State of Florida

Public Service Commission

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

DATE: FEBRUARY 3, 1999

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

FROM: DIVISION OF LEGAL SERVICES (CLEMONS) DMC BR
DIVISION OF TELECOMMUNICATIONS (WILLIAMS) TEW

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

AGENDA: 2/15/00 - REGULAR AGENDA - ISSUE 1 - PROCEDURAL MATTER - ISSUE 2 - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991799.RCM

CASE BACKGROUND

On December 1, 1999, MCI WorldCom, Inc. (MCI WorldCom) and Sprint Corporation (Sprint), hereinafter, MCI WorldCom/Sprint, filed a Joint Application for Acknowledgment or Approval of Merger (Joint Application), pursuant to Section 364.33, Florida Statutes. The application seeks authority to transfer control of the following Sprint operating subsidiaries in Florida to MCI WorldCom: Sprint-Florida, Inc. (holder of LEC Certificate No. 22 and PATS Certificate No. 5365); Sprint Communications Company, Limited

Partnership (holder of PATS Certificate No. 5359, ALEC Certificate No. 4732, and IXC Certificate No. 83); ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398; and Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822).

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

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

Staff also notes that on January 21, 2000, we received a comment letter regarding this proposed merger from the Rainbow/Push Coalition expressing some concerns about the merger. To date, however, the Coalition has not petitioned to intervene in this proceeding.

This recommendation addresses MCI WorldCom/Sprint's Joint Application for Acknowledgment or Approval of Merger and TRA's Motion for Leave to Intervene.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant TRA's Motion for Leave to Intervene?

RECOMMENDATION: No. TRA has failed to sufficiently allege standing to protest the approval of the transfer of control of Sprint to MCI WorldCom. TRA's Motion for Leave to Intervene should, therefore, be denied. The Commission should also accept MCI WorldCom/Sprint's response to TRA's motion.

STAFF ANALYSIS:

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

have substantial and material interest in the matters raised in this proceeding.

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

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

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

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

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

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

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

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

a. it will suffer an injury in fact which is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing; and

b. its substantial injury must also be of a type or nature which the proceeding is designed to protect.

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

to the level of a present, actual injury in fact as required by Agrico.[1]

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

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

> Section 364.33, Florida Statutes, gives us jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers. It does not give us the ability to protect the competitive interests asserted by GTE and CWA. GTE and CWA have, therefore, failed to demonstrate that the injuries each has alleged is a substantial injury of a type or nature which a proceeding under Section

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

> 364.33, Florida Statutes, is designed to protect.

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

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

Additionally, staff agrees with MCI WorldCom/Sprint that the two-pronged test set forth in Agrico is the appropriate test for determining substantial interest. See PSC Order No. PSC-98-0702-FOF-TP at 13, relying upon Agrico Chemical Company, 406 So. 2d 478. Staff believes that TRA has not demonstrated that its substantial interests will be affected by this proceeding conducted pursuant to Section 364.33, Florida Statutes. When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that he does, in fact, have standing to participate in the case. Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

With regard to the first prong of the Agrico test, staff also agrees with MCI WorldCom/Sprint that TRA has not alleged facts sufficient to demonstrate injury in fact sufficient to warrant a Section 120.57, Florida Statutes, hearing.[2] TRA alleges that its members who rely on wholesale network services provided by Sprint or MCI WorldCom will be adversely impacted by the narrowing of the network service provider market. Essentially, TRA seems to argue that the Commission should retain the status quo so that its members do not lose a provider of network services. Staff does not believe that the "loss" of a competitor in the market, in itself, demonstrates a harm to TRA. Companies drop out of markets quite frequently for a variety of reasons. Although the loss of a competitor may have an impact on other market participants, such loss is speculative.

Accordingly, staff believes that TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the

[2] In fact, TRA has not requested a hearing, but only wants to monitor the proceeding and file a brief.

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 TRA is arguing its substantial interests as a competitor or as a customer.

Although it is sufficient to deny standing for failing to meet one prong of the Agrico test, staff also does not believe that TRA'S allegations 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, Certificate of necessity prerequisite to construction, operation, or control of telecommunications facilities, states:

> A person may not begin the construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organization control or controlling stock ownership, without prior approval. This section does not require approval by the commission prior to the construction, operation, or extension of a facility by a certificated company within its certificated area nor in any way limit the commission's ability to review the prudency of such construction programs for ratemaking as provided under this chapter.

Staff agrees with MCI WorldCom/Sprint 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. TRA has, therefore, failed to demonstrate that the injury alleged is a substantial injury of a type or nature which a proceeding under Section 364.33, Florida Statutes, is designed to protect. Agrico, 406 So. 2d 478 (Fla. 2nd DCA 1981). See also PSC Order No. PSC-98-0702-FOF-TP.

For the foregoing reasons, staff recommends that TRA's Motion for Leave to Intervene should be denied.

ISSUE 2: Should the Commission approve the sale of outstanding stock and transfer of control of Sprint Corporation 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) to MCI WorldCom, Inc.?

RECOMMENDATION: Yes. The Commission should approve the transfer of control of Sprint Corporation and its Florida operating subsidiaries MCI WorldCom, Inc.

STAFF ANALYSIS: As discussed in the Case Background, this transaction is between the parent company MCI WorldCom, Inc. and Sprint Corporation. The Florida operating subsidiaries of Sprint, ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and ALEC Certificate No. 4732), Sprint Communications Company Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365), will continue to operate in Florida under their existing certificates and tariffs on file with this Commission.

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.

In accordance with the Commission's authority under Section 364.33, Florida Statutes, to approve the acquisition or transfer of majority organizational control or controlling stock ownership of a telecommunications company providing service in Florida, staff has reviewed the Joint Application and believes that it is appropriate to approve it. Staff based its review and recommendation upon an analysis of the public's interest in efficient, reliable telecommunications services. Staff's recommendation does not address the potential impact of the

transfer on the competitive market in Florida, or on the companies' or their competitors' interests. Staff emphasizes, however, that its recommended approval of the Joint Application pursuant to the Commission's authority under Section 364.33, Florida Statutes, does not preclude the Commission from addressing any concerns that may arise regarding this transaction to the appropriate federal agency or agencies.

Accordingly , staff recommends approval of the Joint Application.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed upon issuance of a Consummating Order unless a person whose substantial interests are affected by the Commission's proposed agency action in Issue 2 files a protest within 21 days of the issuance of the order.

STAFF ANALYSIS: If no person whose substantial interests are affected by the Commission's proposed agency action in Issue 2 files a protest within 21 days of the issuance of the order, this docket should be closed upon issuance of a Consummating Order.