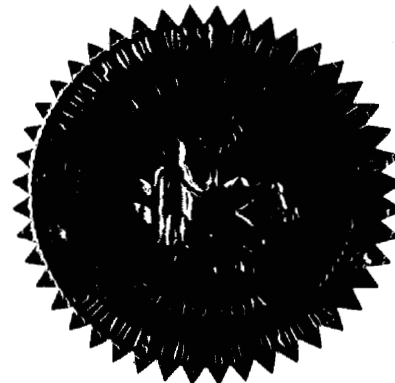


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 050363-TP

In the Matter of:

COMPLIANCE INVESTIGATION OF
SOUTHEASTERN SERVICES, INC. FOR
APPARENT FAILURE TO DISCLOSE
REQUIRED INFORMATION ON EACH OF
ITS APPLICATIONS FOR ALTERNATIVE
ACCESS VENDOR CERTIFICATE,
COMPETITIVE LOCAL EXCHANGE COMPANY
CERTIFICATE, AND INTEREXCHANGE
COMPANY CERTIFICATE.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 10

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, October 18, 2005

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732

1 PARTICIPATING:

2 MARTIN P. MCDONNELL, ESQUIRE, representing
3 NEFCOM.

4 SUZANNE F. SUMMERLIN, ESQUIRE, representing
5 Southeastern Services, Inc.

6 LEE FORDHAM, ESQUIRE, RICHARD MELSON, ESQUIRE,
7 and BETH KEATING, ESQUIRE, representing the Florida Public
8 Service Commission Staff.

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1 P R O C E E D I N G S

2 CHAIRMAN BAEZ: Commissioners, we are on Item 10.

3 MR. FORDHAM: Good morning, Commissioners. Lee
4 Fordham on behalf of the Commission.5 Item 10 is Docket Number 050363, which docket was
6 opened to address alleged irregularities in the various
7 applications of SSI for their certificates. In response to the
8 opening of that docket, SSI tendered an offer of settlement
9 which included the submission of corrected applications and the
10 voluntary contribution in the amount of \$2,500. The Commission
11 accepted that settlement offer, and on July 8th, 2005, issued a
12 Proposed Agency Action order reflecting accepting of that
13 settlement offer.14 Thereafter, NEFCOM filed a protest of that order,
15 which was followed by SSI's motion to dismiss the protest, and
16 that's the issue that is before the Commission this morning is
17 the motion to dismiss NEFCOM's protest. And staff is available
18 for questions.

19 CHAIRMAN BAEZ: Commissioners, questions?

20 COMMISSIONER DEASON: Mr. Chairman, Issue 1 is the
21 question of oral argument. I see that the parties -- I assume
22 that both sides are here. Staff is recommending that we do not
23 have oral argument, but they indicated it is within our
24 discretion. And if we do have it, that we should limit it.

25 I'm going to move that we deny staff and entertain

1 oral argument. I think it would be helpful to me. I know that
2 we are here for the motion to dismiss. And obviously I think
3 the oral argument should be limited to that, and, for my
4 benefit, focused upon the question of NEFCOM's standing. That
5 really, in my opinion, is the key issue, and what I need
6 further understanding concerning.

7 So it would be my motion to deny staff on Issue 1 and
8 to have limited oral argument.

9 CHAIRMAN BAEZ: Is there a second?

10 COMMISSIONER BRADLEY: Second. With the
11 understanding that staff is also recommending five minutes. Is
12 that agreeable?

13 COMMISSIONER DEASON: Five minutes is fine with me.

14 CHAIRMAN BAEZ: Very well. There is a motion and a
15 second to deny staff and allow oral argument on the motion with
16 a time limit of five minutes per side. All those in favor say
17 aye.

18 (Unanimous affirmative vote.)

19 CHAIRMAN BAEZ: Very well. Mr. McDonnell, I guess
20 it's your motion.

21 MS. SUMMERLIN: No, it's SSI's motion, Mr. Chairman.

22 CHAIRMAN BAEZ: I'm sorry, go ahead.

23 MS. SUMMERLIN: This is Suzanne Summerlin, I'm
24 representing Southeastern Services.

25 The Commission has before it SSI's motion to dismiss

1 the protest that was filed by NEFCOM. And, basically, we are
2 here to support the staff recommendation, also. The bottom
3 line is a very simple position that Southeastern Services has.
4 NEFCOM has no standing in this case because it doesn't meet the
5 Agrico test.

6 In order to meet the Agrico test, there has to be an
7 injury in fact of sufficient immediacy to give them the right
8 to have a hearing. The other prong of that is that it has to
9 be a proceeding that is intended to address the concerns that
10 they are raising. Neither of these prongs are being met in
11 this situation by NEFCOM.

12 The bottom line is will NEFCOM suffer injury if SSI
13 is allowed to continue operating? Absolutely. Because pretty
14 much from NEFCOM's point of view, every dollar that SSI makes
15 comes out of NEFCOM's pocket. That's the bottom line. This is
16 an enforcement proceeding by the Commission to decide whether
17 or not a company has violated one of the rules or statutes of
18 the Commission.

19 Once the Commission looked at the proposal that was
20 made by SSI to resolve this matter, the Commission obviously
21 felt that that was an acceptable proposal and issued a PAA
22 order. In an enforcement case, it's not appropriate to allow
23 competitive telephone companies to come in and weigh in on the
24 issue of whether a particular fine is right or whether their
25 competitors' certificate should be revoked. And that is

1 basically the only issue that NEFCOM brings to the table.

2 NEFCOM wants to inflict as much harm on Southeastern
3 Services as it can. Southeastern Services is the only
4 competitor that NEFCOM has in its territory. This has all been
5 basically spelled out in the motion. I think that in this
6 scenario the Commission has to consider most critically that if
7 this is an appropriate thing to grant standing in a case like
8 this to NEFCOM on an issue dealing with the enforcement of a
9 Commission rule or statute against one individual phone
10 company.

11 A decision to allow them to participate in this type
12 of proceeding would be tantamount to, in the future, in any
13 enforcement action, allowing everybody that has an opinion to
14 weigh in on that matter and to have standing to come in and
15 say, well, we think the fine should be this, or we think you
16 should revoke their certificates. And, by the way, we have ten
17 other issues that we have a problem with them on, and we want
18 to drag those things into this particular enforcement action.

19 The issues that are listed by NEFCOM in its protest
20 of the PAA order are generally issues that are policy issues of
21 tremendous significance. Those policy issues don't have
22 anything to do whatsoever with this particular enforcement
23 issue. Those policy issues basically relate to whether or not
24 access charges are appropriate for the VOIP services that SSI
25 provides. Those issues need to be addressed by the Commission

1 and/or the FCC. They are also issues that are being litigated
2 over in the Baker County Circuit Court by SSI and NEFCOM at
3 this point in time.

4 Those issues do need to be addressed, but this is not
5 the forum. This is not the docket for that type of issue to be
6 raised. NEFCOM purports to raise all kinds of issues that
7 question the ability of SSI to operate. Some of those issues
8 deal with characterizing the VOIP services that SSI provides as
9 traditional switched interexchange services.

10 This is the nut of the controversy between NEFCOM and
11 SSI at this point. This is being litigated. These issues do
12 need to be addressed in a policy format, but not in an
13 enforcement proceeding. The bottom line is NEFCOM doesn't have
14 any business being in this docket.

15 The only kind of intervenor in a case like this that
16 could conceivably say that they have standing would possibly be
17 Public Counsel, because Public Counsel has been appointed to
18 represent the interests of the public, and, theoretically, the
19 public could have a reason to be involved in an enforcement
20 docket. But in a situation like this to allow a competitive
21 telephone company who has clearly no larger goal than to
22 destroy this competitor would certainly be a very problematic
23 decision by the Commission. That's all we have got to say at
24 this point.

25 CHAIRMAN BAEZ: Thank you, Ms. Summerlin.

Mr. McDonnell.

MR. McDONNELL: Thank you, Mr. Chairman. Marty McDonnell on behalf of Northeast Florida.

This is not only a compliance investigation, and I ask the Commission not to lose sight of the fact that once this docket was opened in response to staff's legitimate concerns as to the felony conviction that was not disclosed by the owner of this company, there were filed three amended applications. And it has been our position in our petition and remains our position today that any time somebody applies to this Commission for certificates, that it's the Commission's responsibility to review the technical, financial, and managerial fitness of that company.

So in addition to a compliance investigation, I would ask this Commission to not lose sight of the fact that these are new applications filed on their behalf. We do, as we stated in our petition, satisfy both prongs of the Agrico test. Northeast Florida's status rights and obligations under its resale agreement with SSI is going to be impacted by this Commission's decision.

Secondly, Northeast Florida's ability to compete with SSI in the provision of basic local telecommunications services is going to be impacted. And, third, and, finally, as a carrier of last resort, the ultimate responsibility of taking care of these customers is going to lie with Northeast Florida

1 if this Commission takes more severe actions against SSI.

2 This Commission has previously granted standing in an
3 application case when a subsidiary of BellSouth, it was
4 BellSouth BSE, applied for, at that time, an ALEC certificate.
5 And this Commission granted intervention and standing of a
6 competitive CLEC, I believe it was MCI, so that MCI had
7 established that its position was sufficient to grant standing
8 under the Agrico test as it related to the application of a
9 competitor, not as it relates to a compliance investigation.

10 So I submit our standing lies in the fact that we are
11 competitors, as properly stated. We do not believe they have
12 the technical, financial, and managerial fitness to provide
13 services. We stated in our petition that SSI advertises and
14 markets flat rate long distance service. And we submitted in
15 affidavit, also, the fact that they pay zero in regulatory
16 assessment fees on their returns.

17 And I would ask the Commission to investigate the
18 technical and managerial fitness of this company, and I would
19 submit that if standing is an issue on our behalf, this
20 Commission always has the inherent authority to conduct its own
21 investigation into the companies it regulates. And if it is
22 the Commission's position that we do not have standing to
23 protest, I would ask the Commission, and I think it is
24 appropriate that the Commission open its own investigation into
25 the fitness of this company.

1 CHAIRMAN BAEZ: Thank you, Mr. McDonnell.

2 Ms. Summerlin, you were --

3 MS. SUMMERLIN: I just have a one-sentence,
4 basically, statement.

5 The Commission received an amended application simply
6 to correct the omission that was the focus of this entire
7 matter, which was simply that Mr. Woods had failed to
8 acknowledge that he had a felony conviction when he filed those
9 applications. The explanation was provided that he thought he
10 was justified. That, in fact, was not the case, but he thought
11 he was. The explanation was provided. The amended application
12 simply explains and corrects that omission. That is the only
13 change that was made to the application.

14 CHAIRMAN BAEZ: Commissioners, questions?

15 COMMISSIONER DEASON: Mr. Chairman, I have a
16 question, and I will direct this one to staff.

17 Staff, you agree with SSI's position that NEFCOM
18 lacks standing and does not meet the Agrico test. But you also
19 acknowledge and agree that this Commission has an obligation to
20 determine the technical, financial, and managerial abilities or
21 qualifications of a company before it's granted a certificate,
22 correct?

23 MR. FORDHAM: That's correct, Commissioner.

24 COMMISSIONER DEASON: And I think it was issued as a
25 PAA, is that correct?

1 MR. FORDHAM: That's correct.

2 COMMISSIONER DEASON: I guess my question is this:

3 When you issued it as a PAA, the Commission is -- well, we all
4 know what a PAA is, and that we are taking proposed action, and
5 we are asking people who are affected to tell us if they
6 disagree and why. So we are recognizing that there is someone
7 out there, conceivably, that has standing to question whether
8 someone has the technical, financial, and managerial
9 qualifications. If it is not a competitor that has that
10 standing, who has that standing to bring that type of a protest
11 before the Commission?

12 MR. FORDHAM: Commissioner, the statute merely uses
13 the term any person who is substantially affected. That is a
14 little bit broad and a little bit generic. A competitor
15 certainly is affected to the extent that competition does take
16 away from their business, and particularly in this case where
17 there is one sole competitor in that service area. But as far
18 as who would have it, obviously, I guess, we could use our
19 imaginations, but I think the term substantially affected puts
20 us back in the same standing criteria with Agrico, where it has
21 to be shown that they will, in fact, suffer harm of an
22 immediacy to justify the hearing and that --

23 COMMISSIONER DEASON: Well, let me ask. Who suffers
24 harm of immediacy if this Commission were to grant a
25 certificate to someone who does not have financial, technical,

1 or managerial qualifications?

2 MR. FORDHAM: I don't know, Commissioner, who that
3 might be.

4 COMMISSIONER DEASON: Mr. Melson, I see you are
5 reaching for the microphone.

6 MR. MELSON: Commissioner, I think if anybody has got
7 standing it is probably the Office of Public Counsel. I think
8 some history might be useful. We used to issue show cause
9 orders as final orders, and an issue arose at one point as to
10 Public Counsel's right to participate when they thought the
11 Commission hadn't imposed a sufficient penalty. As a result of
12 that, our practice changed and we no longer open, typically,
13 show cause dockets, we open compliance investigation dockets,
14 issue PAA orders primarily to give Public Counsel an
15 opportunity to intervene.

16 Obviously when you do a PAA order, anyone can file a
17 protest and allege that their interests are substantially
18 affected. But under Agrico it is a pretty tough task. And I
19 have difficulty imagining, in most cases, that there is anybody
20 other than Public Counsel who has a statutory right to
21 participate in proceedings who would have standing in most
22 enforcement or certificate application cases.

23 COMMISSIONER DEASON: Let me ask this question, I
24 guess from a practical side. You know, the Commission's
25 responsibility to only issue a certificate to someone that has

1 the prerequisite technical, financial, and managerial ability,
2 I think is a serious one, and I think it's one this Commission
3 has taken seriously, and I think the Commission has done a good
4 job. Sometimes we make mistakes, though. And if we were, and
5 I'm not saying that is the case, this is just hypothetically,
6 if this Commission were to issue a certificate to someone who
7 doesn't have the necessary qualifications, and we are depending
8 on somebody to bring that to our attention, it seems to me that
9 the pool of potential people, the best pool of potential people
10 are probably the people out there that are competing with them.

11 Just from a practical standpoint. But what I read in
12 the recommendation, and I'm not saying I disagree with it, but
13 what I read in the recommendation is just because you may be
14 harmed from a competitive standpoint, that doesn't give you
15 standing under Agrico. But who else out there is going to know
16 the technical, financial, and managerial qualifications better
17 than a competitor and to help us do our job?

18 MR. MELSON: I understand your point, and I'm not
19 sure there is anybody out there better than a competitor. And
20 if a competitor brings facts to staff's attention that create a
21 question in staff's mind as to whether a company has got that
22 appropriate ability, then I think the Commission can obviously
23 pursue that on its own motion.

24 The other thing, and this case is not exactly the
25 case, as I understand it, that has been described. This

1 company had been granted a certificate. So that investigation,
2 to whatever extent it was done, was done when that original
3 certificate was granted. A question was then raised about some
4 statements in the application. The question was should the
5 certificate be revoked, should a penalty be imposed? The
6 company made a settlement proposal that the company accepted.
7 So at this stage the original investigation of financial and
8 managerial capability is sort of ancient history.

9 CHAIRMAN BAEZ: Commissioner Bradley, you had a
10 question?

11 COMMISSIONER BRADLEY: Right. I don't know if I
12 heard this correctly, but is it correct that and -- and I heard
13 what Mr. Melson said, so this may be a moot question, but that
14 no one suffers if a customer doesn't have sufficient managerial
15 skills and sufficient fiscal resources in order to maintain its
16 customer base, that no one suffers? I think that was probably
17 a misstatement.

18 MR. FORDHAM: Commissioner, I would think that as a
19 class, the customer base may suffer in that scenario, but the
20 competitor would not suffer as would the customer base if they
21 had the insufficient capacity to conduct their business. The
22 customer base would suffer as a whole. But that is the reason
23 why the Office of Public Counsel would be a proper party to
24 protest a PAA as opposed to a competitor.

25 COMMISSIONER BRADLEY: And, Mr. Melson, you stated

1 that we have already done an investigation and made a
2 determination that this company is sufficient from a managerial
3 perspective as well as a fiscal perspective.

4 MR. MELSON: The normal process that we go through,
5 and it is not an exceedingly detailed investigation, but when
6 an application was originally filed, that normal process would
7 have been followed. And we are now at a later date when a
8 statement, a misstatement in the application has been brought
9 to our attention. The question is does that justify, in
10 essence, revoking the certificate? Does it justify some
11 punitive action? And staff made a recommendation and the
12 Commission voted that the company's settlement offer to correct
13 the applications and to pay a fine was an appropriate
14 resolution of that issue.

15 COMMISSIONER BRADLEY: So, in other words, the
16 company owned up to the fact that something was amiss by
17 agreeing to pay a \$2,500 fine, am I correct?

18 MR. MELSON: Yes, sir.

19 COMMISSIONER BRADLEY: And the issue before us is
20 whether or not the credibility of the managerial person is in
21 question because of the initial problem that was created when
22 the application was filled out, for whatever reason,
23 incorrectly.

24 MR. MELSON: And I think more specifically the
25 question is does NEFCOM at this point have standing to raise

1 that issue, or is that an issue that could be raised only by
2 Public Counsel or someone else that can demonstrate a
3 substantial interest.

4 MR. McDONNELL: Excuse me, could I make one comment,
5 Mr. Chairman?

6 CHAIRMAN BAEZ: Mr. McDonnell, hang on a second. I
7 think at this point if we have some direct questions, we will
8 refer them.

9 MR. McDONNELL: I apologize.

10 CHAIRMAN BAEZ: Commissioner Bradley, do you have
11 other questions at this point?

12 COMMISSIONER BRADLEY: Well, what is the -- and I
13 think I heard Commissioner Deason ask this question, what is --
14 because there is some cloudiness out there, what is our
15 responsibility as a Commission. It would seem to me that if,
16 in fact, everything is above board, and the company is
17 sufficient in terms of its managerial skills and its ability to
18 financially perform the services that they are selling to its
19 customer base that, I mean, is it harmless to reopen this issue
20 and just put this issue to bed, or should we allow this issue
21 to be just hanging out there forever?

22 MR. MELSON: Well, I think the way the issue
23 developed when staff brought a proposed settlement offer to you
24 for approval, and you voted it out, that was the time at which
25 consideration was given to whether there was something so bad

1 that the settlement offer should be rejected, or had the
2 company adequately convinced the Commission that it was an
3 oversight or misunderstanding that did not affect managerial
4 capability. In essence, you have made that decision by the
5 issuance of the PAA order.

6 CHAIRMAN BAEZ: Let me understand this. Not only are
7 you saying that staff's assessment of the financial, technical,
8 and managerial capabilities of an applicant happened during the
9 original application, but that it was reassessed in light of
10 the incomplete filing.

11 MR. MELSON: What was reassessed was whether the
12 misstatement in the original application was a basis for taking
13 some action against the company. And that was short-circuited
14 when the company made a settlement offer that staff recommended
15 and the Commission voted was sufficient to resolve the issue.

16 CHAIRMAN BAEZ: And can you -- all right. I know I
17 had a question, and I lost my train of thought. But I did have
18 another question.

19 Mr. McDonnell raised an example on the question of
20 standing of an MCI intervention. I seem to recall it. I know
21 you can't answer it. But if Ms. Keating can remind us what it
22 all was about and how this is different, if at all.

23 MS. KEATING: Maybe I should defer to Mr. Melson. I
24 think he did participate in that case.

25 MR. MELSON: But her memory is better than mine.

1 CHAIRMAN BAEZ: I don't know whether -- I was only
2 half joking. I don't want to put anybody in any legal bind
3 here, if Mr. Melson has a conflict that would preclude him from
4 answering the question.

5 MR. MELSON: No, I don't have a conflict that would
6 preclude me from answering it, but I have a memory problem that
7 would give me some difficulty, so if Beth remembers --

8 CHAIRMAN BAEZ: Sometimes that is good enough, right.

9 MR. McDONNELL: You should have stuck with I had a
10 conflict.

11 MS. KEATING: Beth Keating, staff counsel.

12 Commissioners, that case has actually been brought up
13 a few times in the past in similar situations, but it has been
14 distinguished by the Commission in the past. Because in that
15 situation there was an additional issue beyond just review of
16 the application under the state statute. There had been a
17 question raised because Bell Atlantic is a BOC in other states,
18 and there was a question about the application of federal law
19 in that situation and whether a Regional Bell Operating Company
20 subsidiary in the state would have any impact on 271, 272
21 requirements here. So I do believe that that case has been
22 distinguished in the past.

23 CHAIRMAN BAEZ: And I think -- I guess I'm trying to
24 get my hands around the original, the original PAA. Are we
25 saying now that PAAs essentially are conditional? I think we

1 established that they are conditional on standing, they are
2 conditional on -- of which this is really a central issue, but
3 going back to the PAA, just to understand what it seems our
4 decision was at the time that the -- the incompleteness of the
5 filing, or essentially that failure to disclose information
6 was -- there was a determination that it was inadvertent.
7 There was also a determination that it did not rise to the
8 level of putting certificates in jeopardy. Is that essentially
9 what we --

10 MR. MELSON: I think they are essentially -- those
11 determinations were probably not explicit. I have not reviewed
12 that order recently. But they were certainly implicit, because
13 you accepted a settlement offer that said, the company, we
14 admit there was an error in the application, we will cure it by
15 amending those statements in the application indicating why
16 they were inaccurate to begin with and paying a penalty. And
17 the Commission accepted that as a satisfactory resolution of
18 the problem.

19 CHAIRMAN BAEZ: And if I can ask you one further
20 question. As part of the settlement agreement, was there any
21 subsequent monitoring as part of the settlement agreement, any
22 subsequent involvement of the staff with the company in terms
23 of continued compliance or anything like that, or is it, you
24 know, it's done, be on your way, do good.

25 MR. MELSON: I'll have to defer.

1 MR. FORDHAM: Commissioner, we did an examination of
2 the performance of the company since it has been in business.
3 So we looked -- technical staff, for example, evaluated
4 consumer complaints and so forth and found that -- I think
5 there was only one consumer complaint ever filed on this
6 company in the ten years or so they have been operating, which
7 elevates the comfort level with the fact that they were
8 operating on a proper level.

9 CHAIRMAN BAEZ: Well, I hope it's not ten years or
10 so. I'm seeing here they have got a certificate since
11 June 16th, 1999.

12 MR. FORDHAM: The dates I would have to look back,
13 Commissioner.

14 CHAIRMAN BAEZ: I want to make sure.

15 MR. FORDHAM: Yes, you're correct, it has not been
16 that long. But for the length of time they have been operating
17 they have had one consumer complaint.

18 CHAIRMAN BAEZ: Okay. And there was also an issue --
19 and I realize this is outside of the scope of the motion to
20 dismiss. I realize we have strayed a little bit, but I want to
21 get some comfort here. There was also the issue of regulatory
22 assessment fees made, as well. Did you check that out?

23 MR. FORDHAM: Commissioner, there is presently a
24 court case pending in circuit court in Baker County addressing
25 that issue. The position of staff is that, particularly since

1 that issue is being addressed by a court, that we should not
2 intervene in that issue at this time and accept, as we must,
3 the findings of the court.

4 CHAIRMAN BAEZ: And based on the findings of the
5 court, we may or may not have something subsequent to do with
6 the results of that in terms of, I mean, I'm assuming the court
7 is going to determine whether assessment fees would have been
8 appropriate or not.

9 MR. FORDHAM: Commissioner, this is --

10 CHAIRMAN BAEZ: I'm sure it is much more complicated
11 than that.

12 MR. FORDHAM: Well, it is. This is that very big
13 issue that is now permeating the entire country that the FCC
14 ought to be addressing, and the federal courts, about at what
15 point does it become a total Internet call. And the issue is
16 being addressed on several levels, but this is just one of the
17 levels it is being addressed on.

18 And, certainly, if appropriate, depending on the
19 decisions of the courts and/or the FCC, then this Commission
20 might have greater involvement in that issue. But at this
21 point it would not be appropriate for the Commission to
22 intervene in the very issue that is being litigated in a court.

23 CHAIRMAN BAEZ: Agreed.

24 COMMISSIONER BRADLEY: Well --

25 CHAIRMAN BAEZ: Commissioner Bradley.

1 COMMISSIONER BRADLEY: And I think what you all are
2 discussing is the fact that the issue that is before the court
3 is the VOIP issue, right?

4 MR. FORDHAM: That's correct, Commissioner.

5 COMMISSIONER BRADLEY: Which we don't have any
6 jurisdiction over.

7 MR. FORDHAM: I wish it were that clear,
8 Commissioner. At this point we are told we don't have
9 jurisdiction, but it's an issue that is very much in flux right
10 now.

11 COMMISSIONER BRADLEY: You know, as I listened to
12 this discussion, I'm really trying to determine if folks have
13 been totally truthful with us to petition for a certificate,
14 but to claim that their services are VOIP service in court.
15 Well, which is it? I mean, what are we really dealing with
16 here?

17 MR. FORDHAM: Commissioner, I don't believe that the
18 court action is a factor in the application for the
19 certification in any way. I think that is a peripheral issue.
20 And the reason they are in court is because the agreement
21 specified that disputes be resolved in the Circuit Court of
22 Baker County, and that is the reason they are in that court
23 right now.

24 COMMISSIONER BRADLEY: So if the court makes a ruling
25 that this is a VOIP service rather than an issue of access

1 charges, is that going to put this Commission in the position
2 of having to refund the regulatory assessment fees?

3 MR. FORDHAM: Commissioner, it is an issue totally in
4 every way separate from the certificate issue. There are many,
5 many companies, carriers, providers nationwide who are in
6 exactly the same posture they are in in their court action.
7 But it has no bearing in any way on the applications for
8 certification. So whatever the ruling of the court and/or the
9 FCC and/or the federal courts, appellate courts, we will have
10 to deal with that ruling as we will with many other providers
11 that will be affected by a subsequent ruling on that issue.
12 But we would not have to reconsider any of our processes for
13 evaluating this docket, because it is a totally separate issue.

14 CHAIRMAN BAEZ: Commissioner Deason.

15 COMMISSIONER DEASON: If there are no other
16 questions, I'm prepared to make a motion.

17 CHAIRMAN BAEZ: Are there any other questions?

18 COMMISSIONER BRADLEY: No.

19 CHAIRMAN BAEZ: Go ahead, sir.

20 COMMISSIONER DEASON: Based upon the facts of this
21 case as we have discussed here, I'm in agreement with staff's
22 recommendation that the motion to dismiss should be granted. I
23 believe that NEFCOM does not have standing in this particular
24 set of facts. I'm a little uncomfortable, though, with -- and
25 I don't want this to be interpreted that a competitor never has

1 standing to bring a question of a company's technical,
2 financial, and managerial qualifications before the Commission.
3 At some point in the future there could be a set of facts where
4 we would want to do that.

5 I'm also comforted by, I think it was Mr. Melson's
6 representation, or somebody else on staff, that even if staff
7 felt that a competitor didn't have standing, that if there were
8 sufficient allegations made that would warrant it, staff would
9 conduct their own investigation and bring it to the
10 Commission's attention and we could go forward on our own
11 motion. So that gives me comfort, as well. But given the
12 facts of this case, I'm in agreement with staff's
13 recommendation and would move approval of Issues 2 and 3.

14 CHAIRMAN BAEZ: There is a motion on Issues 2 and 3.

15 COMMISSIONER EDGAR: Mr. Chairman, I would just like
16 to say that I concur with the comments of Commissioner Deason.
17 But I also agree that with the facts before us in this instance
18 that the test for standing is not met, and I will second the
19 motion.

20 CHAIRMAN BAEZ: And there is a second. Before we
21 take a vote, I do want to say something, and I hate to -- I
22 have troubles with this for other reasons, you know. I mean,
23 anybody can miss a box on an application, Lord knows I have
24 done it. But there are inadvertent -- there are things that
25 are clearly inadvertent, and things that start looking like

1 something else. And I'm willing, obviously, to accept staff's
2 determination in this case, and that came out of the
3 settlement. But as a future issue, you know, we want to be
4 very cautious about taking these types of inadvertent
5 nondisclosures lightly, too lightly.

6 In this case, it has already been decided, and I
7 don't know that there is much more that we can do. But, you
8 know, those kind of things concern me. We can't let the goal
9 of having complete applications, and then treating them as, you
10 know what, now we are going to fill in all the boxes, I think
11 we need to be very, very cautious as we move along. I know the
12 concern has always been expressed, you know, what happens now
13 in a competitive world? Well, these are the kinds of things
14 that always come up whether you have -- you know, the concern
15 to make sure that all the players in the competitive world are
16 legitimate and that we feel enough comfort. And I know that
17 the staff and this Commission, obviously, has ratified that
18 recommendation. There is enough comfort in this case. I would
19 caution us all to be more vigilant about these types of
20 circumstances in the future.

21 COMMISSIONER BRADLEY: Before we vote, I want to ask
22 a question.

23 CHAIRMAN BAEZ: Commissioner Bradley.

24 COMMISSIONER BRADLEY: Is the issue before us an
25 issue of standing?

1 CHAIRMAN BAEZ: Yes, it is a legal issue. I'm making
2 gratuitous comments at this point.

3 COMMISSIONER BRADLEY: Right. I think that you are
4 perfectly justified, because there is a lot that is going on
5 here.

6 Mr. Melson, before we vote, explain again what the
7 legal issue is as it relates to standing that we are addressing
8 here.

9 MR. MELSON: The legal issue on standing is whether
10 NEFCOM's substantial interests are affected by the decision to
11 accept a settlement. And the legal standard that's applied to
12 that comes out of the Agrico case, and it is a two-prong test.
13 NEFCOM would have to show that the approval of the stipulation
14 somehow causes it an immediate injury in fact. And, secondly,
15 they have to show that the injury they suffer is the type of
16 injury that a certification type proceeding is designed -- or a
17 show cause type proceeding is designed to protect against.

18 I think in staff's analysis they fail both prongs of
19 the test. They don't suffer any immediate injury by the
20 Commission's actions in accepting this settlement. And even if
21 they do suffer competitive harm, this statute that we are
22 operating under is not one that is designed to protect the
23 interests of competitors, it is one that is designed to protect
24 the interest of the general public.

25 CHAIRMAN BAEZ: Commissioners, there is a motion and

1 a second on Issues 2 and 3. All those in favor say aye.

2 (Unanimous affirmative vote.)

3 CHAIRMAN BAEZ: Thank you, staff. Thank you to the
4 parties.

5 MR. McDONNELL: Thank you.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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5 I, JANE FAUROT, RPR, Chief, Office of Hearing
6 Reporter Services, FPSC Division of Commission Clerk and
7 Administrative Services, do hereby certify that the foregoing
8 proceeding was heard at the time and place herein stated.

7

8 IT IS FURTHER CERTIFIED that I stenographically
9 reported the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript constitutes a true transcription of my notes of said
12 proceedings.

10

11 I FURTHER CERTIFY that I am not a relative, employee,
12 attorney or counsel of any of the parties, nor am I a relative
13 or employee of any of the parties' attorney or counsel
14 connected with the action, nor am I financially interested in
15 the action.

13

DATED THIS 25th day of October, 2005.

14



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JANE FAUROT, RPR
Official FPSC Hearings Reporter
FPSC Division of Commission Clerk and
Administrative Services
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