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APRIL 16, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) BK MCB
DIVISION OF COMMUNICATIONS (WILLIAMS) RW LW

RE: DOCKET NO. 971604-TP - 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.

AGENDA: APRIL 28, 1998 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\971604.RCM

CASE BACKGROUND

By letter dated November 25, 1997, WorldCom, Inc. d/b/a LDDS WorldCom (WorldCom) and MCI Communications Corporation (MCI) (as joint movants, herein referred to as MCI/WorldCom) filed with this Commission a joint petition for approval of transfer of control of MCI to TC Investments Corporation (TC Investments), a subsidiary of WorldCom. The companies have stated that upon consummation of the transaction, this new wholly-owned subsidiary of WorldCom will be renamed MCI Communications Corporation.

MCI Communications Corporation is the parent corporation of MCImetro Access Transmission Services, Inc. and MCI Telecommunications Corporation. MCImetro Access Transmission Services, Inc. is the holder of Alternative Access Vendor Certificate, with authority to provide Alternative Local Exchange services (AAV/ALEC), No. 2986. MCI Telecommunications Corporation

is the holder of Interexchange Telecommunications (IXC) Certificate No. 61, Pay Phone Certificate No. 3080, and AAV/ALEC Certificate No. 3996.

On December 15, 1997, GTE Corporation and GTE Communications Corporation (GTE) filed a petition requesting leave to intervene in this proceeding. On December 24, 1997, MCI and WorldCom filed a joint response in opposition to GTE's Petition to Intervene. By Proposed Agency Action Order No. PSC-98-0125-FOF-TI, issued January 22, 1998, the Commission approved the transfer of control. On January 26, 1998, GTE filed a Reply to MCI and WorldCom's joint opposition to GTE's Petition to Intervene. On February 6, 1998, MCI and WorldCom filed a Joint Motion to Strike GTE's Reply to WorldCom and MCI's Opposition to GTE's Petition to Intervene. On February 12, 1998, the Communications Workers of America (CWA) requested leave to intervene in this proceeding and protested Order No. PSC-98-0125-FOF-TI. That same day, GTE filed a protest of Order No. PSC-98-0125-FOF-TI. On February 13, 1998, GTE filed a memorandum in opposition to WorldCom's and MCI's Joint Motion to Strike. On March 3, 1998, MCI and WorldCom filed a Joint Motion to Dismiss GTE's and CWA's protests of Order No. PSC-98-0125-FOF-TP and CWA's petition to intervene. That same day MCI and WorldCom also filed an Answer to the protests. On March 10, 1998, CWA filed a letter asking the Commission to deny MCI's and WorldCom's Motion to Dismiss. Also on that day, GTE filed a Memorandum in Opposition to MCI's and WorldCom's Joint Motion to Dismiss.

This is staff's recommendation on the Joint Motion to Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant WorldCom's and MCI's Joint Motion to Dismiss GTE's Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA's Petition to Intervene and Protest of Order No. PSC-98-0125-FOF-TI?

RECOMMENDATION: Yes. Taking all the petitioners' allegations as true, GTE and CWA have both failed to sufficiently allege standing to protest the approval of the transfer of control of MCI to WorldCom. The Joint Motion to Dismiss GTE's and CWA's protests should, therefore, be granted, and Order No. PSC-98-0125-FOF-TI should be made final and effective as of April 20, 1998.

STAFF ANALYSIS:

POSITIONS

I. Petitions

GTE

In its Petition, GTE asserts that MCI/WorldCom have alleged that the proposed transfer will accelerate competition and enhance competitive choice for telecommunications customers. GTE argues, however, that once the Commission has the information necessary to fully evaluate this merger, the Commission will find that the merger will actually decrease competition in Florida.

GTE states that it is actively involved in the markets that MCI/WorldCom have described and is also a customer of WorldCom. Thus, GTE argues that it has a substantial interest in participating in this case and in evaluating whether the proposed acquisition will produce the benefits that MCI/WorldCom have asserted that it will. GTE argues that its substantial interest in this proceeding is based upon the fact that it is a customer and a competitor of the merged entity. GTE states that it buys most of its long-distance transmission capacity from WorldCom. GTE argues that WorldCom offers much better prices for wholesale supply than its largest rivals AT&T, MCI, and Sprint. In addition, GTE states that WorldCom offers advanced features and capabilities to its wholesale customers that other providers do not offer. Without access to these advanced features, GTE argues that its ability to compete will be detrimentally affected. GTE also asserts that the merger will likely change WorldCom's practices in the wholesale market. GTE states that it expects that WorldCom will raise its wholesale rates.

In support of its petition, GTE cites a number of Commission orders granting intervention to resellers, purchasers, and potential purchasers in Commission proceedings.[1]

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[1] Among the interventions cited by GTE are American Communications Services of Jacksonville, Inc. (ACSI) intervention in the proceeding to consider BellSouth Telecommunications, Inc.'s application to provide long distance service under Section 271 of the Act, Docket No. 960786-TP. GTE also notes that the Commission has allowed resellers to intervene in AT&T's application for a

GTE also cites a number of other cases in which the Commission has allowed customers of a utility to intervene in proceedings before the Commission.[2] GTE further states that the Commission has also allowed competitors to intervene in Commission proceedings based solely upon their status as competitors. [3]

GTE argues that its interests will also be affected by the merger because a major competitor will be removed from the market. GTE asserts that this will cause a change in WorldCom's behavior in the market. Without WorldCom's presence in the wholesale market, GTE asserts that its own interest and ability to compete in the wholesale long distance market will be affected. GTE states that

> Thus, GTE's interest is not just a competitive or economic interest. GTE is not seeking to be protected

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certificate, Docket No. 830489-TI; Southern Bell's post-divestiture application for a certificate to provide WATS service, Docket No. 830537-TL; the application of GTE Sprint Communications Corporation for a certificate, Docket No. 830118-TP; the application for a transfer of certificates from Twin County Utility to Southern States Utilities, Inc., Docket No. 881339-WS; Centel's application for a certificate to provide long distance service, Docket No. 890689-TI; the application of United Telephone to provide long distance service, Docket No. 870285-TI; and the petition of MCI Telecommunications to provide long distance service, Docket No. 820450-TP.

[2] Among the cases cited by GTE are the investigation of possible overearnings by Heather Hills Estates, Docket No. 96814-WS; the application for a rate increase and increase in service availability by Southern States Utilities, Docket No. 950495-WS; Gainesville Gas Company's petition for increase rates, Docket No. 870688-GU; and Florida Power and Light's petition to establish an amortization schedule for nuclear generating units to address the potential for stranded investment, Docket No. 950359-EI.

[3] GTE cites intervention by competitors in the petition by subscribers in the Groveland exchange for EAS, Docket No. 941281-TL; Continental Telephone's petition for waiver of Rule 25-4.345(4), Florida Administrative Code, Docket No. 820529-TP; and Centel's application for authority to provide interexchange service, Docket No. 890689-TI.

> from competition; at present, it is not even a competitor in the wholesale market. Rather, GTE's interest is in assuring the kind of conditions that are necessary to give all market participants a fighting chance of success in the long term, so that long-distance competition can flourish in Florida.

GTE argues that it has raised serious concerns that the merger will affect the long-distance and local market. GTE argues that the Commission must, therefore, further investigate this merger in order to determine if the merger is in the public interest.

In addition, GTE argues that the Commission should reject MCI/WorldCom's challenge to GTE's standing in this case because GTE's participation will help expose some of the important issues involved and because GTE can provide a balance to the perspective presented by MCI/WorldCom. GTE asserts that it has already shown that it can identify important aspects of this merger that the Commission should consider, as indicated by the discussion of this matter at the Commission's January 7, 1998, Agenda Conference.

Furthermore, GTE argues that MCI/WorldCom must prove that the merger is in the public interest. GTE argues that the Commission's proposed agency action order has, effectively, created a presumption that the merger is in the public interest, without requiring any proof from the entities involved. GTE asserts that the Commission should proceed with this matter and require MCI/WorldCom to demonstrate, in accordance with Section 364.335(2) and (4), Florida Statutes, and Commission Rules 25-24.473 and 25-24.730, Florida Administrative Code, that the merger is in the public interest.

GTE notes that MCI/WorldCom did not submit any information or evidence in support of the application for approval of the merger and did not attempt to conform their application to provide any guidance as to the effects that the merger would have on competition. GTE states that the Commission has emphasized in the past that the burden of proof is upon the applicants to demonstrate that the proposed transaction is in the public interest. [4] GTE adds

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[4] See Order No. 21420, issued June 20, 1989, in Docket No. 880140-TI, Application of Metro Comm. Network, Inc. For Transfer of IXC Certificate to Profit Concept Systems of Lake County d/b/a

that if the parties will not put on enough evidence to support their claims that the merger is in the public interest, the burden should not be upon the interested parties to show that the public interest burden has not been met. GTE argues that the Commission must require MCI/WorldCom to demonstrate some factual basis for their assertions. GTE argues that only after an inquiry of those facts, will there be an adequate basis for a Commission finding that the merger is in the public interest. GTE further argues that without further analysis, if the Commission's PAA Order approving the transfer of control becomes final, the decision would ". . . be a textbook example of impermissibly arbitrary and capricious action." GTE Petition at 22.

Finally, GTE argues that this is a critical merger with complex policy questions. GTE states that the Florida Commission should, therefore, conduct a thorough investigation of the merger. GTE further asserts that it believes such an investigation will show that the merger will decrease competition, and compromise the supply of bulk capacity and advanced features.

CWA

In its Petition, CWA asserts that the Commission should conduct a formal proceeding to determine the impact that the proposed merger will have on Florida consumers. CWA argues that the merger will, in fact, adversely affect consumers because it will hinder the development of competition, it will decrease the quality of service, it will adversely affect the Internet market, and it will result in job loss for communications workers.

Like GTE, CWA argues that the merger will adversely affect the local exchange residential and small business market. CWA argues that the merger will cause a reduction in investment in facilities in local markets, while it will eliminate MCI as an aggressive competitor for residential and small business service. CWA asserts that before the merger, MCI had plans to enter the local market. After the merger was announced, however, WorldCom announced that the merged company would retreat from the consumer/residential market. CWA further asserts that the companies have reduced their plans for local loop investments. CWA adds that the cost savings that MCI/WorldCom assert will take place due to the merger can only

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Metro Long Distance.

take place if there is some shift in the business focus.

CWA also argues that the merger will result in a shift of revenues from the public switched network to the MCI/WorldCom network. CWA states that because the merged entity will be vertically integrated, MCI/WorldCom will be ". . . ideally positioned to arbitrage business opportunities opened by a competitive, deregulatory policy." CWA Petition at 10. CWA further asserts that while MCI and WorldCom have alleged that the merger will enhance competition, the merged entity will not actually be competing in all markets, but will only compete for business customers.

In addition, CWA argues that the merger will result in a substantial access charge bypass. CWA argues that this will result in a significant loss of revenue to the local exchange companies, and, therefore, a decrease in the quality of service provided by the LECs. CWA further argues that such a decrease in revenue would also reduce investments in upgrading and expanding facilities.

CWA also argues the merger will have a detrimental impact on Internet service. CWA asserts that the merged entity will have 63% of all Internet Service Providers (ISPs) connected to the network. Thus, CWA asserts that the merger will significantly reduce competition in the Internet provider market. This reduction in competition will, argues CWA, allow the dominant entity to control prices and access to the Internet backbone and to further consolidate its control over the Internet network. CWA further argues that this would impede new providers' ability to compete or even to enter the market.

Finally, CWA argues that the merger will reduce employment growth in Florida. CWA asserts that the reduced spending will result in the loss of jobs for Florida communications workers. CWA estimates that the merger will have a detrimental effect on 75,000 communications workers nationwide by the year 2002, including a large portion in Florida. Thus, CWA argues that the merger is not in the public interest. To support its assertions, CWA notes that soon after the merger was announced, MCI stated that 1,500 employees would lose their jobs.

II. Motion to Dismiss

MCI and WorldCom

In their Motion to Dismiss, MCI/WorldCom state that GTE bases its petition on assertions that GTE will no longer be able to obtain discounts for wholesale long-distance services that it currently receives from WorldCom. MCI/WorldCom argue that GTE is, however, protected from such a threat because the GTE contract with WorldCom includes "multi-year" protection. MCI/WorldCom note that GTE has acknowledged that the contract between WorldCom and GTE includes a "multi-year" provision that would prevent MCI/WorldCom from immediately canceling the contract. Motion to Dismiss at 2. MCI/WorldCom also note that GTE has recently announced transactions with Qwest Communications that will allow GTE to have an advanced data network with access nationwide. MCI/WorldCom assert that GTE has indicated that Qwest will be providing GTE with advanced services. MCI/WorldCom assert that this agreement will cover Florida; therefore, GTE does not depend upon WorldCom for such access. Thus, MCI/WorldCom argue that GTE's claim of standing is speculative because GTE's claim is, essentially, that it may, at some point, wish to order services from WorldCom.

Specifically, MCI/WorldCom argue that GTE's standing claim does not accurately reflect the facts. MCI/WorldCom point out that GTE has announced that it will be able to provide long-distance service in 1998 as a result of arrangements between GTE and Qwest Communications. MCI/WorldCom state that in this announcement, GTE also stated that its national network would be "fully operational next year" and would put GTE in position to "reach virtually the entire U.S. population." See Motion to Dismiss at 4, citing announcement released on GTE's web site (http://www.gte.com/j/news/050697.html). Thus, MCI/WorldCom argue that there is no basis for GTE's claim that it may lose its ability to get wholesale access and advanced services from WorldCom and have to pay higher prices to obtain service from Sprint or AT&T. MCI/WorldCom also note that in that same announcement, GTE stated that its new network will be an advanced data network that will allow GTE to develop new services and Internet offering to meet customer needs. MCI/WorldCom emphasize that this network does not depend upon WorldCom.

MCI/WorldCom also assert that GTE's standing claim is not valid because GTE has admitted that it has not tried to buy advanced services from WorldCom. Citing Ms. Covey's affidavit submitted by GTE, MCI/WorldCom argue that GTE has admitted that it has not decided whether it will try to purchase services from WorldCom. MCI/WorldCom further argue that the reason for this statement by Ms. Covey is that GTE has decided to purchase such services from Qwest Communications.

MCI/WorldCom further argue that AT&T and MCI do currently sell to both wholesale and retail customers. MCI/WorldCom argue, therefore, that GTE's argument that it cannot purchase services from another long distance carrier is inaccurate. MCI/WorldCom add that the FCC's prohibitions on resale restrictions, along with market pressure, ensure that interexchange services are available to all resellers on a nondiscriminatory basis.

As for CWA, MCI/WorldCom argue that CWA's assertions of standing are based solely upon speculation that the efficiencies of the merged company will result in fewer jobs for communications workers. MCI/WorldCom argue, however, that CWA is assuming that the two separate companies would grow at the same rate that the new merged entity will grow. MCI/WorldCom argue that due to the efficiencies created by the merger, the merged entity will likely create jobs because it will be more capable of successfully competing against the ILECs.

In particular, MCI/WorldCom state that CWA has not argued that the merged company will spend less than the two separate companies are currently spending and investing in local loops and other network and sales aspects of the business. MCI/WorldCom argue that, instead, CWA argues that the merged company will spend less in the future than the separate companies would have spent in the future. MCI/WorldCom argue that CWA's position is based, essentially, upon the argument that the merged company may not employ as many people in the future than the separate companies would if the separate companies are competitively successful.

Furthermore, MCI/WorldCom argue CWA's claim that service quality will suffer because of reduced access revenues is untenable because service will be subsidized in high cost areas by the universal service fund, in accordance with the Telecommunications Act of 1996.

Based on GTE's and CWA's allegations, MCI/WorldCom assert that the allegations presented by CWA and GTE are insufficient to establish standing under the Agrico test for standing. See Agrico Chemical Co. V. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). MCI/WorldCom argue that GTE and CWA have not demonstrated that they will experience an actual injury from the proposed merger. MCI/WorldCom assert that CWA and GTE have only alleged potential economic harm that is merely speculative. MCI/WorldCom argue that the courts have already established that the type of harm alleged by CWA and GTE is insufficient to meet the standard set by Agrico.[5] MCI/Worldcom state that the Commission has also stated that such claims do not amount to substantial interest. MCI/WorldCom state that in Order No. PSC-94-0114-FOF-TI, issued January 31, 1994, denying Best Telephone Company's protest of a Proposed Agency Action Order granting a certificate to Atlas Communications Consultants, the Commission stated that

> Nothing in Chapter 364, Florida Statutes, grants or implies that competitive long distance carriers have a legally cognizable interest in being free from competitive injury. The actions of Atlas about which Best complains are those of any normal competitor in a competitive marketplace.

Motion to Dismiss at 9; citing Order No. PSC-94-0114-FOF-TI, issued in Docket No. 930396-TI, on January 31, 1994. MCI/WorldCom add that if CWA and GTE actually experience any of the problems that they have alleged, at that time either could file a complaint. MCI/WorldCom argue, however, that until an actual problem arises, there is no injury in fact. In addition, MCI/WorldCom assert that this transfer will not, by itself, cause any of the problems alleged by GTE or CWA. See Village Park Mobile Home Association v. State Dept. Of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987).

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[5]Citations in Motion to Dismiss to AmeriSteel Corp. V. Clark, 691 So. 2d 473 (Fla. 1997); ASI. Inc. V. Fla. Pub. Service Comm., 334 So. 2d 594 (Fla. 1976); and Microtel v. Fla. Publ. Service Comm., 464 So. 2d 1189 (Fla. 1985).

MCI/WorldCom also argue that GTE and CWA have not shown that the problems they have raised are issues that a proceeding under Section 364.33, Florida Statutes, is designed to protect. MCI/WorldCom state that this is a petition, filed pursuant to Section 364.33, Florida Statutes, for approval of a transfer of majority ownership control. MCI/WorldCom argue that Section 364.33, Florida Statutes, is not a merger review statute. MCI/WorldCom assert that this statute allows the Commission to determine who should be allowed to own telecommunications facilities in Florida; not to determine whether it is in the "public interest" for companies to merge.

Furthermore, MCI/WorldCom argue that should the merged companies decide at a point after the merger to apply for original certification in Florida, there would still be no basis for rejecting such application under Section 364.335, Florida Statutes. At this time, however, the companies seek only to transfer ownership of facilities through the transfer of stock ownership. MCI/WorldCom argue that such a transfer does not "extend the zone of protection conferred by section 364.33 to issues otherwise beyond the Commission's authority." Motion to Dismiss at 10. MCI/WorldCom add that the Commission has already found that both MCI's and WorldCom's certificates and tariffs are in the public interest. MCI/WorldCom argue that simply because the parent companies that own the companies that hold the Florida certificates merge does not change the public interest concerns addressed by Section 364.33, Florida Statutes. The companies that hold the certificates in Florida still hold the same certificates. MCI/WorldCom assert that GTE and CWA would like the Commission to conduct a review under Section 364.33, Florida Statutes, that the Commission is without jurisdiction to conduct.

In addition, MCI/WorldCom state that both GTE and CWA assert that their interest is in protecting customers and ensuring that competition is successful. MCI/WorldCom argue, however, that the courts have rejected similar claims as not addressing causes of action that the statute at issue was designed to protect. See Ameristeel, 691 So. 2d 473(Fla. 1997) and Fla. Society of Ophthalmology, 532 So 2d 1279(Fla. 1st DCA 1988). MCI/WorldCom argue that Section 364.33, Florida Statutes, does not extend to allow the Commission to address the economic and competitive consequences of a merger.

Finally, MCI/WorldCom add that the numerous orders granting intervention cited by GTE do not demonstrate that the Commission should grant GTE intervenor status in this proceeding. MCI/WorldCom note that these cases are distinguishable because almost all involve situations wherein a rate or the policies of a particular company were being established or altered and the intervenors would have been directly affected by the Commission's action. MCI/WorldCom state that only one, the Application for Approval of Transfer of Certificate from Twin County Utility Company to Southern States Utilities, Inc., Docket No. 881339-WS, involved a transfer of a certificate. MCI/WorldCom argue, however, that the application was filed under Chapter 367, Florida Statutes, and the rules for transferring certifications of water and wastewater companies are significantly different than those governing a transfer of control under Chapter 364, Florida Statutes.

For the foregoing reasons, MCI/WorldCom request that GTE's Petition on Proposed Agency Action and CWA's Petition to Intervene and Protest of Proposed Agency Action be dismissed for lack of standing.

III. Responses to Motion to Dismiss

GTE

In its Response, GTE argues that MCI/WorldCom have not stated a basis for dismissing GTE's petition. GTE argues that, taking all of GTE's allegations as true, the Commission must find that GTE has a substantial interest in this matter and should, therefore, deny the motion to dismiss. See Varnes v. Dawkins, 624 So. 2d 349(Fla. 1st DCA 1993; Ralph v. City of Daytona Beach, 471 So. 2d 1 (1983); and Kest v. Nathanson, 216 So. 2d 233(Fla. 4th DCA 1968).

GTE argues that MCI/WorldCom's petition for approval of the merger demonstrates that WorldCom's practices with regard to wholesale services and innovative features will change as a result of the merger. GTE further argues that this will affect competition in the wholesale market and will interfere with GTE's ability to compete. GTE adds that the merger will also alter the entire telecommunications market by removing a major competitor. Thus, GTE argues there is not basis for dismissing its petition. Furthermore, GTE argues that if the Commission were to dismiss the

protests, then the Commission would essentially be declaring that effects on rates, services and competition are not within the realm of the public interest.

GTE also argues that it has standing because WorldCom is GTE's principal wholesaler in Florida. GTE asserts that WorldCom was an independent supplier that did not supply long distance service; thus, it had incentives to underbid other IXCs to provide wholesale services. GTE argues that if the merger is approved, WorldCom will no longer have incentives to outbid other IXCs, including MCI. GTE adds that its contract with WorldCom does not alter its interest in retaining WorldCom as an independent supplier. GTE states that under the terms of the contract,

> *[t]he obligations under the contract will very shortly no longer run both ways.* Although WorldCom will then remain obligated under the contract, *nothing* in the contract will prevent GTE from purchasing the same services from another provider, or, therefore, from re-negotiating the terms of the existing contract with WorldCom (or, indeed, from walking away from the contract altogether). (Emphasis in original).

Memorandum in Opposition to Motion to Dismiss at 5. GTE states that because the conditions of the contract will change and it may want to re-negotiate with WorldCom, it has a substantial interest in the proposed merger.

GTE also argues that its purchase of fiber from Qwest Communications does not alter the need for WorldCom to stay in the market separate from MCI. GTE argues that WorldCom has always been the leader in lowering prices for services and that if WorldCom loses its incentive to keep prices low, Florida consumers will, ultimately, pay the price. GTE also states that it uses enhanced service and WorldCom has indicated a willingness to "consider, upon request, a development schedule and cost for adding such features." Memorandum in Opposition to Motion to Dismiss at 7. GTE states that the market for enhanced services is likely to be very competitive in the near future. GTE notes that while it is true that WorldCom is not currently providing most of these types of services, WorldCom's early indication that it is interested in providing enhanced services makes it important to retain WorldCom in the market. If WorldCom is no longer a true competitor, GTE argues that other competitors in the enhanced services market will

not feel any pressure to provide such services at a reasonable price.

GTE also argues that MCI/WorldCom have misapplied the legal standards for establishing a substantial interest in this proceeding. GTE argues that the cases cited by MCI/WorldCom for the proposition that GTE's claims amount to competitive claims which do not meet Agrico are distinguishable because none of the interests presented in those cases are comparable to the interests asserted by GTE. GTE states that it has not argued here that it has any right to be free from competition, as was argued in Microtel, Inc. V. Fla. Public Service Commission, 464 So. 2d 1189(1985). GTE also states that there is no statute limiting the Commission's discretion like there was in Ameristeel Corp. V. Clark, 691 So. 2d 473(1997) and ASI, Inc. V. Fla. Public Service Commission, 334 So. 2d 594(1976). In this case, GTE argues that the public interest standard gives the Commission broad discretion to consider all market and consumer issues that may be involved. As a customer/reseller of WorldCom, GTE argues that its substantial interests are undeniable. GTE asserts that the test for substantial interests should be applied broadly and that GTE should be allowed to present its case.

GTE further argues that potential economic injury can confer standing as indicated in Florida Medical Ass'n et al. v. Dept. of Professional Regulation, 426 So. 2d 1112(Fla. 1st DCA 1983). In that case, GTE states that the court overturned an administrative decision dismissing a rule challenge by ophthalmologists for lack of standing. The rule would have allowed optometrists to treat patients that would have, otherwise, had to seek treatment from an ophthalmologist.[6]

Finally, GTE argues that MCI/WorldCom cannot argue now that the Commission does not have jurisdiction to review the merger. GTE argues that this assertion is contrary to MCI/WorldCom's actions in this case. GTE argues that the statutes are clear that the standard of approval of a transfer of control is whether the transfer is in the public interest, as set forth in Section 364.335, Florida

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[6]GTE cites Sierra Club v. Morton, 405 U.S. 727(1972); citing Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159(19700; and Singleton v. Wulff, 428 U.S. 106(1976).

Statutes. GTE argues that this section and the rules implementing this section are applicable to both certification proceedings and to transfer proceedings. As such, GTE argues that MCI/WorldCom must now demonstrate that the merger is in the public interest.

CWA

In its letter in response to the Motion to Dismiss, CWA asserts that MCI/WorldCom have provided no evidence that the merger will benefit Florida consumers. CWA argues that the evidence suggests, in fact, that the merger will not be beneficial. CWA further argues that there is no benefit to Florida consumers of a merged private company that would remove customers from the public switched network to its private network, unless the merged company has plans to compete for business and residential customers. CWA argues that MCI/WorldCom have not indicated that they plan to compete in all areas; thus, CWA asks that the Commission deny the Motion to dismiss.

ANALYIS OF STAFF

Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief.

GTE's Petition and CWA's Protest should be viewed in the light most favorable to GTE and CWA, in order to determine whether their request is cognizable under the provisions of Section 364.33, Florida Statutes. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Furthermore, the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Applying the standard set forth above, staff is persuaded that WorldCom's and MCI's joint motion to dismiss demonstrates that GTE and CWA do not have a right, under the law or the facts, to the

relief requested in their petitions. Neither GTE nor CWA have demonstrated that their 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). 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 Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

Staff agrees that the allegations of GTE and CWA do not pass the first prong of the Agrico test. GTE's and CWA'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. Speculation as to the effect that the merger of MCI and WorldCom 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). Staff believes that this standard is equally applicable whether GTE is arguing its substantial interests as a competitor or as a customer. See Ameristeel, 691 So. 2d 473 (Fla. 1997)[7].

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[7] Ameristeel, a customer of Florida Power and Light (FPL), asserted that FPL had become a high cost provider. As a result, Ameristeel asserted that its continued viability in the market was

GTE argues that the courts have determined that potential economic injury will confer standing. See Florida Medical Association et al. v. Department of Professional Regulation, et al., 426 So. 2d 1112 (Fla.1st DCA 1983). However, that case involved a rule challenge and the standing determination therein was specifically distinguished by that same court a few years later. See Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In Florida Society of Ophthalmology, the Court applied the Agrico test for standing and found that the Society of Ophthalmology failed both prongs of the test. In so finding, the Court stated that some degree of loss due to economic competition does not satisfy the "immediacy" requirement of Agrico. Id. at 1285. The Court further stated that

> Since appellants have shown no zone of interest personal to them that would be invaded by the certification process, they have no standing to contest the Board's decisions on the applications generally. See ASI, Inc. v. Florida Public Service Commission, 334 So. 2d 594 (Fla. 1976). . . . [W]e approve the denial of appellants' standing based on the allegations of economic injury upon the rationale in Agrico Chemical Co. V. Department of Regulation, 405 So. 2d 478, and Shared Services, Inc. v. State, Department of Health and Rehabilitative Services, 426 So. 2d 56.

Id. at 1286.

The Court then distinguished Florida Medical Association et al. v. Department of Professional Regulation, et al. stating that

> In ruling that the petitioners in that case had standing, we explicitly noted that the fact that petitioners challenged the validity of the proposed rule as an invalid delegation of legislative authority distinguished

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threatened and it might have to relocate. Ameristeel further asserted that this might, ultimately, have a detrimental affect on the local economy. Ameristeel argued, therefore, that its substantial interests were affected by the proceeding to approve the proposed territorial agreement between FPL and Jacksonville Electric Authority because, under the agreement, Ameristeel would remain a customer of FPL. The Court found that Ameristeel met neither prong of the Agrico test. Id. at 476, 477.

> the case from Agrico Chemical Company v. Department of Environmental Regulation. . . .

Id. at 1287.

This case does not involve a rule challenge; therefore, staff believes that the Agrico test is applicable to determine the standing of GTE and CWA.

In addition, staff agrees with MCI/WorldCom that the numerous Commission Orders that GTE has cited to support its standing in this proceeding are all distinguishable. In nearly all of the cases, a rate or policy was being established or altered, or the application of a new market competitor was being considered. Thus, the intervenors would have been directly affected by the Commission's action. In this case, however, there is no new entrant in the market, nor is there any request for alteration, transfer, or modification of any certificates held by WorldCom or MCI. Staff also agrees with MCI/WorldCom that the Application for Approval of Transfer of Certificate from Twin County Utility Company to Southern States Utilities, Inc., Docket No. 881339-WS, is distinguishable because that case involved certification under Chapter 367, Florida Statutes. This case does not involve certification, nor does it involve the transfer or modification of a certificate.

Staff notes that at the Commission's April 6, 1998, Agenda Conference, the Commission determined that the MCI and FCCA did have standing to protest Order No. PSC-97-1347-FOF-TP granting BellSouth BSE, Inc. an ALEC certificate. That decision also is distinguishable from this case for several reasons. First, the entry of BSE, a new competitor, into the local market would directly affect MCI and FCCA's members as competing ALECs. MCI further alleged that under the Act the Commission must review the application to ensure that there is not abuse of market power by the ILEC in its relationship with its subsidiary, BSE. In this case, there is no alleged abuse of monopoly power by an ILEC that would authorize the Commission to take action under the Telecommunications Act of 1996. Finally, BellSouth BSE is seeking certification from the Commission. MCI and WorldCom are not.

Regarding GTE's specific factual assertions that as a result of the merger, WorldCom will no longer have any incentive to offer discounts on its wholesale services, staff does not believe that

this allegation demonstrates that GTE will suffer an injury in fact of sufficient immediacy to warrant a hearing. Both parties have stated that GTE and WorldCom are currently parties to a multi-year contract. GTE has further stated that under this contract, GTE will soon be able to negotiate with other providers, including WorldCom, if it so chooses. WorldCom will, however, remain obligated under the contract. GTE argues, therefore, that it has an interest in retaining WorldCom in the market as an independent competitor so that it can try to negotiate a new, better wholesale services contract. Essentially, GTE seems to argue that the Commission should retain the market at status quo so that GTE's ability to negotiate future contracts with WorldCom will not change. Thus, it will be able to compete successfully and able to *better position itself in the market in the future*. Staff believes, however, that the contract between WorldCom and GTE protects GTE from any price increase in WorldCom's wholesale offerings.

In addition, GTE's assertion that it may choose to try to negotiate a better contract with WorldCom in the future is itself speculative and does not demonstrate that GTE will suffer a harm of sufficient immediacy to warrant a hearing. Furthermore, other variables can and may impact GTE's ability to negotiate a better deal with WorldCom in the future. Staff does not believe that the merger of MCI and WorldCom can be defined as the sole event that will impact future negotiations between GTE and WorldCom. Thus, staff does not believe that GTE's allegations regarding its ability to negotiate future contracts with WorldCom demonstrate that GTE will suffer an injury in fact of sufficient immediacy to warrant a hearing.

GTE also alleged that the merger will, in effect, eliminate from the wholesale market a competitor that had demonstrated a willingness to provide enhanced services. First, staff does not believe that the "loss" of a competitor in the market, in itself, demonstrates a harm to GTE. 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, as well as that competitor's customers, it does not necessarily have a harmful impact. As noted by both parties, there are other competitors in the wholesale market ready to fill the gap, and GTE, as a customer, is specifically protected by the contract between GTE and WorldCom.

Finally, regarding enhanced services offerings, staff notes that both parties agree that GTE has not yet tried to purchase enhanced services from WorldCom. GTE states only that ". . .

WorldCom has shown itself willing to consider, upon request, a development schedule and cost for adding such features." Memorandum in Response to Motion to Dismiss at 7. GTE argues, therefore, that WorldCom must be retained as an independent competitor to ensure that there is sufficient competitive pressure to encourage the timely provision of enhanced services at a reasonable price. Again, staff notes that there are other competitors in the wholesale market, such as Qwest Communications, who appear capable and willing to provide enhanced services. Furthermore, WorldCom is not currently providing enhanced services to GTE and has only indicated a willingness to consider development schedules and costs associated with providing such services. Therefore, GTE would experience no actual harm if WorldCom were to recede from its apparent intent to begin providing enhanced services.

In addition, even if the merger did not take place, it is possible that WorldCom could determine that it is too costly to provide enhanced services at this time. Thus, staff believes that the link between the harms alleged by GTE and the proposed transfer of control is tenuous, at best. Even taking all of GTE's allegations as true, GTE has not demonstrated that GTE will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57, Florida Statutes, hearing. See Order Approving Transfer of Control (MCI/WorldCom), issued March 10, 1998, by the North Carolina Utilities Commission, in Docket Nos. P-141, Sub 34; P-283, Sub 20; P-156, Sub 29; and P-474, Sub 5. See also Entry entered December 30, 1997, in Case Nos. 97-1580-CT-ZCO and 97-1581-TP-ACO, by the Public Utilities Commission of Ohio, declining to set MCI/WorldCom merger for hearing, and, thereby, rendering GTE's petition to intervene moot.

As for CWA, it primarily alleges that the merger might have detrimental affects on the market, specifically Internet access. CWA does not, however, identify how these particular concerns relate to CWA's interests. The only allegation raised by CWA of the impact that the merger will have on CWA and its members is that the merger may result in a decrease in jobs for CWA workers in Florida. CWA can, however, only speculate as to the long term effects the merger may have on the market, and, ultimately, on jobs for communications workers. Staff believes that such conjecture regarding future economic harm or possible loss of jobs as a result of increased business efficiency is too remote to establish standing in a proceeding conducted pursuant to Section 364.33, Florida Statutes. See Ameristeel, 691 So. 2d at 477, 478. Therefore, taking all of CWA's allegations as true, CWA has not demonstrated that it will suffer injury in fact which is of

sufficient immediacy to entitle it to a Section 120.57, Florida Statutes, hearing.

Although it is sufficient to deny standing for failing to meet one prong of the Agrico test, staff also does not believe that the allegations of either GTE or CWA are 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, titled 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 are nor in any way limit the commission's ability to review the prudency of such construction programs for ratemaking as provided under this chapter.

GTE argues that MCI and WorldCom must prove that the merger is in the public interest, and that the Commission should proceed with this matter and require MCI and WorldCom to demonstrate, in accordance with Section 364.335(2) and (4), Florida Statutes, and Commission Rules 25-24.473 and 25-24.730, Florida Administrative Code, that the merger is in the public interest. CWA raises similar public interest concerns. MCI/WorldCom have not, however, filed a petition for a new certificate to operate in Florida, nor do they seek to transfer or modify any certificate that subsidiaries of either company currently hold in Florida. Staff adds that the Florida Supreme Court has stated that Section 364.335, Florida Statutes, is a certification statute. See Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248, 250(Fla. 1993). Section 364.335, Florida Statutes, and the rules implementing that section are, therefore, inapplicable in this instance, as are the public interest review standards set forth therein.

The plain language of Section 364.33, Florida Statutes, contains no public interest standard. Staff also agrees with MCI/WorldCom that this section is not a merger review statute. Section 364.33, Florida Statutes, gives the Commission jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers. MCI and WorldCom are not applying to operate facilities in the state. MCI/WorldCom, instead, seek approval to transfer control of one company that does not directly operate facilities in this state to another company that also does not directly operate facilities in Florida. Staff believes, therefore, that the review that GTE and CWA have both asked the Commission to conduct is beyond the scope of Section 364.33, Florida Statutes. The review that GTE and CWA appear to seek is a review under Section 364.335, Florida Statutes, which is inapplicable in this case. GTE and CWA have, therefore, 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. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

Furthermore, staff notes that the subsidiaries of the merging entities that hold Florida certificates 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.

For the foregoing reasons, staff recommends that the Joint Motion to Dismiss GTE Petition on Proposed Agency Actions and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action filed by MCI and WorldCom be granted and Order No. PSC-98-0125-FOF-TI should be made final and effective the date of the vote at the Commission's Agenda Conference. Even taking all of the petitioners allegations as true, GTE and CWA have failed to demonstrate standing in this proceeding.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, GTE's outstanding Petition to Intervene in this proceeding will be rendered moot. As such, no other issues will remain for the Commission to address in this Docket. This Docket should, therefore, be closed.

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, GTE's outstanding Petition to Intervene in this proceeding will be rendered moot. As such, no other issues will remain for the Commission to address in this Docket. This Docket should, therefore, be closed.