HOPPING GREEN SAMS & SMITH
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
123 SOUTH CALHOUN STREET
POST OFFICE BOX 6526
TALLAHASSEE, FLORIDA 32314
(850) 222-7500
FAX (850) 224-8551
FAX (850) 425-3415

Writer's Direct Dial No.
(850) 425-2313

ORIGINAL

January 20, 2000

BY HAND DELIVERY

Blanca Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: MCI WorldCom/Sprint -- Docket No. 991799-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI WORLDCOM, Inc. and Sprint Corporation (together "Applicants") are the original and fifteen copies of their Response in Opposition to Telecommunications Resellers Association's Motion to Intervene.

By copy of this letter, copies of this response have been furnished to the parties on the attached service list.

If you have any questions regarding this filing, please call.

Very truly yours,

Richard D. Melson
Counsel for the Applicants

AFA
APP
CAF
CMP
COM
CTR
ECR
LEG
OPC
PAI
PSC
RGO
SEC 1
WAW
OTH

RDM/mee
Enclosure
cc: Attached Service List

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint application of MCI WorldCom, Inc. and Sprint Corporation for acknowledgment of approval of merger whereby MCI WorldCom will acquire control of Sprint and its Florida operating subsidiaries, ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398), Sprint Communications Company Limited Partnership d/b/a/ Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365	Docket No. 991799-TP Filed: January 20, 2000

RESPONSE OF MCI WORLDCOM AND SPRINT IN OPPOSITION TO TELECOMMUNICATIONS RESELLERS ASSOCIATION'S MOTION TO INTERVENE

MCI WORLDCOM, Inc. ("MCI WorldCom") and Sprint Corporation ("Sprint") (together "Applicants"), by their undersigned counsel, hereby file their response in opposition to the Motion to Intervene ("Motion") filed by the Telecommunications Resellers Association ("TRA") on or about December 13, 1999. Applicants assert that the TRA's Motion to Intervene should be denied for lack of standing for the reasons set forth below.

INTRODUCTION AND SUMMARY

1. As a preliminary matter, Applicants have never been served with the Motion. Counsel for Applicants became aware of the Motion on January 11, 2000, at which time counsel purchased a copy of the Motion from the Commission's Division of Records and

Reporting. The Motion contains no certificate of service and hence violates Rules 28-106.104(2)(f) and (4), Florida Administrative Code.

2. TRA bases its standing on the broad general contention that the merger of MCI WorldCom and Sprint "may adversely affect TRA members providing services in Florida" by adversely impacting the network services currently provided by MCI WorldCom and Sprint.

3. Under Florida law, to establish standing a person must demonstrate 1) an injury in fact that is substantial and immediate, not merely speculative or conjectural, and 2) the injury is of a type which the governing statute is designed to protect. Neither requirement is met here. The potential injury that TRA alleges is speculative and conjectural. In addition, Section 364.33 is not a merger review statute and is not designed to protect against the type of competitive and economic injury that TRA alleges.

TRA'S STANDING CLAIM HAS NO LEGAL BASIS

4. TRA filed its Motion to Intervene pursuant to Rule 25-22.039, Florida Administrative Code. Pursuant to that rule, petitions to intervene:

> . . .must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

TRA has not, and could not, allege any constitutional, statutory or rule provision which gives it a right to participate in this proceeding. TRA must therefore meet the traditional test of standing; namely, will its substantial interests be affected by the proceeding within the meaning of Chapter 120, Florida Statutes.

5. Although "substantial interest" is not defined by statute, the Commission has utilized the two pronged test for standing first articulated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981) rev. den. 415 So.2d 1359 (Fla. 1982). To establish standing under the Agrico test, a person must demonstrate that:

a. it will suffer an injury in fact which is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing; and

b. its substantial injury must also be of a type or nature which the proceeding is designed to protect.

First Prong of Agrico Test

6. Since the advent of Agrico's two-prong test, a number of cases have reaffirmed the test and clarified its application. First, in order to satisfy the first prong of the test, a person must show that he has more than a mere interest in the outcome of a proceeding. There must be a showing that the petitioner's rights and interests are immediately affected and thus in need of protection. Florida Society of Ophthalmology v. Board of Optomerty, 532 So.2d 1279 (Fla. 1st DCA 1988). Proceedings are

not open to everyone who may have an interest in the outcome of a particular case. Furthermore, the alleged injury cannot be speculative or conjectural. Village Park Mobile Home Association v. Department of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987) rev. den. 513 So.2d 1063 (Fla. 1987). While TRA, like many others, may be interested in the outcome of the merger, such interest is not enough to satisfy *either* prong of the Agrico test.

7. The Motion does not allege that TRA or its members will suffer any "injury in fact" of sufficient immediacy to entitle it to a Section 120.57 hearing. Indeed, while the Motion makes general allegations of injury, the lack of specificity makes it impossible to determine exactly what type of harm TRA contends may occur. The totality of the potential harm alleged by TRA is described in the paragraph 2 of the Motion as follows:

> The proposed merger of MCI and Sprint *may* adversely affect TRA members providing telecommunications services in Florida. Many TRA members rely on wholesale netowrk services provided by MCI and Sprint. *To the extent* that the merger will result in a narrowing of competitive network service providers and adversely impact the network services currently provided by both companies, the merger *could have* direct consequences for TRA members and the resale industry.
>
> (Motion ¶2, emphasis added)

In other words, *if* the merger results in a "narrowing of competitive network services providers" TRA fears that such narrowing *could* adversely affect network services used by its

members to provide competitive resold services. It is nothing more than speculation or conjecture to assume that the merger will adversely impact the Applicants' provision of network services. And there is absolutely no description of how any change to the network services offered by the Applicants would translate into specific injury to TRA or its members. As to standing, all of these allegations involve at most potential economic harm or highly speculative assumptions about future conduct that do not rise to the level of a present, actual "injury in fact" as required by Agrico.

8. A number of cases support the conclusion that economic or competitive claims such as those raised by TRA simply do not meet the first prong of the Agrico test for standing. In fact, the Commission cited and relied on many of these cases in holding that similar (and even more specific) allegations of economic and competitive harm by GTE and the Communications Workers of America ("CWA") were insufficient to give those parties standing to object to the earlier merger of WorldCom and MCI Communications Corporation. In re: Request for approval of transfer of control of MCI Communications Corporation, Docket No. 971604-TP, Order No. PSC-99-0702-FOF-TP (May 20, 1998) ("WorldCom"). In its decision in WorldCom, the Commission, after fully analyzing the positions of the parties, stated that:

> Upon consideration, we find that the allegations of GTE and CWA do not pass the first prong of the Agrico test. GTE's and CWA's allegations fail to demonstrate that either will suffer an injury in fact which is

> of sufficient immediacy to warrant a Section 120.57 hearing. Speculation as to the effect that the merger of MCI and WorldCom will have on the competitive market amounts to conjecture about future economic detriment. 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). This standard is equally applicable whether GTE is arguing its substantial interests as a competitor or as a customer. See Ameristeel, 691 So. 2d 473 (Fla. 1997).
>
> (Order No. PSC-98-0702-FOF-TP at 12, footnote omitted)

The general allegations of competitive and economic harm made by TRA in this case do not even rise to the level of specificity that was present in the WorldCom case, much less to the higher level that would be required to support standing under the first prong of Agrico.

9. The substantiality of TRA's alleged injury is further belied by its own request for relief. TRA does not request a

Section 120.57 evidentiary hearing on the application for transfer of control; instead, it wishes to intervene "for the specific purpose of monitoring this proceeding and submitting a brief." (Motion ¶3) Intervention is not required for TRA to "monitor" the proceeding. Further, since no party has requested an evidentiary hearing in this case, there will be no opportunity for submitting a brief. By failing to request an evidentiary hearing, TRA in effect has conceded the insubstantiality of its interest.

Second Prong of Agrico Test

10. TRA has also failed to meet the second prong of Agrico because the interests claimed in the Motion do not fall within the "zone of interest" which this proceeding is designed to protect. This proceeding is a request for approval of the transfer of majority organizational control of Sprint filed pursuant to Section 364.33, Florida Statutes. Section 364.33 is not a merger review statute. It authorizes the Commission to determine who should be allowed to own and operate telecommunications facilities in Florida. To the extent that a "public interest" determination is involved, the only issue is whether the public interest is served by the acquiring company's ownership and operation of telecommunications facilities in the state -- not whether a merger that company engaged in is or is not in the public interest.

11. In regard to the second prong of Agrico, this case presents exactly the same legal issue the Commission addressed in

the WorldCom case. Although the Commission dismissed the objections filed in that case by GTE and CWA on the grounds that they failed the first prong of Agrico, the Commission went on to conclude that "it appears to us that CWA and GTE have not satisfied the second prong of the Agrico test." (Order PSC 98-0702-FOF-TP at 16) As the Commission stated in its analysis:

> 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. It does not give us the ability to protect the competitive interests asserted by GTE and CWA. GTE and CWA have, therefore, failed to demonstrate that the injuries each has alleged is a substantial injury of a type or nature which a proceeding under Section 364.33, Florida Statutes, is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

The economic and competitive interests asserted by TRA in its Motion are no different than the types of interests asserted by CWA and GTE in the WorldCom case. The same conclusion must apply: TRA's interests are not within the "zone of interests" that the transfer of control statute is designed to protect. See, Ameristeel, supra.; Florida Society of Ophthalmology, supra.

CONCLUSION

12. When a person's standing to participate in a proceeding is contested, the burden is on the petitioner to demonstrate that he does, in fact, have standing to participate in the case. Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979). In this case, TRA has

totally failed to allege a substantial interest that meets either one, much less both, of the two prongs of the Agrico test for standing. Therefore, its motion to intervene must be denied.

RESPECTFULLY SUBMITTED this 20th day of January, 2000.

Jerry M. Johns
Charles J. Rehwinkel
SPRINT CORPORATION
315 S. Calhoun, Suite 500
Tallahassee, FL 32301
(850) 599-1002 (Tel)
(850) 224-0794 (Fax)

Richard D. Melson
HOPPING GREEN SAMS & SMITH, P.A.
P.O. Box 6526
Tallahassee, FL 32314
(850) 425-2313 (Tel)
(850) 224-8851 (Fax)

Donna Canzano McNulty
MCI WORLDCOM, INC.
325 John Knox Road
Ste. 105
Tallahassee, FL 32303
(850) 422-1254 (Tel)
(850) 422-2586 (Fax)

Jean L. Kiddoo
Edward S. Quill, Jr.
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7834 (Tel)
(202) 424-7645 (Fax)

COUNSEL FOR THE APPLICANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was provided by Hand Delivery (*) or Overnight Mail (**) to the following persons this 20th day of January, 2000.

Donna Clemons (*)
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Andrew O. Isar (**)
Telecommunications Resellers Association
3220 Uddenberg Lane, Suite 4
Gig Harbor, WA 98335

Attorney