

State of Florida



Public Service Commission

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DATE: MAY 9, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (T. WILLIAMS) *[Signature]*
OFFICE OF THE GENERAL COUNSEL (FORDHAM) *[Signature]*

RE: DOCKET NO. 020054-TP - EMERGENCY JOINT APPLICATION FOR APPROVAL OF ASSIGNMENT OF ASSETS AND AAV/ALEC CERTIFICATE NO. 4025 AND IXC CERTIFICATE NO. 2699 FROM WINSTAR WIRELESS, INC. TO WINSTAR COMMUNICATIONS, LLC.

AGENDA: 05/21/02 - REGULAR AGENDA - MOTION TO DISMISS PROTEST - DECISION PRIOR TO HEARING - PARTIES MAY PARTICIPATE.

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\020054REC.RCM

CASE BACKGROUND

As a result of a bankruptcy sale, on January 28, 2002, Winstar Wireless, Inc. (Old Winstar) and Winstar Communications, LLC (New Winstar) filed with this Commission a joint request for assignment of assets and Alternative Access Vendor, with Alternative Local Exchange Telecommunications authority, (AAV/ALEC) Certificate No. 4025 and Interexchange Telecommunications (IXC) Certificate No. 2699 from Old Winstar to New Winstar.

Old Winstar and New Winstar complied with Rule 25-24.730 and Rule 25-24.473, Florida Administrative Code, regarding the assignment of AAV and IXC certificates and assets. The Commission found the assignment to be in the public interest and, therefore, approved the assignment of assets and certificates. In Order No. PSC-02-0321-PAA-TP, entered on March 12, 2002, the Commission ordered that AAV/ALEC Certificate No. 4025 and IXC Certificate No.

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2699 be amended to reflect that New Winstar is the holder of those certificates.

On April 2, 2002, Verizon Florida, Inc. (Verizon) filed its Petition Protesting Proposed Agency Action Order Approving Assignment of Assets and Alternative Local Exchange Telecommunications and Interexchange Telecommunications Certificates. On April 8, 2002, Old Winstar and New Winstar filed a joint Motion to Dismiss Verizon's Protest and on April 17, 2002, Verizon filed its Opposition to Winstar's Motion to Dismiss Verizon's Petition Protesting Proposed Agency Action Order. The Commission has jurisdiction in this matter pursuant to Sections 364.335 and 364.345, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Winstar's Motion to Dismiss Verizon's Protest of PAA Order No. PSC-02-0321-PAA-TP?

RECOMMENDATION: Yes. The Commission should grant Winstar's Motion to Dismiss Verizon's Protest of PAA Order No. PSC-02-0321-PAA-TP and Order No. PSC-02-0321-PAA-TP should be reinstated as a final order effective as of the date of the Commission's vote.

(FORDHAM)

STAFF ANALYSIS: Staff notes that in Verizon's Protest, Winstar's Motion to Dismiss Protest, and Verizon's Response to the Motion to Dismiss, there is virtually no discussion regarding the transfer of assets and certificates, but much discussion regarding the impact of the bankruptcy court's Order Approving Sale, and the future relationship between Verizon and Winstar. Essentially, Verizon argues that New Winstar must accept the debt of Old Winstar before it can transfer the Old Winstar customer base and continue serving those customers. Failing the assumption of that debt, Verizon asks that New Winstar be required to place new orders and go to the back of the line, resulting in a disruption of service to those customers. Additionally, Verizon is requesting that New Winstar deposit into escrow an amount equal to the last six months billings from Verizon to Old Winstar, from which Verizon would be able to draw in the event of a default by New Winstar. The final relief requested by Verizon is that every contract between Verizon and New Winstar include a unilateral right by Verizon to terminate the contract upon default by Winstar. Verizon also questions whether New Winstar has met the criteria for financial and managerial

capability to be certified in Florida, which it believes should be addressed by imposition of the aforementioned requirements.

Winstar contends, however, that the bankruptcy court was very specific in transferring the assets of Old Winstar to New Winstar free of all encumbrances. It also noted the court's interest in accomplishing a transfer without disruption of service to the customers. Winstar emphasizes that the bankruptcy court has retained jurisdiction over these issues pending completion of the regulatory requirements and final disposition of the bankruptcy proceedings. Therefore, Winstar believes that the Protest should be dismissed.

Staff notes that the bankruptcy court has, indeed, specifically retained jurisdiction over all matters addressed by it. Those issues are simply not properly before this Commission for discussion. The only issue presently before the Commission is the request for assignment of certificates and assets.

Because the arguments in the Protest and in the Motion to Dismiss address, primarily, the interpretations and impact of the bankruptcy court's ruling and do not appear to address the standard for dismissal to any degree, staff believes a review of that standard is appropriate. A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. In determining the sufficiency of the petitions, the Commission should confine its consideration to the petitions and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). In accordance with the pertinent case law, the Commission should also construe all material allegations against Winstar in making its determination on whether Verizon has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

In the present matter, the issues and the relief requested in the Petition by Verizon are largely issues over which the bankruptcy court has retained jurisdiction, as emphasized by Winstar. The issues discussed in the Protest concern the relationships between the two Winstars and Verizon and related

interconnection agreements. Those are certainly different issues than the narrow question of whether the joint request for transfer of assets and certificates of necessity from Old Winstar to New Winstar should be granted. The bankruptcy court specifically provided for a 120-day window in which Winstar was to complete all necessary regulatory transactions.¹ In so doing, however, the Court did not relinquish jurisdiction regarding the assumption of liabilities, which are the primary issues Verizon asks the Commission to address.

Furthermore, staff acknowledges Verizon's concerns that New Winstar could default in its payments to Verizon in the same way that Old Winstar apparently did. While the bankruptcy court did not clearly retain jurisdiction in this area, staff believes that Verizon lacks standing in this proceeding to have this concern addressed; thus, it does not support that Verizon's protest should be maintained. The relief that Verizon requests to remedy this anticipated future injury is the imposition of provisions in Verizon's interconnection agreements with New Winstar in this proceeding under Section 364.335 and 364.345, Florida Statutes. These assertions and the requested relief appear to fail both prongs of the Agrico test for standing. Agrico Chemical Co. v Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

According to the Agrico test, a party must show: (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes, hearing; and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. Id. at 482. Verizon has not alleged any injury that it will, in fact, incur by virtue of New Winstar receiving certification through this transfer, but instead argues that conditions should be imposed upon New Winstar *in order to preclude possible future injury resulting from its dealings with the new company*. Conjecture about future economic detriment is too remote to establish standing. Order No. PSC-98-0702-FOF-TP, issued May 20, 1998, at p. 15, citing Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy

¹Staff has determined that, as a result of the delay caused by the protest, the bankruptcy court has extended the 120-day window, retaining jurisdiction pending a May 21, 2002 hearing in Delaware.

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). In addition, proceedings under Sections 364.335 and 364.345, Florida Statutes, are not designed to establish or address interconnection provisions between carriers. As such, staff believes that Verizon's concerns regarding the future relationship between itself and New Winstar do not establish Verizon's standing to seek relief through this proceeding.

Therefore, staff recommends the Commission should grant the Motion to Dismiss, because Verizon has not only failed to state a cause of action upon which the Commission can grant relief, but it has also failed to demonstrate standing with regard to certain specific injuries claimed. Accordingly, the Commission should grant Winstar's Motion to Dismiss, and Order No. PSC-02-0321-PAA-TP should be reinstated as a final order effective as of the date of the Commission's vote.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission accepts staff's recommendation in Issue 1, there would be no further action required on this Docket and it should be closed. (FORDHAM)

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1, there would be no further action required on this Docket and it should be closed.