg. 11 ¶ 24 ; *Time Warner* Petition ¶ 9b; *Joint CLEC Response* pg. 5 ¶ 16. However, we have consistently held that the loss of a competitor is insufficient to establish standing. See MCI Order at 18 (stating that "the 'loss' of a competitor in the market does not, in itself demonstrate a harm . . ."); Sprint Order at 7 ("We do not believe that the 'loss' of a competitor in the market, in itself, demonstrates harm . . .").

Next, Time Warner presents a scenario of events that would have to occur before it "could be without access to a competitive environment or without any effective remedy or jurisdictional review at the [Commission]". *Time Warner Petition* ¶ 9c. While it may be possible to trace these effects back to the proposed merger "the causal chain has too many links in it to view the downstream effects are 'direct' or 'immediate'." Nextel Order at 6.

B. Nature of Injury

Joint CLECs and Time Warner allege deficiencies in our review of the transfer of control and seek to expand the proceeding beyond the scope of what we have held is relevant in a transfer of control proceeding. While Joint CLECs and Time Warner may allege that a transfer of control proceeding *should* protect against certain alleged injuries, the relevant question for the purposes of determining standing is whether the proceeding *is* designed to protect the injuries alleged.

Joint CLECs' and Time Warner's reliance on our citation of 364.01, Florida Statutes, is misplaced. We explained that the public interest is examined within the framework of sections 364.33 and 364.335, Florida Statutes. PAA Order pg. 4. This is consistent with the rule of statutory construction which requires that the more specific statute controls over the general. See State v. J.M., 824 So. 2d 105, 112 (Fla. 2002) citing State ex rel. Johnson v. Vizzini, 227 So. 2d 205, 207 (Fla. 1969).

In their Response, Joint CLECs claim that the standing principles at issue here are the same as in rule challenge proceedings. *Joint Response* pg. 6 n. 12. We disagree. The courts have recognized a distinction between the meaning of the concept, "substantially affected," as used in 120.56, Florida Statutes, (which deals with challenges to agency rules) and the meaning of the concept, "substantial interest," as used in 120.57, Florida Statutes (which deals with challenges to agency actions other than rules). See Dept. of Prof. Reg. v. Florida Dental Hygienist Assoc., 612 So. 2d 646, 651 (Fla. 1st DCA 1993). More importantly, Agrico set out the standing requirements in permitting proceedings which are analogous to the merger at issue in this proceeding. In Agrico, competitors challenged the issuance of Agrico's permits. The court held that "[w]hile petitioners []were able to show a high degree of potential economic injury, they were wholly unable to show that the nature of the injury was one under the protection of chapter 403." 406 So. 2d at 482; see also Florida Medical Assoc. v. Dept. of Bus. And Prof. Reg., 426 So. 2d 1112, 1118 (stating the general principle that "in licensing or permitting proceedings a claim of standing by third parties based solely upon economic interests

is not sufficient unless the permitting or licensing statute itself contemplates consideration of such interests, or unless standing is conferred by rule or statute, or based upon constitutional grounds.").

Likewise, in this case, accepting the Petitioners' allegations as true there may be a high degree of potential economic injury. However, neither section 364.33 nor section 364.335, Florida Statutes, was designed to protect competitors' interests. We have consistently held that a transfer of control proceeding under Section 364.33, Florida Statutes, is not designed to protect alleged competitive injuries. We have held that the appropriate inquiry in a transfer of control proceeding is the effect of the transfer of control on service to consumers, not on the interests of competitors. See MCI Order at 20 (holding that "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."); Sprint Order at 8 ("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.").

While it is true that under section 364.01, Florida Statutes, we should encourage and promote competition, the method in which we carry out that duty is found elsewhere in chapter 364, Florida Statutes. See e.g., 364.09, Florida Statutes, (prohibiting rebates or special rates); 364.16, Florida Statutes (governing local interconnection and number portability); 364.161, Florida Statutes, (unbundling and resale); 364.12, Florida Statutes, (negotiated prices for interconnection and resale). In this proceeding, we are operating under sections 364.33 and 364.335, Florida Statutes, which governs whether the transfer of majority organizational control is in the public interest in light of the criteria enumerated therein.

We find that Joint CLECs' reliance on the BSE Order, for standing based on an "alleged immediate threat of harm" from a PAA Order, is in error. In that Order, we were examining whether BellSouth BSE should be granted an ALEC certificate. We found that "MCI has standing because it is a competitor-ALEC which has alleged an immediate threat of harm by the very granting of ALEC authority to the subsidiary of the ILEC to serve in the ILEC's incumbent territory." However, in the MCI Order we distinguished the granting of a certificate from a transfer of control proceeding, because MCI and WorldCom were not seeking a certificate. MCI Order pg. 17.

For the foregoing reasons we find that the Protests filed by Joint CLECs and Time Warner and *Joint CLEC Response* are insufficient to establish standing; and that the defects in these pleadings cannot be cured. Therefore, Order No. PSC-06-0531-PAA-TP is made final and effective August 15, 2006. By denying the protests, we have rendered all outstanding Petitions to Intervene moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the protests filed by ITC^DeltaCom Communications, Inc., NuVox Communications, Inc., XO Communications Services, Inc., and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC and Time Warner Telecom of Florida, L.P. are denied. It is further

ORDERED that the Proposed Agency Action Order No. PSC-06-0531-PAA-TP is rendered final with an effective date of August 15, 2006. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 24th day of August, 2006.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

JKF

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.