



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: DECEMBER 28, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (WATTS) *CBW/MCB*
DIVISION OF COMMUNICATIONS (ISLER) *AIT*

RE: DOCKET NO. 981016-TX - APPLICATION FOR CERTIFICATE TO PROVIDE ALTERNATIVE LOCAL EXCHANGE TELECOMMUNICATIONS SERVICE BY AMERICAN PHONE CORPORATION.

DOCKET NO. 981017-TI - APPLICATION FOR CERTIFICATE TO PROVIDE INTEREXCHANGE TELECOMMUNICATIONS SERVICE BY AMERICAN PHONE CORPORATION.

AGENDA: 01/05/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION TO DISMISS - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981016.RCM

CASE BACKGROUND

On August 11, 1998, American Phone Corporation (APC) filed an application for certification to provide alternative local exchange (ALEC) service and an application to provide interexchange telecommunications (IXC) service in Florida. By PAA Orders Nos. PSC-98-1464-FOF-TX and PSC-98-1465-FOF-TI issued October 26, 1998, the Commission granted APC's applications. On November 17, 1998, a timely protest petition was filed by Utilicore Corporation (Utilicore). On December 8, 1998, APC timely filed a Motion to Expedite and Rule From the Bench and a Motion to Dismiss protest petitions in both dockets. On December 22, 1998, Utilicore filed a Response to the Motion to Dismiss. Utilicore's protests of the ALEC and the IXC certificates are substantially similar, as are

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APC's Motions to Dismiss on both protests. This recommendation addresses the pending motion to dismiss as to both dockets.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant APC's Motions to Dismiss the Protest Petitions on PAA Orders Nos. PSC-98-1464-FOF-TX and PSC-98-1465-FOF-TI filed by Utilicore?

RECOMMENDATION: Yes, the Commission should grant APC's Motions to Dismiss. Utilicore's petitions are insufficient to establish standing in these proceedings and therefore fail to state a cause of action upon which the Commission may grant relief. **(Watts)**

STAFF ANALYSIS: In reviewing a motion to dismiss, the Commission must decide whether the petition states a claim upon which the Commission can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). The Commission must view the petition in the light most favorable to the petitioner, taking all allegations in the petition as true, to determine whether Utilicore may protest APC's certification. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2d DCA 1960).

APC's Motion to Dismiss

In its Motion to Dismiss, APC states that pursuant to Rule 28-106.201(2)(b), Florida Administrative Code, Utilicore fails to explain how its substantial interests will be affected by the Commission's approval of APC's certificate applications. APC also argues that Utilicore has failed to do the following: 1) to provide a statement of the disputed issues that are under the jurisdiction of the Florida Public Service Commission, 2) to allege facts that warrant the reversal or modification of the agency's proposed action, 3) to specify any rules or statutes that would require the FPSC to reverse its decision, and 4) to state the relief sought from the FPSC. According to APC, there is no injury alleged, and if any injury has been alleged it is not of a type that this proceeding was designed to protect.

Utilicore's Petition and Response to Motion to Dismiss

Utilicore's protest of PAA Orders Nos. PSC-98-1464-FOF-TX and PSC-98-1465-FOF-TI alleges that APC personnel used proprietary and confidential information from Utilicore to personally benefit from the knowledge and experience they gained while working at Utilicore. In its petition, Utilicore attached copies of Utilicore's circuit court complaint for damages and injunctive relief against APC as additional reasons for its protest. In its response to APC's Motion to Dismiss, Utilicore further argued that its protest and complaint in court demonstrated how its interests in the certification of APC and the public's interest would be adversely affected. Utilicore also alleged that APC has not demonstrated that it has sufficient technical, financial, and managerial capability to provide service.

ANALYSIS

APC argues that Utilicore's petition should be dismissed because it is not in substantial compliance with subsection (2) of Rule 28-106.201, Florida Administrative Code. Uniform Rule of Procedure 28-106.201(2) reads in part:

All petitions filed under these rules shall contain:

(b) The name, address, and telephone number of the petitioner...and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(d) a statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and

(f) A demand for relief.

Standing

APC asserts that Utilicore does not have a substantial interest that will be affected by APC's certification and therefore, Utilicore does not have the requisite standing to object to APC's certificate. The burden is upon the petitioner to demonstrate that he does 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 first that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and second 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. 2d DCA 1981).

Staff recommends that Utilicore's petition does not allege facts sufficient to meet the first prong of the Agrico test. Utilicore's allegations fail to demonstrate that it will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. As the Florida Supreme Court stated in Ameristeel v. Clark, 691 So. 2d 473 (Fla. 1997), under the first prong of the Agrico test, a petitioner must show that the alleged harm is of sufficient immediacy to require a hearing, and loss due to economic competition is not harm of sufficient immediacy to establish standing. See also Florida Society of Ophthalmology v. State Board of Ophthalmology, 532 So. 2d 1112 (Fla. 1st DCA 1983). Allegations that APC has used confidential and proprietary information from Utilicore raises issues of competitive harm and unlawful business practices more appropriately addressed in the courts, not in a Commission certification proceeding.

Staff also recommends that Utilicore's petition does not allege facts sufficient to meet the second prong of the Agrico test. To do so, Utilicore must demonstrate that its alleged injury is of the type or nature that this proceeding was designed to protect. Utilicore makes a blanket statement that APC's certification would be detrimental to the public, but alleges no facts to support that statement, or to show that the public's interest in efficient, reliable telecommunications service would be harmed by granting APC's certificate. Although possible injury to the public would be of the nature for which such a proceeding exists, a mere assertion of harm is not sufficient. Furthermore, Utilicore has not shown how its personal interest would be affected. Where there exists no zone of personal interest that would be harmed by the certification process, a petitioner has no standing to contest the order granting certification. As the court stated in Florida Society of Ophthalmology, "[s]ince the 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." Utilicore states that APC has utilized assets and arrangements of Utilicore unlawfully. Any injury to its business assets and arrangements are more appropriately addressed in the courts.

Therefore, Utilicore has not shown a substantial injury which this proceeding before the Commission is designed to protect.

No Disputed Issues

APC argues that under Uniform Rule of Procedure 28-106.201(2)(d) Utilicore failed to provide a statement of the disputed issues that are under the jurisdiction of the Florida Public Service Commission. The only disputed issues raised by Utilicore are contained in its circuit court complaint. Staff notes Section 120.80(13)(b), Florida Statutes which states that "a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Further Utilicore's court complaint involves issues such as: breach of fiduciary duty, usurpation of corporate opportunity, breach of standard of conduct for a director or officer, tortious interference with business relationships, and theft of trade secrets. Accordingly, staff believes these issues raised by Utilicore are not under the jurisdiction of the FPSC and are more appropriately addressed in the courts.

Reversal of PAA Order

Under Uniform Rule 28-106.201(2)(e) and (f), APC argues that Utilicore has failed to allege any facts that warrant reversal or modification of the FPSC's PAA Order, and Utilicore has not cited any specific rules or statutes that would require the FPSC to reverse its decision. Utilicore points to Section 364.337(1), Florida Statutes, which states the applicant must demonstrate that it has sufficient technical, financial, and managerial capability to provide service. Staff finds no underlying facts in the petition that support Utilicore's bare assertion in its response that APC does not possess the requisite technical, financial, and managerial capabilities required by Section 364.337, Florida Statutes. The fact that Utilicore has filed suit against APC in circuit court and the allegations asserted therein, even if taken as true, do not show that APC has failed to demonstrate technical, financial, or managerial capability to provide telecommunications service.

Relief Sought

Under Uniform Rule 28-106.201(2)(g), APC argues that Utilicore has failed to state the relief sought from the FPSC. In its petition, Utilicore stated its formal protest of the PAA Order but did not request a hearing or other relief from the Commission.

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Staff finds no grounds upon which the Commission can grant relief to Utilicore for the issues it raises.

Based on the foregoing analysis and considering the facts alleged as true and in the light most favorable to Utilicore, staff recommends that the Commission grant APC's Motion to Dismiss. Utilicore has not established standing to protest the Commission's order because the two prongs of the Agrico test have not been met. Therefore, Utilicore has not alleged sufficient facts to state a cause of action upon which the Commission may grant relief. Furthermore, Utilicore's petition alleges impropriety in confidential business arrangements. The jurisdiction of such business related issues resides in the courts. Accordingly, APC's Motion to Dismiss should be granted.

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ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, American Phone Corporation's motion to dismiss is granted. As such, no valid protest to PAA Orders Nos. PSC-98-1464-FOF-TX and PSC-98-1465-FOF-TI will remain and the entire order should be made final and effective as of the date of this Agenda Conference. **(Watts)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, American Phone Corporation's motion to dismiss is granted. No valid protest will exist and both PAA orders should be made final and effective as of the date of this Agenda Conference. This Docket should, therefore, be closed.

From: Kay Flynn
To: Tina Watts
Subject: fwd: 981016/981017

---NOTE-----1/05/99--4:29pm--

Tina, I made a note to myself to go back and check the APC Motion to Dismiss and Motion to Expedite, since the question was raised in agenda about its being filed in one or both dockets. We have it listed only in 981016 on CMS, and filed only in 981016, because Mr. Beard's cover letter only referenced 981016. In his motion to expedite, he mentions both the ALEC and IXC applications, but in his motion to dismiss he references only 981016.

Should we go back and change the record to show the motions apply to both dockets (though it's not really clear from the filings that they do)? Kay

Fwd-by:-Tina=Watts-----1/06/99--8:25am--
Fwd to: Kay Flynn

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Yes, the record should be amended to show the motion to dismiss applies to both dockets. Because there was some ambiguity as to which dockets, it is at the Commissioner's discretion to make it apply to both and I think that was their intent from yesterday's proceedings to have it apply to both dockets.

Thanks.
Tina

Fwd-by:-Kay=Flynn-----
Fwd to: Tina Watts

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Okay. Thanks.

From: Tina Watts
To: Kay Flynn
Subject: fwd: 981016 & 981017

===NOTE=====1/06/99=10:36am==
Yes. Utilicore's response should be
entered in both dockets.

Fwd-by:=Kay-Flynn-----
Fwd to: Tina Watts
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Okay--thanks again.
