

State of Florida



## Public Service Commission

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

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**DATE:** October 6, 2005

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

**FROM:** Office of the General Counsel (Rojas)  
Division of Competitive Markets & Enforcement (McCoy)

**RE:** Docket No. 050200-TX – Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc.

**AGENDA:** 10/18/05 – Regular Agenda – Dismissal of Protest – Oral Argument Not 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\050200.RCM.DOC

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### 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, staff believes that dismissal of the Protest is appropriate. Staff, therefore, brings the following recommendation.

### **Discussion of Issues**

**ISSUE 1:** Should the Commission, on its own motion, dismiss Verizon's Protest and Request for Hearing regarding Order No. PSC-05-0555-PAA-TX as it pertains to Matrix?

**RECOMMENDATION:** Yes. Verizon has failed to adequately allege standing to proceed. Therefore, the protest should be dismissed and Order No. PSC-05-0555-PAA-TX should be reinstated as a final order as it applies to Matrix. **(ROJAS)**

### **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 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 the Commission considers dismissal on its own motion. See Order No. PSC-04-0636-FOF-TL.

#### **VERIZON'S PROTEST**

Verizon argues that the Commission should reject Matrix's application, because Verizon believes the application is deficient on its face. In the alternative, Verizon requests a hearing to demonstrate that Matrix does not meet the statutory criteria to obtain a certificate in Florida.

Specifically, Verizon contends that Matrix did not fully complete the certificate application form, Form PSC/CMU 8 (11/95). Verizon argues that Matrix failed to include certain critical information regarding Matrix's financial capabilities, and its ability to meet its financial obligations for services and facilities obtained from other carriers. Verizon emphasizes that the application form requires the applicant to provide, ". . . **written explanation** that the applicant has sufficient financial capability to meet its lease or ownership obligations." (emphasis in original). Verizon explains that Matrix did not provide the required written explanation; thus, Verizon believes the application is deficient and should be rejected. Failure to provide this information, argues Verizon, is also contrary to the provisions of Section 364.337, Florida Statutes, which requires the Commission to consider whether a certificate applicant has, ". . . sufficient technical, financial, and managerial capability. . . ." Verizon contends that the Commission cannot grant an application for a certificate wherein the applicant has failed to provide the required financial demonstration.

Even if the application itself could be accepted, which Verizon argues it cannot, Verizon contends that Matrix is simply not capable of meeting its financial obligations for wholesale services obtained from other carriers, such as Verizon. To explain, Verizon points out that Matrix ordered services from Verizon's affiliates in California and Indiana, but has defaulted on the payments for those services. Verizon also notes that Matrix's sister company, Claricom Networks, also ordered services from Verizon affiliates in thirteen states, and similarly defaulted in most instances. Verizon adds that it was forced to disconnect Matrix in California and Indiana, and Claricom in Massachusetts, New Jersey, Pennsylvania, New York, and Washington, D.C. Verizon adds that Matrix holds itself out to provide service using the networks of "the largest and highly regarded carriers in the country. . . ." If Matrix cannot meet its financial obligations to other carriers, then Verizon argues that Matrix cannot be considered financially capable.

### 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 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). Staff does not believe that Verizon has met this test, and as such, believes that to proceed further to hearing would be an unnecessary waste of the Commission's and the parties' resources. As such, staff recommends that the Commission dismiss the protest on its own motion.

Verizon speculates that, if the 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. 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, 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 the 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, staff does not believe that this allegation is sufficient to establish standing.<sup>2</sup>

Therefore, staff recommends that the Commission find that Verizon has failed to adequately allege standing to proceed, the protest should be dismissed and Order No. PSC-05-0555-PAA-TX should be reinstated as a final order as it applies to Matrix.

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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.

Docket No. 050200-TX

Date: October 6, 2005

**ISSUE 2:** Should this Docket be closed?

**RECOMMENDATION:** Yes, if the Commission approves staff's recommendation in Issue 1, this Docket should be closed. **(ROJAS)**

**STAFF ANALYSIS:** If the Commission approves staff's recommendation in Issue 1, Order No. PSC-05-0555-PAA-TX will be reinstated as a final order as it applies to Matrix. This Docket may then be closed. If, however, the Commission denies staff's recommendation in Issue 1, staff recommends that this matter be set for hearing.