

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: November 22, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Scott) *KIS* *RDR*
Division of Competitive Markets & Enforcement (Curry) *RC* *WMS*

RE: Docket No. 050551-TP – Joint application for approval of transfer of control of Sprint-Florida, Incorporated, holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corporation to LTD Holding Company, and for acknowledgment of transfer of control of Sprint Long Distance, Inc., holder of IXC Registration No. TK001, from Sprint Nextel Corporation to LTD Holding Company.

AGENDA: 12/06/05 – Regular Agenda – Motion to Dismiss – Oral Argument Requested – Participation at the Commissioners' Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050551.rcm.doc

Case Background

By Order No. PSC-05-0985-PAA-TP, issued October 13, 2005, the Commission approved the transfer of control of Sprint-Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company. Thereafter, on October 27, 2005, the Communications Workers of America (CWA) filed a Petition for a Formal Administrative Hearing protesting Order No. PSC-05-0985-PAA-TP. On November 3, 2005, Sprint Nextel Corporation, LTD Holding Company,

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Sprint-Florida, Incorporated, and Sprint Payphone Services, Inc., collectively filed a Motion to Dismiss. CWA filed a Response and Request for Oral Argument on November 9, 2005.

Discussion of Issues

Issue 1: Should the Commission grant the Communications Workers of America's (CWA) Request for Oral Argument?

Recommendation: No. Staff recommends that oral argument be denied. (Scott)

Staff Analysis: Rule 25-22.058, Florida Administrative Code, provides that the Commission has the sole discretion to grant oral argument upon request of any party. Staff does not believe that oral argument would assist the Commission in evaluating the issues presented by Sprint's Motion to Dismiss and CWA's Petition for a Formal Administrative Hearing. The arguments are fully set forth in the pleadings.

Issue 2: Should the Commission grant Sprint's Motion to Dismiss CWA's Petition for a Formal Administrative Hearing protesting Order No. PSC-05-0985-PAA-TP?

Recommendation: Yes. CWA has failed to adequately allege standing to proceed in this matter. Therefore, the petition should be dismissed and Order No. PSC-05-0985-PAA-TP should be reinstated as a final order. (Scott)

Staff 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, the 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, the Commission should also construe all material facts and allegations in the light most favorable to CWA in determining whether the petition is sufficient. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

CWA's PROTEST

CWA asserts that its substantial interests are affected as a customer of Sprint-Florida, because the proposed spin-off of Sprint-Florida will result in a degradation in the quality of local telecommunications service that it currently receives. In addition, CWA states that the proposed merger will result in a loss of jobs by CWA workers in Florida.

CWA cites the following as issues of fact in this proceeding that are disputed: 1) Whether after the spin-off, Sprint-Florida will be able to provide efficient and reliable communications service; 2) Whether after the spin-off, Sprint-Florida will have the ability to raise capital to invest in networks, employees and systems to continue providing high quality service; 3) Whether the newly created holding company, LTD Holding Company, will possess the financial capability to assist Sprint-Florida to provide quality service to its customers in Florida; 4) Whether sufficient assets not owned, but jointly used by Sprint-Florida, will be transferred to Sprint-Florida; and 5) Whether the level of debt and equity is such that LTD Holding Company will obtain investment grade debt ratings.

CWA concludes, without any cited specificity, that Section 364.33, Florida Statutes, and the Commission's various decisions interpreting that law, require reversal of the Commission's Proposed Agency Action (PAA) Order.

SPRINT's MOTION TO DISMISS

Sprint argues that CWA has cited no statutory provisions or issues that would support its standing to pursue a hearing on the PAA Order. Sprint contends, rather, CWA seeks to establish standing by alleging that, as a customer of Sprint, CWA would be harmed by any degradation in service quality that results from the transaction. Sprint alleges that this allegation is not within CWA's general scope of interest and activity and is not appropriate for CWA to assert on behalf of its members. Sprint argues that CWA's assertion that the transfer of control will result in a loss of jobs by CWA workers in Florida, is outside the scope of the Commission's jurisdiction and review under Section 364.33. Sprint states that both of these alleged injuries are entirely speculative and, therefore, insufficient to establish standing under Rule 25-22.029, Florida Administrative Code.

Sprint further argues that CWA has not alleged any facts whatsoever that the transfer of control will impair Sprint's ability to continue to comply with the Florida laws and Commission rules relating to service quality or with its statutory carrier of last resort obligations.

Sprint argues that CWA's allegations that Sprint will not be able to continue to provide quality service are mere conjecture and any such alleged future injury would be far too remote to give CWA standing to pursue its Petition. Indeed, in dismissing a CWA protest in another transfer of control proceeding, the Commission expressly held that speculation regarding job losses is insufficient to confer standing. The Commission ruled in Order No. PSC-02-0744-FOF-TP¹ (*Winstar*) as follows:

¹ In re: Emergency Joint Application for Approval of Assignment of Assets and Certificates from Winstar Wireless to Winstar Communications, Order No. PSC-02-0744-FOF-TP at 4 (2002).

The only allegation raised by CWA of the impact that the merger will have on CWA and its members is that the merger may result in a decrease in jobs for CWA workers in Florida. CWA can, however, only speculate as to the long term effects the merger may have on the market, and, ultimately, on jobs for communications workers. Such conjecture regarding future economic harm or possible loss of jobs . . . is too remote to establish standing in a proceeding conducted pursuant to Section 364.33

Sprint concludes that the purported injuries identified by CWA are purely speculative and are beyond the scope of this proceeding. In addition, the purported injuries are outside the general scope of CWA's interest and activity and are not appropriate for CWA to assert on behalf of its members. Accordingly, Sprint states that, CWA has failed to establish any element necessary to establish standing to pursue its Petition. In addition, CWA's Petition fails to state a cause of action for which relief can be granted and is procedurally deficient. Sprint therefore requests that the Commission dismiss CWA's Petition and declare the PAA Order to be final.

CWA's RESPONSE

In its Response, CWA contends that, as a Sprint customer, it is significantly impacted by any actions taken by Sprint that affect the level of service that CWA receives. CWA alleges that the divestiture of Sprint's holdings and assets will result in a financially weaker company with fewer resources to meet the demands of a growing Florida population. Consequently, CWA further alleges that as a result of a weakened Sprint, it will be injured by a degradation in quality of service. CWA also alleges that LTD Holding Company will be over-burdened with debt resulting in its inability to raise sufficient capital to invest in service, infrastructure, and maintenance of existing customers. CWA contends that a disproportionate debt to equity ratio would adversely affect CWA in that it would have to deal with service diminution and higher rates. Furthermore, CWA alleges that the spin off of LTD Holdings Company does not represent an equitable allocation of assets and debts to ensure a viable entity. As such, CWA contends that the proposed certificate transfer will ultimately result in its substantial and immediate injury.

CWA contends that its allegations of injury are not speculative. CWA further contends that it is purely a customer concerned with the affects of the transfer in question and not affiliated in any other way with Sprint. Furthermore, CWA asserts that its complaint is not entirely based on economic grounds. CWA also contends that dismissing a customer's complaint, in this instance, for lack of standing would render Section 364.33, Florida Statutes, meaningless.

Contrary to Sprint's argument in its Motion to Dismiss, CWA contends that it has satisfied Section 120.80(13)(b), Florida Statutes, by raising allegations in direct conflict with the findings in the Commission's PAA Order; i.e. that the new entity will have the same financial abilities to provide service and that the transfer will serve the public interest.

Furthermore, CWA contends that it is irrelevant whether it meets the requirements for associational standing since CWA, and not its members, is the recipient of bills and service provided by Sprint.

In addition to the first prong of the Agrico test, CWA concludes that it meets the second prong because it has alleged the type of injury that this proceeding is designed to protect. As such, CWA asserts that it has demonstrated that it is substantially and immediately affected by the Commission's PAA Order.

ANALYSIS

At the outset, staff acknowledges that dismissal is a drastic remedy, and one that should be granted only when the appropriate legal standard has been clearly met. Staff believes, however, that in this case, dismissal is warranted, because the case law and the Commission's own prior decisions reflect that CWA does not have standing to maintain its protest of Order No. PSC-05-0985-PAA-TP. 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. 2nd DCA 1981).

Staff recognizes that CWA's allegations are worthy of concern, particularly in view of Sprint's unique posture as an ILEC in Florida. The financial stability, or instability, of a company can certainly have significant effects on service availability and quality. CWA has indicated that Sprint's bond rating may be adversely impacted by this transaction. The FCC approved the Sprint Nextel Corporation merger with the commitment that the new local wireline company that is being spun off will receive an equitable debt and asset allocation at the spin-off so that it will be a financially secure entity. The spin-off of the local wireline company is expected to be completed in the second quarter of 2006. Staff notes that Standard and Poor's (S&P) currently assigns a corporate credit rating of triple B minus (BBB-) to Sprint - Florida, Inc. Moreover, S&P has placed its ratings on the debt of the local wireline division of Sprint Nextel on CreditWatch with negative implications. The local division is comprised of Sprint - Florida, Inc., Centel Corporation, Centel Capital Corporation, Central Telephone Company, and Carolina Telephone & Telegraph Company. The implications were recently revised to negative from developments reflecting the potential that the local wireline company could be rated below investment grade after its spin-off from Sprint Nextel. S&P expects to determine the final ratings near the time of the spin-off, but intends to provide further clarity on the probable outcome as appropriate in the months preceding the spin-off.

Staff emphasizes that while the concerns raised by CWA may have merit, they are, nevertheless, speculative in nature. CWA speculates that if the Commission approves Sprint's transfer of control in Florida, Sprint will be unable to meet its financial obligations and faces a possible degradation of service quality. 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. The Commission has 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, CWA's allegations regarding Sprint's potential inability to raise future capital, as well as other future financial impacts, are not the types of concerns designed to be addressed through the transfer of control process, nor is the allegation ripe for consideration. If Sprint fails to fulfill any payment obligations that may arise in the course of doing business in Florida, or fails to meet service quality standards, such issues may be addressed through a complaint proceeding. Proceedings conducted pursuant to Section 364.33, Florida Statutes, are simply not designed to provide in-depth analysis of potential long term financial possibilities. Thus, CWA does not meet the second prong of the Agrico test.

Finally, CWA's blanket assertion that the Commission's various decisions interpreting Section 364.33, Florida Statutes, require reversal of the Commission's PAA Order is insufficient to establish CWA's standing in this matter. Furthermore, CWA has failed to cite to any of the Commission's own prior decisions that reach a contrary conclusion. Rather, the Commission, in Order No. PSC-02-0744-FOF-TP (Winstar), denied CWA standing in a similar such matter. Thus, staff does not believe that these allegations are sufficient to establish standing.

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Therefore, staff recommends that the Commission find that CWA has failed to adequately allege standing to proceed, that the protest should be dismissed and Order No. PSC-05-0985-PAA-TP should be reinstated as a final order.

Issue 3: Should this Docket be closed?

Recommendation: Yes, if the Commission approves staff's recommendation in Issue 2, this Docket should be closed. **(Scott)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, Order No. PSC-05-0985-PAA-TP will be reinstated as a final order, and this Docket may be closed. If, however, the Commission denies staff's recommendation in Issue 2, staff recommends that this matter be set for an administrative hearing.