

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc.	DOCKET NO. 050200-TX ORDER NO. PSC-05-1126-FOF-TX ISSUED: November 8, 2005
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The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman  
J. TERRY DEASON  
RUDOLPH "RUDY" BRADLEY  
LISA POLAK EDGAR

ORDER DISMISSING PROTEST

BY THE COMMISSION:

Case Background

By Order No. PSC-05-0555-PAA-TX, issued May 20, 2005, Matrix Telecom, Inc. (Matrix) was granted CLEC Certificate No. 8586. Thereafter, on June 10, 2005, Verizon Florida, Inc. (Verizon) filed a Protest and Request for Hearing in this matter. No response to that Protest was filed. However, upon review of the Protest, we find that dismissal of the Protest is appropriate.

ANALYSIS:

STANDARD OF REVIEW

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 petition, this Commission should confine its consideration to the petition 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, this Commission should also construe all material facts and allegations in the light most favorable to Verizon in determining whether the petition is sufficient. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960). This same standard of review is equally applicable when this Commission considers dismissal on its own motion. See Order No. PSC-04-0636-FOF-TL.

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### ANALYSIS

At the outset, we acknowledge that dismissal is a drastic remedy, and one that should be granted only when the appropriate legal standard has been clearly met. We find, however, that in this case, dismissal is warranted, because the case law and this Commission's own prior decisions reflect that Verizon does not have standing to maintain its protest of Order No. PSC-05-0555-PAA-TX. In order to establish standing, a petitioner 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. Agrico Chemical Co. V. Department of Regulation, 405 So.2d 478, 482 (Fla. 2<sup>nd</sup> DCA 1981). We find that Verizon has not met this test.

Verizon speculates that, if this Commission grants Matrix a certificate in Florida, Matrix will be unable to meet its financial obligations for wholesale services obtained from Verizon and other wholesale providers. This speculation, however, amounts to conjecture about future economic detriment, and the case law is clear that 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).

While potential economic injury was found to confer standing, in limited instances, in Florida Medical Association et al. v. Department of Professional Regulation, et al., 426 So.2d 1112 (Fla. 1st DCA 1983), that decision was specifically distinguished by that same court just a few years later. Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988). In the distinguishing case, the Court applied the Agrico test for standing and found that the Society of Ophthalmology failed both prongs of the test. In so finding, the Court stated that some degree of loss due to economic competition does not satisfy the "immediacy" requirement of Agrico. Id. at 1285. The Court further stated that since appellants had shown no zone of interest personal to them that would be invaded by the certification process, they had no standing to contest the Board's decisions on the applications generally. See ASI, Inc. v. Florida Public Service Commission, 334 So.2d 594 (Fla. 1976), citing Agrico Chemical Co. V. Department of Regulation, 405 So.2d 478, and Shared Services, Inc. v. State, Department of Health and Rehabilitative Services, 426 So.2d 56. We have reached similar conclusions on similar facts in a number of cases, including certification cases. See Order No. PSC-04-0114-FOF-TI, issued in Docket No. 930396-TI; and PSC-99-0146-FOF-TX, issued in Docket No. 981016-TX. See also Order No. PSC-98-0702-FOF-TP, issued in Docket No. 971604-TP.

Furthermore, Verizon's allegations regarding Matrix's potential inability to fulfill its payment obligations to other carriers is not the type of concern designed to be addressed through the certification process, nor is the allegation ripe for consideration. If Matrix fails to fulfill any payment obligations that may arise in the course of doing business in Florida, such issues may be addressed through a complaint proceeding. Proceedings conducted pursuant to Section 364.337, Florida Statutes, are simply not designed to address intercarrier billing and compensation issues. See Order No. PSC-02-0744-FOF-TP, at p. 4, issued in Docket No. 020054-TP.<sup>1</sup> Thus, Verizon does not meet the second prong of the Agrico test.

Finally, with regard to Verizon's argument that this Commission cannot accept Matrix's incomplete application as it fails to provide the information necessary to establish that Matrix has the financial capability required to obtain a certificate, this allegation alone is insufficient to establish Verizon's standing in this matter. Verizon has not stated how Matrix's incomplete application has any impact on Verizon, beyond the alleged potential economic harm addressed above. Thus, we do not find that this allegation is sufficient to establish standing.<sup>2</sup>

Therefore, we find that Verizon has failed to adequately allege standing to proceed, the protest shall be dismissed and Order No. PSC-05-0555-PAA-TX shall be reinstated as a final order as it applies to Matrix and this Docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon's protest shall be dismissed and Order No. PSC-05-0555-PAA-TX shall be reinstated as a final order as it applies to Matrix Telecom, Inc. and this Docket shall be closed.

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<sup>1</sup> In addressing Winstar's Motion to Dismiss Verizon's protest of the transfer of assets and control from "Old Winstar" to "New Winstar", the Commission found, ". . . proceedings under Sections 364.335 and 364.345, Florida Statutes, are not designed to establish or address interconnection provisions between carriers. Accordingly, Verizon's concerns regarding the future relationship between itself and New Winstar do not establish Verizon's standing to seek relief through this proceeding . "

<sup>2</sup> While not necessary to address the question of standing, staff does further note that Matrix did provide its financial information under separate confidential cover when it filed its application for a certificate on March 28, 2005, although it did not specifically reference the financial information on the appropriate line of its application. See Document No. 02981-05. The financial information was examined as part of the application review process.

By ORDER of the Florida Public Service Commission this 8th day of November, 2005.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

JPR

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.

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 the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services 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.