

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for  
certificate to provide  
alternative local exchange  
telecommunications service by  
American Phone Corporation.

DOCKET NO. 981016-TX  
ORDER NO. PSC-99-0146-FOF-TX  
ISSUED: January 25, 1999

The following Commissioners participated in the disposition of  
this matter:

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

ORDER GRANTING MOTION TO DISMISS AND  
RESOLVING PROTEST OF ORDER NO. PSC-98-1464-FOF-TX

BY THE COMMISSION:

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 27, 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 APC's Motions to Dismiss on both protests.

Our determination on the Motion to Dismiss and protest of Order No. PSC-98-1465-FOF-TI is set forth below.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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 Protest 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.

Determination

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. Thus, in reviewing a motion to dismiss, we 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). We are required to 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 assertion that Utilicore has failed to show how its substantial interests will be affected by our approval of this certification raises the question of Utilicore's standing to protest our proposed approvals. When a petitioner's standing in an action is contested, 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).

Upon consideration, we find 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). Therefore, we find 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.

In addition, we find further 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. We find it appropriate that any injury to its business assets and arrangements are more appropriately addressed in the courts. Accordingly, we find that Utilicore has not shown a substantial injury which this proceeding before the Commission is designed to protect.

APC also asserts 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.

Regarding APC's argument 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 this Commission, the only disputed issues raised by Utilicore are contained in its circuit court complaint. Section 120.80(13)(b), Florida Statutes, 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, we believe the issues raised by Utilicore are not under the jurisdiction of this Commission and are more appropriately addressed in the courts.

Also, 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 our PAA Order, and Utilicore has not cited any specific rules or statutes that would require us to reverse our 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. We find 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.

APC also alleged that under Uniform Rule 28-106.201(2)(g), Utilicore has failed to state the relief sought from this Commission. In its petition, Utilicore stated its formal protest of the PAA Order but did not request a hearing or other relief from the Commission. We find 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, we 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 we may grant relief. Furthermore, Utilicore's petition alleges impropriety in confidential business arrangements. The jurisdiction of such business related issues resides in the courts.

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Based on the foregoing, it is

ORDERED that the Motion to Dismiss by American Phone Corporation is hereby granted. It is further

ORDERED by the Florida Public Service Commission that Order No. PSC-98-1464-FOF-TX, issued October 27, 1998, is hereby reinstated in its entirety as a final order. It is further

ORDERED that American Phone Corporation shall have statewide authority to provide alternative local exchange telecommunications service under Certificate No. 5733. It is further

ORDERED that this docket may be closed.

BY ORDER of the Florida Public Service Commission, this 25th day of January, 1999.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

CBW

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.



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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 Records and Reporting, 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 Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.