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July 18, 2006

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Docket No. 060308-TP - Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T, Inc. and BellSouth Corporation**

Dear Ms. Bayo:

Enclosed is AT&T, Inc. and AT&T of the Southern States, LLC ("AT&T"), BellSouth Corporation ("BellSouth"), BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively "Joint Applicants") Joint Response in Opposition for Lack of Standing to Joint CLECs' and Time Warner's Protests and Petitions for a Formal Proceeding, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III

cc: All Parties of Record
E. Earl Edenfield, Jr.
Jerry D. Hendrix

**CERTIFICATE OF SERVICE**
**DOCKET NO. 060308-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U.S. Mail and Electronic Mail this 18th day of July, 2006 to the following:

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James Meza III

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T Inc. and BellSouth Corporation | ) | Docket No. 060308-TP |
| | | Filed: July 18, 2006 |

**JOINT RESPONSE IN OPPOSITION FOR LACK OF STANDING TO JOINT CLECS' AND TIME WARNER'S PROTESTS AND PETITIONS FOR A FORMAL PROCEEDING**

AT&T Inc., TCG South Florida, and AT&T of the Southern States, LLC ("AT&T"), BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, "Joint Applicants") respectfully file this opposition for lack of standing to the Protests of Proposed Agency Action filed by ITC^Deltacom Communications, Inc., NuVox Communications, Inc., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Jacksonville, LLC (collectively, "Joint CLECs") and Time Warner Telecom of Florida, L.P. ("Time Warner") (further collectively, "Protesting Parties"). These parties protest the Florida Public Service Commission's ("Commission") proposed agency action on June 23, 2006[1] approving, pursuant to Section 364.33,[2] the indirect transfer of control resulting from the merger between AT&T Inc. and BellSouth Corporation. *See* Order No. PSC-06-0531-PAA-TP ("*Order*").[3] These purported protests should be rejected and

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[1] Since the Commission issued its proposed agency action, transfers of control related to this merger have been approved without conditions by the Louisiana Public Service Commission and the Tennessee Regulatory Authority.

[2] Fla. Stat. § 364.33 (2005).

[3] Because the Protesting Parties have the burden of establishing standing, the Protesting Parties cannot file a reply to this Response in Opposition. *See In re: Application for Certificate To Provide Wastewater Service*, Order No. PSC-04-0333-

summarily dismissed, because, as previously held by this Commission on numerous occasions involving identical claims, neither the Joint CLECs nor Time Warner has standing to participate in this proceeding.

The Protesting Parties bear the affirmative burden of establishing standing by proving that: (1) they will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing, *and* (2) the substantial injury is of a type or nature that the proceeding is designed to protect. *See Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. Dist. Ct. App. 1981); Rule 25-22.029, F.A.C.; *In re: Request for Approval of Transfer of Control of MCI Communications Corp.*, Order No. PSC-98-0702-FOF-TP, Docket No. 971604-TP (May 20, 1998). The Protesting Parties have not and cannot meet this burden under the clear and binding precedent of this Commission.

First, under settled law, the Protesting Parties have standing only if they affirmatively demonstrate that the indirect transfer of control of BellSouth Telecommunications, Inc. facilities in Florida will cause them real and immediate injury, but they have made no such showing. Specifically, the Protesting Parties have not demonstrated how this indirect transfer of control will affect their existing business relationships with BellSouth Telecommunications, Inc. in *any* way (much less do so *immediately*), nor could they do so. That is because BellSouth Telecommunications, Inc. will remain subject to the same wholesale and other contractual obligations vis-à-vis the Protesting Parties after the merger that existed prior to the merger, a point that no

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PCO-SU at 2 n.2, Docket No. 020745-SU (Mar. 30, 2004) (refusing to consider a "Memorandum in Opposition" to a response in opposition to a petition to intervene because the intervenors' filing was an "unauthorized reply to a response").

Protesting Party challenges.[4] Moreover, the merger will in no way affect this Commission's regulatory authority over BellSouth Telecommunications, Inc., or the Commission's ability to address any complaints by the Protesting Parties that are subject to the Commission's jurisdiction.[5] Again, no Protesting Party has challenged these facts.

Also, the Protesting Parties have not established any other way that they will be harmed (immediately or otherwise) by the granting of the Joint Application. Other than vague speculation of harm that "*could*" one day occur, Time Warner Protest[6] ¶ 9(c) (emphasis added), the Protesting Parties have offered little more than general assertions of future competitive harm based on pure speculation. This Commission has expressly and repeatedly held in previous transfer-of-control proceedings that future competitive injury is insufficient to establish standing. The Protesting Parties, however, never even mention this binding precedent. The Protesting Parties also allude vaguely and inappropriately to the interests of *other* parties, in particular Florida consumers, but the Protesting Parties are private companies that do not and cannot represent the interests of consumers. Notably, moreover, no Florida consumer has sought to intervene in this proceeding or protest this Commission's decision, nor has any other entity that represents the interests of consumers. Accordingly, there is no doubt that the Protesting Parties fail to meet the first requirement for standing.

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[4] *See* Joint Application at 10 ("Following the merger, the BellSouth operating subsidiaries certificated in Florida will operate just as they do today. . . . The merger will have no effect on the rates, terms, and conditions of service that those entities currently provide."); *see also Order* at 3.

[5] *See* Joint Application at 10 ("The merger will not impair, compromise, or in any way alter the Commission's authority to regulate BellSouth Telecommunications, Inc.").

[6] Time Warner's Protest of Proposed Agency Action and Petition for Formal Proceeding (filed July 14, 2006) ("Time Warner Protest").

Second, and independently, the Protesting Parties' petitions should be rejected because, in addition to not establishing any real and immediate injury, it is settled law in Florida that a transfer-of-control proceeding under Section 364.33 is not designed to protect competitor interests. Rather, the Commission's focus is on whether consumers will continue to receive high-quality service, which is why the *Order* unanimously approved by the Commission properly analyzed the "financial, management, and technical abilities of the Applicants." *Order* at 4. For this independent reason alone, the Protesting Parties do not have standing to protest the proposed agency action, and their petitions should be dismissed.

## THE PROTESTING PARTIES HAVE NOT ESTABLISHED AND CANNOT ESTABLISH STANDING

### A. The Commission's Precedents Preclude Standing For These Parties

To protest a proposed agency action, a party must provide "an explanation of how the petitioner's substantial interests will be affected by the agency determination." Rule 28-106.201(2)(b), F.A.C. If a party lacks substantial interests and thus standing, then the Commission must reject the purported protest, including the protest of a Commission order approving a transfer-of-control pursuant to Section 364.33. *See In re: Joint Application for Approval of Transfer of Control of Sprint-Florida*, Order No. PSC-06-0033-FOF-TP at 1-2, 10, Docket No. 050551-TP (Jan. 10, 2006).

Under a long line of Commission decisions, the proper test to determine "substantial interest" is that announced in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. Dist. Ct. App. 1981). *See In re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger*, Order No. PSC-00-0421-PAA-TP at 6, Docket No. 991799-TP

(Mar. 1, 2000) ("[W]e agree with MCI WorldCom/Sprint that the two-pronged test set forth in *Agrico* is the appropriate test for determining substantial interest.");[7] *see also* Order No. PSC-06-0033-FOF-TP at 5-7 (applying *Agrico* test in rejecting CWA's protest of the Commission's approval of a transfer of control of Sprint-Florida from Sprint-Nextel to LTD Holding Company on the grounds that CWA lacked standing); Order No. PSC-98-0702-FOF-TP at 14-16, 18-19 (applying *Agrico* test in finding that a competitor/customer (GTE), and a union (CWA) did not have substantial interests and thus standing to participate in the Commission's consideration of a transfer of control as part of the MCI-WorldCom merger).

Under *Agrico*, a party has a substantial interest in the outcome of an administrative proceeding if: (1) the party will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing,[8] *and* (2) the substantial injury is of a type or nature that the proceeding is designed to protect. *See* 406 So. 2d at 482. "The first aspect of this test deals with the degree of injury. The second deals with the nature of the injury." *Id.*; *see also AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997).

The Protesting Parties bear the burden of demonstrating that they meet *both* prongs and therefore have standing in this proceeding. *See, e.g., In re: MCG Capital*

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[7] This order, which also approved the transfer of control in that merger between holding companies, was ultimately vacated because the merger was not consummated, so approval of the transfer of control was no longer necessary. *See In re: Joint Application of MCI WorldCom, Inc. and Sprint Corp. for Acknowledgment or Approval of Merger*, Order No. PSC-00-1667-FOF-TP, Docket No. 991799-TP (Sept. 18, 2000). That, of course, has no bearing on the Commission's decision or reasoning in determining there was no standing.

[8] Fla. Stat. § 120.57 (2005) (prescribing procedures for the conduct of administrative hearings).

*Group*, Order No. PSC-05-0382-FOF-TP at 7, Docket No. 050111-TP (Apr. 12, 2005); Order No. PSC-00-0421-PAA-TP at 6. If the Protesting Parties fail to make *either* showing under the *Agrico* test, their protests and petitions must fail. *See* Order No. PSC-00-0421-PAA-TP at 7.

This Commission has consistently applied the *Agrico* test to deny standing in transfer-of-control proceedings involving telecommunications companies. For example, in the Commission's 1998 proceeding involving the MCI/WorldCom merger, GTE sought to establish standing based on alleged injuries it would suffer as a wholesale customer due to the decrease in competition between MCI and WorldCom in the wholesale market. It also argued that its interests as a competitor would be affected by the merger. The Commission found that both bases of GTE's asserted injuries – as a customer and as a competitor – were far too speculative to confer standing under the first prong of *Agrico*. *See* Order No. PSC-98-0702-FOF-TP at 14 ("Speculation as to the effect that the merger . . . will have on the competitive market amounts to conjecture about future economic detriment."). The Commission also ruled that the asserted injuries were beyond the scope of a transfer-of-control proceeding because Section 364.33 "does not give us the ability to protect the competitive interests asserted." *Id.* at 19.

Two years later, the Commission issued a virtually identical ruling in a proceeding concerning the indirect transfer of control of regulated operating subsidiaries resulting from the proposed merger of MCI WorldCom, Inc. and Sprint Corporation. *See* Order No. PSC-00-0421-PAA-TPP at 6 (citing Order No. PSC-98-0702-FOF-TP). In that proceeding, TRA, a national trade organization representing telecommunications service providers and suppliers (with several members that were authorized to provide

local and interexchange service in Florida), sought to establish standing on the basis that the proposed merger "will result in a narrowing of competitive network service providers" and therefore "may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network services provided by Sprint or MCI." *Id.* at 3.

The Commission rejected TRA's petition and found that it failed to satisfy *both* of the *Agrico* prongs. *See id.* at 4. First, the Commission rejected TRA's contention on the degree-of-injury prong because "the 'loss' of a competitor in the market, in itself," does not demonstrate harm to TRA. *Id.* at 7. Specifically, the Commission held that:

> TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive market amounts to conjecture about future economic detriment. Such conjecture is too remote to establish standing. . . . We find that this standard is equally applicable whether TRA is arguing its substantial interest as a competitor or as a customer.

*Id.* at 6-7; *see also* Order No. PSC-06-0033-FOF-TP at 6 (confirming need for immediate harm). Second, the Commission reaffirmed its previous judgment that Section 364.33 "is not a merger review statute" and therefore that TRA's assertion of the competitive interests of its members was insufficient to meet the nature-of-injury prong. Order No. PSC-00-0421-PAA-TP at 8.[9]

[9] More recently, and in an analogous situation, the Commission denied the CWA's attempt to establish standing and to protest the Commission's approval of the transfer of control of Sprint-Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company pursuant to Section 364.33. *See* Order No. PSC-06-0033-FOF-TP.

### B. Under These Established Commission Precedents, the Protesting Parties Cannot Establish Standing

These Commission decisions control here and require the Commission to dismiss these petitions for lack of standing.

***First***, the Protesting Parties cannot satisfy the degree-of-injury prong of the *Agrico* test. As discussed above, the Protesting Parties must prove that they will suffer an injury in fact of sufficient immediacy to entitle them to a Section 120.57 hearing. *See Agrico*, 406 So. 2d at 482. The Protesting Parties have not met their burden of demonstrating such a real and immediate injury.

In seeking to satisfy this first aspect of the *Agrico* test, the Joint CLECs speculate as to their alleged immediate injury – potential future competitive harm. Specifically, they claim that "[t]he proposed transfer raises issues which will directly impact Joint CLECs and which are directly related to Joint CLECs' business and on-going operations in the state of Florida." Joint CLEC Protest[10] ¶ 23. But the Joint CLECs are unable to support that vague and conclusory statement with any demonstration of concrete immediate injury they will suffer. Instead, they speak in a vague, speculative, and imprecise manner of "undue competitive advantages" that the merger will allegedly give the Joint Applicants and of the fact that the merger will supposedly remove a single "competitive option[]" offering "special access services." *Id.* ¶¶ 23-24.

The Joint CLECs never explain what "undue competitive advantages" they believe the merger will create, much less do they bear their burden of showing how such alleged "undue" advantages will cause them imminent injury. Nor could they do so.

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[10] Joint CLECs' Protest of Proposed Agency Action (filed July 14, 2006) ("Joint CLEC Protest").

The Joint CLECs do not contest that, after the merger, the Joint Applicants will be subject to the same nondiscriminatory wholesale access and interconnection obligations under the federal Telecommunications Act of 1996, the rules of the Federal Communications Commission ("FCC"), and the rules and orders of this Commission as the Joint Applicants are today. The Joint CLECs also do not dispute that the Joint Applicants will remain subject to their interconnection agreement obligations with CLECs such as the Protesting Parties. Finally, the Joint CLECs do not contest that this Commission's regulatory jurisdiction will be unchanged by the transaction.[11] Thus, the Joint CLECs' entire claim of immediate substantial injury rests solely on speculative future competitive harm claims that, as a matter of fact and law, will not come to fruition.[12]

For all these reasons, just as in prior directly on-point cases where this Commission has concluded that standing did not exist in a transfer-of-control proceeding, this vague suggestion of future competitive harm does not satisfy the Protesting Parties' burden of demonstrating real and immediate injury. *See* Order No. PSC-98-0702-FOF-

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[11] Because the Commission's regulatory oversight over BellSouth will not be impacted by the transaction, the Commission will have the ability to address any actual claims that may arise post merger.

[12] In addition to the speculative nature of their claims, the Joint CLECs also cannot establish the "sufficient immediacy" aspect of the first prong of the *Agrico* test. Specifically, the *Order* directly and immediately impacts only the respective corporate parents of the regulated entities – BellSouth Corporation and AT&T, Inc. Thus, even if the assertions of alleged injury were true (which they are not), the Joint CLECs do not and cannot prove that any of their alleged injuries will be immediate. *See* Order No. PSC-06-0033-FOF-TP at 6 ("Specifically, this Commission's proposed agency action directly and immediately affects Sprint, not CWA or its members. . . . But even assuming that this happens, the effects on CWA and its members will not be 'immediate.' This is not to deny that these effects, if they occur, can trace a ca[us]al chain back to the approval of Sprint's restructuring. Rather, it is to discern that the causal chain has too many links in it to view the downstream effects as 'direct' or 'immediate.'").

TP at 14 ("Speculation as to the effect that the merger . . . will have on the competitive market amounts to conjecture about future economic detriment."); Order No. PSC-00-0421-PAA-TP at 7 ("Accordingly, we find that TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive market amounts to conjecture about future economic detriment. Such conjecture is too remote to establish standing."); Order No. PSC-06-0033-FOF-TP at 5 ("The 'injury in fact' must be both real and immediate and not speculative or conjectural.").

Likewise, the Joint CLECs' reference to the alleged loss of a single wholesale special access supplier (AT&T) does not demonstrate imminent injury. Indeed, the Commission has already rejected an identical argument on at least two prior occasions as it found that the alleged "loss of a competitor" in the wholesale arena is insufficient to establish standing in a transfer-of control proceeding. *See* Order No. PSC-00-0421-PAA-TPP at 3 (claim that the proposed merger "will result in a narrowing of competitive network service providers" and therefore "may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network services provided by Sprint or MCI" was insufficient to create standing because "the 'loss' of a competitor in the market, in itself," does not demonstrate harm); Order No. PSC-98-0702-FOF-TP at 17 ("First, the 'loss' of a competitor in the market does not, in itself, demonstrate a harm to GTE. Companies drop out of markets quite frequently for a variety of reasons."). Further, as with the other Joint CLEC arguments, this claim cannot establish standing, because it entirely relies on speculative, future economic harm. *See* Order No. PSC-98-0702-FOF-TP at 14 ("Speculation as to the effect that the merger . . . will have on the competitive market amounts to conjecture about future economic

detriment. Such conjecture is too remote to establish standing. . . . This standard is equally applicable whether GTE is arguing substantial interests as a competitor or as a customer.").

Time Warner's attempts at demonstrating imminent injury to a substantial interest fails for many of the same reasons. As with the Joint CLECs' vague claims of competitive harm, Time Warner's assertions that it may lose "competitive influence" and "market power," Time Warner Protest ¶ 9a, are both wholly speculative and unsupported. It therefore constitutes the same kind of "conjecture about future economic detriment" that this Commission has previously rejected in transfer-of-control proceedings. Order No. PSC-98-0702-FOF-TP at 14. Likewise, Time Warner's statements about losing AT&T as a "competitor," Time Warner Protest ¶ 9b, are equally unavailing and deficient. It therefore fails for the same reasons, and under the same precedents, that apply to the Joint CLECs' arguments.

Similarly, Time Warner's wholly unsupported assertion that Joint Applicants someday "*could* deny [it] access to the 'last mile,'" Time Warner Protest ¶ 9c (emphasis added), is speculative and hypothetical; it does not come close to establishing any real and immediate harm. Beyond that, like the Joint CLECs, Time Warner simply ignores the fact that the merger does not affect the Joint Applicant's existing duties to provide nondiscriminatory network access and interconnection under their wholesale interconnection agreements or the regulatory authority of this Commission or the FCC to enforce those obligations in the unlikely event that a problem should arise. Accordingly, any alleged anticompetitive behavior can be addressed by the appropriate regulatory authorities in the appropriate forum after the merger, just as it could before the merger.

Moreover, Time Warner never even explains *why* the Joint Applicants would want to discourage the wholesale use of its network under special access tariffs. In fact, the Joint Applicants have every reason to encourage use of tariffed special access services to keep traffic on their networks and not those of other competitive providers, and Time Warner's counterintuitive contrary suggestion does not establish imminent injury.

Further, to the extent that Time Warner is concerned about the impact that legislation enacted by the Florida Legislature in 2005 may have on this Commission's review of broadband access issues, *see* Time Warner Protest ¶ 9c, this is decidedly not the forum or proceeding to address such legislative determinations. As Time Warner itself recognizes, this Commission has no jurisdiction over issues concerning "VoIP" or "[b]roadband services, regardless of the provider, platform, or protocol." Fla. Stat. § 364.011(2)-(3) (2005). For this reason, neither Time Warner's discussion of the Joint Applicant's broadband network (¶ 9c) nor its discussion of internet "peering" on the IP network (¶ 9d) is appropriately considered by this Commission. These assertions thus provide no basis for standing.

Finally, the Protesting Parties cannot satisfy their burden as to the first prong of the *Agrico* test through any suggestion that the merger could harm Florida telecommunications consumers. *See, e.g.*, Joint CLEC Protest ¶ 24 (asserting merger "will reduce consumer choice"); Time Warner Protest ¶ 9e ("the proposed merger would affect directly customers and consumer access, rates, regulation and service issues"). Even if any basis existed for the Protesting Parties' opaque conjecture – and it emphatically does not – these Protesting Parties do not represent the interests of consumers in Florida, and such allegations therefore could not establish the standing of

these Protesting Parties. Rather, any claim of standing by the Protesting Parties must be based on their *own* interests, not on their assertions about the interests of Florida consumers. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) ("'In the ordinary course, a litigant must assert his or her own legal rights or interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'") (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); *In re: Application for a Limited Proceeding To Include Groundwater Development and Protection Costs in Rates,* Order No. PSC-96-0768-PCO-WU at 2-3, Docket No. 960192-WU (June 14, 1996) (denying a town intervention because it had no standing to represent the interests of consumers who are residents and taxpayers). Indeed, as emphasized at the outset, the parties that *do* represent Florida consumers have not protested the Commission's *Order*.

***Second***, and independently, the Protesting Parties' petitions fail to meet the second prong of the *Agrico* test concerning the type and nature of the alleged injury.

The Commission has explained repeatedly and in plain language that a *transfer-of-control* proceeding under Section 364.33, is not designed to address purported competitive injuries. Rather, in reviewing telecom transactions under Section 364.33, the Commission's focus is on the effect of the transfer of control on service to *consumers* in Florida, and not on the interests of competitors, if any such interests are even implicated (and, in this case, they are not). In the Commission's words, Section 364.33 gives it "jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida *consumers*," but that provision "does *not* give [the Commission] the ability to protect . . . competitive interests." Order No. PSC-98-0702-FOF-TP at 19 (rejecting attempts of GTE and CWA to intervene to assert alleged injuries

to competitors) (emphasis added); *see* Order No. PSC-00-0421-PAA-TP at 8 ("We agree with MCI Worldcom/Sprint that this section is *not* a merger review statute. 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.*") (emphases added).

To be clear, the Commission's authority to review transfer-of-control proceedings lies in Section 364.33. Thus, when the Protesting Parties seek to rely only on Section 364.01 to circumvent Section 364.33, *see* Joint CLEC Protest ¶¶ 13-14, 16; Time Warner Protest ¶¶ 4-5, they misunderstand the basic fact that this transaction is subject to the well-established boundaries of Section 364.33.[13] In accord with the Commission's established precedent interpreting Section 364.33, the *Order* unanimously adopted in this proceeding expressly focuses on the ability of Joint Applicants to serve consumers. *See Order* at 2-4.

The Protesting Parties' attempt to expand the Commission's well-established Section 364.33 analysis should be rejected. First, this argument does not give them standing. Second, even if it were relevant to the standing analysis, it is incorrect. The Commission has never adopted the analysis and remedies suggested by the Protesting Parties.[14] Indeed, in transfer-of-control proceedings involving ITC^Deltacom, XO, and

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[13] The Protesting Parties' references to the Tunney Act proceeding relating to the SBC/AT&T Corp. merger are mystifying. The Tunney Act is a federal statute that gives federal courts certain authority in reviewing an antitrust consent decree. It has nothing whatsoever to do with this Commission's authority under Florida law as interpreted in prior precedents of this agency.

[14] Time Warner recognizes this fact in its Petition and Protest: "While historically the Public Service Commission has limited its 'public interest' [*sic*] to financial, management, or technical capabilities of the applicant under the change of control petition. . . ." Time Warner Protest ¶4.

Time Warner, the Commission applied the same analysis that it applied in the *Order* to approve those transfers. *See In re: Request for Approval of Intracorporate Reorganization,* Order No. PSC-03-0298-PAA-TP at 2, Docket No. 030019-TP (Mar. 5, 2003) ("In accordance with our authority under Section 364.33 . . . we have reviewed the petition of TWEAN and TWCIS FL and find it appropriate to approve it. We have based our review and decision upon an analysis of the public interest in efficient, reliable telecommunications service."); *In re: Request for Approval of Transfer of Control of ITC^Deltacom*, Order No. PSC-02-1389-PAA-TP at 2, Docket No. 020900-TP (Oct. 8, 2002) ("In accordance with our authority under Section 364.33 . . . we have reviewed the Petition of ITC^Deltacom and Interstate Fibernet, and find it appropriate to approve it. We have based our review and decision upon an analysis of the public interest in efficient, reliable telecommunications service."); *In re: Application for Expedited Treatment of Transfer of Control of XO*, Order No. PSC-02-1709-PAA-TP at 2, Docket No. PSC 021117-TP (Dec. 6, 2002) ("In accordance with our authority under Section 364.33 . . . we have reviewed the Application of XO Long Distance Services, Inc., XO Florida Inc., and their parent, XO Communications, Inc., and find it appropriate to approve it. We have based our review and decision upon an analysis of the public interest in efficient, reliable telecommunications service.").[15]

Contrary to their "new" understanding of the Commission's authority in transfer-of-control proceedings, Section 364.33 does not have different standards – one for the

[15] The Commission conducted a similar analysis for NuVox in its application to approve the transfer of its CLEC certificate. *See In re: Request for Approval of Transfer of CLEC Certificate No. 5638 From NuVox Communications, Inc. to NewSouth Holdings, Inc.*, Order No. PSC-05-0318-PAA-TX at 2, Docket No. 041168-TX (Mar. 21, 2005) (finding that "it is in the public interest to approve the transfer").

Joint CLECs and one for the Joint Applicants.[16] Rather, the same analysis applies to all applicants regardless of the size of the entities involved or whether the parent of an ILEC is involved in the transaction. *See, e.g., In re: Joint Petition for Approval of Merger of GTE Corp. and Bell Atlantic Corp.*, Order No. PSC-98-1645-FOF-TP at 3, Docket No. 981252-TP (Dec. 7, 1998) (approving merger of GTE and Verizon without any discussion of Section 364.01, any conditions, or a Section 120.57 hearing).

Accordingly, just as in the prior cases discussed above, the Protesting Parties' petitions challenging the *Order* fail to establish any "substantial interest" of a type or nature that a proceeding under Section 364.33 is designed to protect. *See Agrico*, 406 So. 2d at 482. Indeed, the Joint CLECs and Time Warner do not cite, much less address, this Commission's dispositive orders, which are clearly fatal to the attempts of competitors to establish standing in a transfer-of-control proceeding. The Commission's precedents could not be clearer: Florida law "does *not* give [the Commission] the ability to protect . . . competitive interests" in this context. Order No. PSC-98-0702-FOF-TP at 19 (emphasis added).

Notably, moreover, Order No. PSC-98-0562-PCO-TX,[17] the *only* decision on which the Joint CLECs rely, did not involve a transfer-of-control proceeding and, unlike the instant case, involved a new entrant in the local market. In that case, the Commission

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[16] XO's participation in the Joint CLEC protest is baffling at best. Specifically, at the June 20, 2006 agenda conference, XO conceded that the FCC will make the "final call" on the merger: "XO understands that the Commission's authority is what it is in this area and that ultimately it is the FCC that will make the final call on this." *See* Agenda Conference Transcript, Item 5, *Joint Application for Approval of Indirect Transfer of Control*, Docket No. 060308-TP, at 22 (June 20, 2006).

[17] *In re: Application for Certificate To Provide Alternative Local Exchange Telecommunications Service by BellSouth BSE, Inc.*, Docket No. 971056-TX (Apr. 22, 1998).

found that MCI had standing to protest a proposed order granting BellSouth BSE Inc. an ALEC certificate. It thus has no relevance here and, in fact, the Commission distinguished that decision in a Section 364.33 proceeding involving the MCI/WorldCom merger. Accordingly, the only authority relied upon by the Joint CLECs has already been distinguished by the Commission and found to be inapplicable. *See* Order No. PSC-98-0702-FOF at 16-18.

In sum, this Commission's orders are consistent in holding that competitors do not have standing in transfer-of-control proceedings like this one. Those decisions compel the conclusion that Joint CLECs and Time Warner lack standing to protest the *Order*.

## CONCLUSION

For the foregoing reasons, the Joint Applicants respectfully request that the Commission deny the protests and petitions for formal proceeding filed by the Joint CLECs and Time Warner on the ground that they lack standing in this proceeding.

Respectfully submitted, this 18th day of July 2006,

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