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Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

March 10, 1998

Re: Docket No. 971604-TI
Request for approval of transfer of control of MCI Communications Corporation (parent corporation of MCI Metro Access Transmission Services, Inc., holder of AAV/ALEC Certificate 2988, and MCI Telecommunications Corporation, holder of IXC Certificate 61, PATS Certificate 3080, and AAV/ALEC Certificate 3996) to TC Investments Corp., a wholly-owned subsidiary of WorldCom, Inc. d/b/a LDDS WorldCom

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE's Memorandum in Opposition to Joint Motion of WorldCom, Inc. and MCI Communications Corporation to Dismiss GTE Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2617.

ACK
AFA
APP
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Very truly yours,

Kimberly Caswell/dm

Kimberly Caswell
KC:tas
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Request for approval of merger of MCI Communications Corporation (Holder of AAV/ALEC Certificate 2988 in the name MCI Metro Access Transmission Services, Inc.; and IXC Certificate 3998 in the name of MCI Telecommunications Corp.) with TC Investments Corp., a Wholly-Owned Subsidiary of WorldCom, Inc.	)	Docket No. 971604-TI Filed: March 10, 1998

GTE'S MEMORANDUM IN OPPOSITION TO JOINT MOTION OF WORLDCOM, INC. AND MCI COMMUNICATIONS CORPORATION TO DISMISS GTE PETITION ON PROPOSED AGENCY ACTION AND REQUEST FOR SECTION 120.57 HEARING AND CWA PETITION TO INTERVENE AND PROTEST OF PROPOSED AGENCY ACTION

GTE Corporation and GTE Communications Corporation (collectively, GTE) ask the Commission to deny the Joint Motion of WorldCom, Inc. and MCI Communications Corporation to Dismiss GTE Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action (Motion to Dismiss). That Motion provides no basis for lawfully dismissing GTE's Petition on the Proposed Agency Action to approve the proposed merger of WorldCom, Inc. (WorldCom) and MCI Communications Corporation (MCI) (collectively, Applicants). The Applicants have mischaracterized GTE's interest in this case, misrepresented the facts that ground GTE's standing, and misapprehended the law supporting GTE's Petition.

I. **The Joint Motion Does Not Meet the Legal Standard for Dismissing GTE's Petition.**

Commission Rule 25-22.036 states that the Commission may deny a petition on proposed agency action for one of two reasons: "if it does not adequately state a

substantial interest in the Commission determination or if it is untimely." Fla. Admin. Code sec. 25-22.039(3)(b)1. There is no question that GTE's Petition was timely filed. Therefore, the Commission may grant the Motion to Dismiss only if the Petition fails to state a substantial interest in the outcome of this case. In making this evaluation, the Commission must take all of GTE's allegations in the Petition as true, and must consider them in the light most favorable to Petitioner GTE. See, e.g., In re: Petition for Arbitration of Dispute with BellSouth, PSC-97-0072-FOF-TP (Jan. 23, 1997); Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993); Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (1985); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA 1968).

Applying these standards, Applicants' Motion to Dismiss fails to provide any basis for dismissing GTE's Petition, which discusses at length GTE's substantial interest in this case as both a customer and competitor of the merged entity. As a reseller, GTE buys most of its long distance minutes from WorldCom. The Petition, including the Affidavit of Dr. Robert G. Harris, details how approval of the requested transfer of control will alter WorldCom's practices and incentives in the wholesale long distance market, including expected discontinuation of innovative wholesale features and less favorable pricing. This outcome will undermine competition in the wholesale market (and, in turn, the retail market) and hinder GTE's and other resellers' long distance business. GTE has further explained that the merger will also harm competition by reducing the number of major interexchange carriers (IXCs) from four to three, and by removing an actual competitor for local exchange service in several Florida markets.

GTE has thus raised fundamental market development issues that will affect GTE's and other resellers' operations (as well as consumers) in the long-term. (As GTE made clear in its Petition and its earlier Reply to the Applicants' Opposition to GTE's intervention, GTE's interest is not, as WorldCom repeatedly misstates, merely that GTE "is in danger of losing its WorldCom contract." (Motion to Dismiss at 1, 3, 4.)) These issues are central to the public interest analysis the Commission is required to perform in this case. This public interest analysis is necessarily fact-based and, for purposes of the Motion to Dismiss, the Commission must accept as true GTE's version of the facts--that the merger will have negative consequences for the wholesale long-distance market in which GTE operates and upon which its business depends. It must also accept GTE's conclusion that the merger will likely decrease, rather than increase, competition at several levels and that it will cause more harm than good for consumers, including resellers like GTE.

Because GTE's factual conclusions must be deemed accurate and its arguments regarded in the most favorable light, there is no basis for dismissing the Petition for failure to make out a substantial interest and there is no basis for denying the section 120.57(1) hearing the Petition seeks. To grant the Motion to Dismiss, the Commission would have to conclude that GTE's allegations, assumed to be true, provide no reasons for denying the Application or for at least setting this matter for hearing. If the Commission were to grant the Motion to Dismiss, it would be tantamount to deciding that detrimental effects on rates, services, and competition are not at all relevant to the Commission's determination of whether the transfer of control is in the public interest. The Commission cannot lawfully

or even plausibly take such action.

II. The Applicants Have Misrepresented the Facts Grounding GTE's Petition.

Applicants' assertion that GTE lacks any substantial interest in informing this Commission of the problems associated with the proposed merger is simply wrong. Even at this early stage in the proceedings, their argument is revealed to be transparently flawed. The flaws will become even more obvious once the Commission's investigation--including Staff data requests and discovery--is underway.

Applicants' Motion attempts to raise a number of relatively peripheral issues, in order to divert the Commission's attention from the big picture: WorldCom is GTE's principal wholesale supplier of long distance services in Florida. WorldCom is in that position because--as an independent supplier that, unlike MCI, was not also a retailer of long distance services--it had the incentive in 1996 to underbid MCI and the other IXCs within the state. If the Applicants' merger is approved as proposed, WorldCom's incentives would change substantially, raising costs to GTE, and raising prices to Florida consumers.

A. GTE's Contract With WorldCom Does Not Eliminate the Need to Keep WorldCom as an Independent, Competitive Supplier.

Applicants first contend that, because GTE has a multi-year contract with WorldCom, GTE cannot have a good faith interest in ensuring that WorldCom maintain a strong incentive to offer GTE favorable contract terms for wholesale long distance services.

This argument is based on a false premise. As Applicants note, GTE is unable to provide the Commission with a copy of the contract itself, because it is confidential. (Supplemental Declaration of Debra Covey, attached, at para. 3.) GTE *can* inform the Commission, however, that *the obligations under the contract will very shortly no longer run both ways*. Although WorldCom will then remain obligated under the contract, *nothing* in the contract will prevent GTE from purchasing the same services from another provider, or, therefore, from re-negotiating the terms of the existing contract with WorldCom (or, indeed, from walking away from the contract altogether). *Id.* In this circumstance, it is very much in GTE's interest that WorldCom remain the independent, competitive, supplier that it was in 1998, when WorldCom outbid MCI and other IXCs to land GTE as a customer of wholesale long distance services. *Id.* Were WorldCom to join forces with MCI, WorldCom would have little (or, at a minimum, substantially less) incentive to offer GTE services at rates that would enable GTE to undercut MCI's prices. *Id.* This circumstance alone renders invalid Applicants' argument that GTE has no substantial interest in the proposed merger.

B. The "Availability" Of Qwest Fiber Is Not a Panacea that Would Remove the Need for the Competitive Environment that WorldCom's Independence Has Created.

Applicants also misunderstand GTE's position with respect to Qwest. While it is true that GTE has purchased fiber from Qwest, it could take years for that fiber to be "lit" (*i.e.*, usable) throughout Florida. (Covey Supplemental Declaration at paras. 17-19.)

Furthermore, regardless of when the Qwest fiber is lit, it will always be critical to GTE that WorldCom remain a viable and independent competitor to sell wholesale long distance services. WorldCom has been the *leader* in lowering the prices of these services. (Covey Supplemental Declaration at paras. 7-9.) For the market to lose this leader will only result in higher prices for Florida consumers.[1]

C. GTE Needs WorldCom to Obtain (and Offer Consumers) Enhanced Services at the Lowest Prices Possible, and With the Fewest Strings Attached.

To stay competitive, GTE needs to be able to offer a full range of services, including what are known as "enhanced services." (Covey Supplemental Declaration at paras. 11-

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[1] With its Petition, GTE submitted the Affidavit of Dr. Robert Harris, which explained (at p. 9 & Ex. 15) the limitations of the company's ability to use Qwest. Applicants take issue with this statement, pointing to the Affidavit of Applicants' witnesses, Dennis Carlton and Hal Sider, at para. 15. (Motion to Dismiss at 5 & n.4). In fact, the cited text of Carlton and Sider has nothing to do with Qwest.

Applicants seek to make much of a nearly year old GTE press release regarding Qwest fiber. As explained more fully in the Supplemental Declaration of Debra Covey, at para. 19, a number of Applicants' statements regarding the press release are misleading. First, the press release says nothing about Florida. Second, the press release discusses providing the *foundation* for a myriad of high speed data communication services; it does *not* discuss a full long distance (as opposed to data) network. All Qwest will do is provide a backbone, a foundation, for other things--it will in no sense create a full-blown long distance network. The press release was focused on the GTE corporate data strategy only, and not on long distance. Finally, the press release was written in early May of 1997, and is somewhat out of date. Much of the planned capability will not be completed until 1999 or later. Even when that happens, it does not mean that a GTE long distance network will exist in Florida. There will still very much be a need to have the capacity that WorldCom provides. If WorldCom is not interested at that point in renewing its wholesale contract with GTE, the ability of GTE Long Distance to provide the kind of long distance service in Florida that it now provides will be seriously damaged.

16.) The term "enhanced services" encompasses a number of products—including virtual private network (VPN), ATM, Frame Relay, Private Line services, ISDN, and enhanced 800 services. As set forth more fully in Ms. Covey's Supplemental Declaration (at paras. 11-16), each product requires additional network overlays of hardware and operations processes, all of which take time to engineer and manage. In some cases, the service is integral to the network and cannot be "added on." Some services include real time network management and monitoring for both voice and data services. These enhancements are frequently proprietary, and providers are unwilling to offer them for resale. The most common services are VPN and advanced 800 services to serve large call center applications. These services require direct access and control over the network in order to be effectively managed. *Id.*

In their Motion to Dismiss, WorldCom and MCI indicate that GTE lacks standing to complain, in part, because WorldCom is not *currently* providing GTE with these enhanced services. However, while it is true that WorldCom is not providing most of these services *at this time*, WorldCom has shown itself willing to consider, upon request, a development schedule and cost for adding such features. *Id.*

The fact is that the enhanced products represent the next competitive wave of wholesale products, and to reduce the number of competitors in this venue would significantly reduce any pressure felt to deliver the products or to deliver them at the lowest reasonable price. *Id.*

For reasons explained more fully in Ms. Covey's Supplemental Declaration, in most cases MCI has chosen *not* to make these products available through its wholesale offering

on competitively neutral terms. The result of this position is, in effect, to hinder GTE from competing in the market for enhanced services (even though the services might technically be available), because, among other things, the services are not available for rebranding by GTE. *Id.* WorldCom is working to correct this anomaly; to lose WorldCom as an independent, disinterested seller would be harmful to GTE and to competition in Florida.

D. It is Inappropriate to Reject GTE's Claims Before Applicants Have Been Required to Reveal Information Related to Those Claims.

Applicants' unfounded assertions that, in light of Applicants' unproven--indeed, undisclosed--post-merger plans, GTE has nothing to worry about, are no basis for a motion to dismiss. As set forth in GTE's Petition (and expanded elsewhere herein), GTE does have a strong interest in this matter, for WorldCom's merger will remove what is GTE's most important supplier in this state, a supplier that will be impossible to replace. While Applicants may hope to contest that fact, it would be unfair to allow them even to try to do so before they have provided information related to it--as well as contrary to the law requiring the Commission to assume GTE's factual assertions to be true. (See Section I, above.)

As an example only, Applicants contend that it is "pure speculation" to argue that, following the merger, WorldCom would not have a decreased incentive to offer discounts to GTE. (Motion to Dismiss at 2). Applicants offer *no* support for this argument, other than a vague statement that "MCI and AT&T presently make significant wholesale sales, despite their large retail operations." *Id.* But how "significant," we cannot say, for

Applicants have not provided this information. Moreover, if MCI and AT&T did, in fact, have the same strong incentives that WorldCom does to sell GTE wholesale services at a low price, then why were they unwilling to match WorldCom's offer to provide those services to GTE in 1998?

Applicants' *ad hominem* remarks to the contrary, GTE's "theories" are not "belied by the facts." (Motion to Dismiss at 2). If the facts support either party at this early stage, it is GTE (and, of course, GTE's factual statements must be taken as true for purposes of the Motion to Dismiss). More to the point (in the context of a motion to dismiss), once Applicants are required to disclose facts in support of their application, including the facts requested by GTE--those facts will confirm GTE's conclusions and its substantial interest in this case. Given that context, it is entirely inappropriate for Applicants to avoid scrutiny through a motion to dismiss. As GTE argued in its Petition, GTE should not be penalized for the Applicants' failure to provide the Commission any meaningful information about the proposed transaction--information that would verify GTE's showing of substantial interest. (Petition at 13.)

E. GTE's Continued Participation in These Proceedings Will Assist the Commission and Promote the Public Interest.

Even apart from GTE's interests, it is in the Commission's (and thus in Florida consumers') interests for GTE to remain in this case. In their four-page "letter application," Applicants have provided *no* meaningful information to help this Commission make its public interest determination. As examples only:

- Although Applicants allege that MCI (and AT&T) "presently make significant wholesale sales, despite their retail operations," nowhere is the word "significant" defined, nor is this information anywhere provided with the Application.

- Applicants imply that they do not intend that the merger will not result in a loss of jobs in Florida, but provide no evidence to this end.

- Chairman Johnson has already observed that GTE's comments at the agenda prompted her to consider more closely the potential effects of the merger. (Jan. 7, 1998, Agenda Conf. Tr., Item 10, at 35-36, 49.). As a party to the proceedings, GTE can seek, obtain, and synthesize for the Commission information related to the public interest, and thus serve as a necessary check against Applicants' often unsubstantiated (and incorrect) factual assertions.

In short, as GTE explained at greater length in its Petition, the already-demonstrated educational benefits of GTE's participation in this proceeding are additional, important support for concluding that GTE has standing in this matter. (See Petition at 14-17; Petition of Talquin Elec. Coop., Inc. to Resolve Territorial Disputes with City of Tallahassee, 89-5 FPSC 439 (1989); Petition to Establish Amortization Schedule for Nuclear Generating Units to Address Potential for Stranded Investment by Florida Power & Light, 95 FPSC 367 (1995); Petition of Continental Tel. Co. of the South for Waiver of Rule 25-4.345(4), Florida Admin. Code, 83 FPSC 141 (1983).

III. WorldCom and MCI Misapprehend the Legal Standards that Apply to this Case.

In its Petition and its earlier Reply to the Applicants' Opposition to GTE's Petition to Intervene, GTE explained its substantial interest as both customer and competitor to the merged entity. "Substantial interest" is the standard for entitlement to intervene and to

protest proposed agency action. This term is not defined by statute, leaving the Commission to develop its meaning through its own decisions. See Investigation of the Rates and Charges of Southern Bell Tel. & Tel. Co., 7 FPSC 749 (1970). To this end, GTE cited over 50 cases supporting its standing in this matter. Time and again, the Commission has confirmed that resellers and other purchasers--either actual or potential--of inputs used to provide retail service have a patently substantial interest in proceedings that might affect the market for the service at issue. (See Protest at 6-7 and cases cited in n. 3.) These reseller cases are just a subset of the innumerable instances in which customer status was an unquestioned basis for finding substantial interest in all manner of Commission proceedings, whether that customer was an individual consumer, private corporation or governmental entity. (See Protest at 7 and cases cited in n. 4.) The Commission has just as routinely granted standing to competitors as to customers, even in cases that do not present nearly the depth and breadth of issues that this merger application does. (See Protest at 7-8 and cases cited in n. 5.) Indeed, MCI itself has often sought and been granted standing in past cases on the basis of its plainly stated interest as a competitor in the market at issue, so Applicants cannot plausibly dispute the sufficiency of GTE's interests here. See, e.g., Application of United Tel. Long Distance, Inc. for a Certificate of Public Convenience and Necessity as a Reseller, 87 FPSC 124 (1987) (granting MCI intervention in proceeding to certificate toll reseller, on the basis of MCI's status as an IXC); US Sprint Comm. Co.'s Petition for Hearing on Bijurisdictional WATS Access Line Policy, 87-11 FPSC 345 (1987); Southern Bell Tel. and Tel. Petition to Initiate Rulemaking Re: Shared Tenant Services, 85 FPSC 309 (1985) (granting MCI's

intervention on the basis of its argument that "since 'smart buildings' ordinarily operate to concentrate the interexchange traffic of unrelated customers, such action could affect the number and size of potential customers for MCI's interexchange services").

Nevertheless, Applicants apparently take issue with the factors the Commission has considered in the past to grant MCI and others standing. They state that the many cases GTE cites "do not confer standing on GTE, or anyone else, under the Agrico standard." (Motion to Dismiss at 12 [emphasis added].) Obviously, the Commission disagrees. Standing was conferred on everyone petitioning for it in the cases cited, whether or not the Commission founded its decision explicitly on Agrico Chemical Co. v. Dep't of Environmental Reg., 406 So.2d 478 (Fla. 2d DCA 1981). And all of these cases--involving resellers, customers, and competitors--directly support GTE's arguments that it will suffer the kind of injury sufficient to entitle it to standing. The fact that GTE would be both reseller/customer and competitor to the merged entity makes its substantial interest undeniable.

Because there is no statutory definition of "substantial interest," and because the parameters of an agency's standing test are developed through its decisions, Commission precedent is necessarily the best guide for the Commission's standing evaluation in this case. To this end, while the Commission has cited Agrico as a guide for substantial interest evaluations, it does not mechanically apply the Agrico criteria (which are: (1) an injury of sufficient immediacy to warrant a formal hearing; and (2) that the proceeding be of the type intended to address the concerns raised.) Rather, it has used a deliberately "broad interpretation of the term 'substantial interest.'" Bell Tel., 7 FPSC 749, supra. The

Commission's standing decisions are necessarily adapted to the exigencies of the administrative process and informed by public interest considerations with which courts need not concern themselves. (Protest at 6.)

Because this Commission precedent does not square with the Applicants' challenge to GTE's standing, they largely ignore it. They mention only one Commission decision, Application for Certificate to Provide Interexchange Telecommunications Service by Atlas Comm. Consultants, Inc., 94 FPSC 1:358 (1994), which does not at all undermine GTE's standing arguments. In Atlas, Best Telephone Company protested the certification of Atlas Communications, alleging injury because Best had targeted and signed up customers of Best. As Applicants note, the Commission there found that nothing in Chapter 364 gives long distance carriers "a legally cognizable interest in being free from competitive injury." (Motion to Dismiss at 9, quoting Atlas.) GTE would agree. GTE is not asking the Commission to protect it from competition. In fact, one of GTE's primary interests in this case, as it has explained over and over, is as a customer of the merged entity. GTE is not even currently a participant in the wholesale market that is the focus of GTE's concerns in this case.

Aside from Atlas, Applicants cite three court cases for the conclusion that "economic or competitive claims raised by GTE and CWA simply do not meet the first prong of Agrico." (Motion to Dismiss at 9.) But, like the interest presented in Atlas, all of the interests asserted in these cases are easily distinguished from GTE's interests here.

In Microtel, Inc. v. Fla. Pub. Serv. Comm'n, 464 So.2d 1189 (1985), the Florida Supreme Court found the Commission acted properly in denying Microtel standing to

protest certification of other IXCs. Microtel, the first company certified to provide intrastate long-distance service in Florida, argued that it was entitled to be protected from competition until it had sufficiently established itself in the market.

Ameristeel Corp. v. Clark, 691 So.2d 473 (1997), involved the Commission's evaluation of a territorial agreement between power companies. The Florida Supreme Court affirmed the Commission's denial of standing to Ameristeel because "its corporate interests remain[ed] completely unaffected and in no way injured" by the utilities' territorial agreement and because Ameristeel's interest in low rates was not intended to be protected in proceedings based on the applicable statutory mandate to avoid uneconomic duplication of facilities. Id. at 478.

In ASI, Inc. v. Fla. Pub. Serv. Comm'n, 334 So.2d 594 (1976), ASI, a motor carrier, unsuccessfully appealed the Commission's rejection of ASI's protest of the Commission's award of a permit to another freight delivery service. The Supreme Court explained that the permitting statute did not require any public interest determination before a permit was awarded; rather, permits were to be issued as a matter of right. Id. at 596.

None of these cases are germane to GTE's arguments here. Unlike Microtel, GTE has never claimed any right to be free of competition. In fact, as noted, GTE is not even a competitor in the wholesale market in which it buys capacity, and all of GTE's arguments are directed to increasing, rather than decreasing, competition in the long-distance and local markets. Unlike the Ameristeel and ASI cases, there is no statute here specifically limiting the Commission's discretion to consider the interests GTE has presented. To the contrary, the statutory public interest standard governing this merger assessment gives

the Commission ample latitude to consider the market and consumer issues GTE has raised. GTE has, moreover, shown in its Petition and Affidavits (and the Commission must take as true here) that its corporate interests will be affected by the merger's removal of WorldCom as the maverick supplier in the wholesale long distance market.

In addition to their citing inapposite court precedent, Applicants mislead the Commission with their assertions indicating that economic injury is insufficient to meet Agrico's injury requirement. (Motion to Dismiss at 9.) This is simply not true. While, as noted, protection from competition is not an adequate basis for standing, potential economic injury will confer standing. The distinction between the two is clarified in Florida Medical Ass'n et al. v. Dep't of Professional Regulation et al., 426 So.2d 1112 (Fla. 1st DCA 1983). The Court there overturned an administrative ruling dismissing, for lack of standing, a rule challenge petition filed by a group of ophthalmologists. The rule would have permitted optometrists to treat patients who would otherwise have to obtain such treatment from ophthalmologists. The ophthalmologists thus claimed the rule would cause them potential economic injury. The Court explained:

> While we readily accept the premise that physicians, ophthalmologists in particular, have 'no legally recognized interest in being free from competition...,' ASI, Inc. v. Florida Public Service Commission, 334 So.2d 594, 596 (1976), it by no means follows that the assertion of interest economic in nature can never furnish the basis for standing....

Fla. Medical Ass'n at 1115.

The Court then cited a number of other decisions confirming that economic interest will ground standing: State Dep't of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1052 (Fla. 1st DCA 1979) (physician satisfied substantial interest requirement

by showing that an agency cut-off of funds for elective abortions decreased the number of patients served by the doctor's abortion clinic); Professional Firefighters of Fla., Inc. v. Dep't of Health and Rehabilitative Services, 396 So.2d 1194 (Fla. 1st DCA 1981) (allegations that agency's proposed rules on licensing of paramedics affected the "continued employment" of Association members, and would injure individual members "monetarily" held sufficient to confer standing); Sierra Club v. Morton, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (economic injuries "have long been recognized as sufficient to lay the basis for standing"), citing Data Processing Service v. Camp, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); Barlow v. Collins, 397 U.S. 159, 25 L. Ed. 192, 90 S. Ct. 832 (1970); Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976).

The fact that economic injury is a sufficient basis for standing is reflected in the numerous cases GTE cited in its protest. In all of those cases--and probably every other one in which a corporation has sought and been granted leave to participate--the companies (and consumers) were necessarily seeking to protect their economic interests, just as GTE is doing here. GTE is not asking to be free of competition; it is, rather, interested in the maintenance of competitive market conditions that will allow the wholesale market (and thus the retail market) to flourish.

Finally, Applicants seem to confuse the standard for approving a transfer of a certificate with the standard for granting standing. They dismiss GTE's citation of precedent with the argument that only one of the cases involved a transfer of a certificate. But resolution of the standing dispute depends on an analysis of the Commission's

substantial interest standard, not its standard for approving requests for transfer of certificates. In deciding whether a party has an interest substantial enough to ground standing, the Commission will consider common factors, regardless of the substantive nature of the case. It doesn't matter if some of the cases cited by GTE involve establishment or revision of "rates or policies of a regulated utility" or anything else, for that matter. (Applicants' Motion at 12.) Plainly stated, standing cases have precedential value for other standing cases.

In any case, GTE points out, once again, that the standing cases it has cited cover the spectrum in terms of their substantive contexts. With specific regard to the Applicants' faulting GTE for citing only one transfer case, GTE reminds the Applicants that the statutory standard for evaluating a transfer of control application (i.e., whether it is in the public interest) is the same as that governing original certificate applications (see Fla. Stat. sec. 364.335(4)--and GTE has, in fact, cited several original certification proceedings. (See Petition at n. 5.) With this identity of standards in mind, it is instructive to consider MCI's rationale for intervening in Application of Centel Network Comm., Inc., d/b/a Centel Net for Authority to Provide Interexchange Telecommunications Services, 89-9 FPSC 284 (1989), an original certification proceeding. MCI successfully argued there that granting a certificate to a potential IXC competitor would "have an adverse effect on the competitive interexchange market as well as having an effect on MCI's ability to offer telecommunications services in the future." The situation here is exactly the same--the merger will have an adverse effect on the interexchange market as well as having an effect on GTE's ability to offer telecommunications services in the future.

Now, however, MCI argues just the opposite of what it did in Centel. Here, MCI and WorldCom are trying to convince the Commission that adverse market effects are immaterial to the Commission's deliberations. They contend that GTE's interest is necessarily outside the zone of interests this proceeding is designed to address because the Commission has no jurisdiction to review the merger in the first place. (Motion to Dismiss at 11.) For this astonishing proposition, Applicant provides just one cryptic cite--"Order PSC-97-1370-FOF-TP"--unaccompanied by any case caption, decision date, or explanation of the case. In fact, that decision is Complaint by MCI Telecomm. Corp. against GTE Florida Incorporated Regarding Anticompetitive Practices Related to Excessive Intrastate Switched Access Pricing, decided on October 29, 1997. As the Commission may recall, MCI had complained in that case that GTE Florida Incorporated's intrastate access charges were "excessive" and thus anticompetitive and unlawful. The Commission granted GTE Florida's motion to dismiss MCI's complaint, concluding that Florida Statutes section 364.163 prohibited the Commission from ordering the access charge reductions MCI sought.

GTE has no idea what this decision dismissing MCI's access charge complaint has to do with the application for transfer of control under review in this case. It certainly does not support MCI's contention that the Commission has no jurisdiction to determine whether the contemplated merger is in the public interest.

In fact, MCI's newly formulated legal theory about the Commission's lack of jurisdiction to review the merger is at odds with its earlier statements and actions in this case. In the letter that Applicants have called their "application," they expressly ask the

Commission to "approve the merger" and include a section entitled "Public Interest Considerations" associated with the merger. (Letter from T. Bond and R. D. Melson, counsel for MCI and J. L. Kiddoo and F. R. Self, counsel for WorldCom, to B. Bayo, Director, Division of Records and Reporting, Florida Public Service Commission, dated Nov. 25, 1997, at 1, 3-4, 5.) If, as Applicants claim, the Commission has no authority to determine "whether a merger [a] company is engaged in is or is not in the public interest" (Motion to Dismiss at 10), Applicants would have had no reason to ask the Commission to approve the merger or to offer reasons why the merger is purportedly in the public interest.

Again, MCI's legal theories are contrary to Commission precedent, as well as the Florida Statutes. As GTE explained in its Protest, under section 364.33 of the Florida Statutes, the contemplated merger cannot occur here unless the Commission approves it. The standard for approval of a transfer of control is whether it will be in the public interest, as reflected in Florida Statutes, section 364.335(2), (3) and (4), Commission Rules 25-24.473 (governing transfer of IXC certificates) and 25-24.730 (governing transfer of alternative access vendor certificates), and Commission actions under these statutes and rules. Applicants in transfer of control cases have the burden of proof, and they must provide the Commission with the information it needs to determine whether the proposed transaction is in the public interest. Application of Metro Comm. Network for Transfer of IXC Certificate to Profit Concept Systems of Lake County d/b/a Metro Long Distance, 89-6 FPSC 385 (1989).

In view of this authority, it would certainly come as a surprise to the Commission that it has no jurisdiction to assess whether the merger is consistent with the public interest. In past transfer of control cases, the Commission has, for example, cited a transaction's likelihood of providing "improved services and lower rates, thereby promoting competition in Florida," Request for Approval of Merger of Shared Technologies Fairchild, 97 FPSC 10:320, 321 (1997), and has found that a merged entity would provide "quality service at a reasonable price in a competitive environment and would therefore be in the public interest." Petition for Expedited Approval of Indirect Change of Control of NYNEX Long Distance Co., 97 FPSC 1:55, 56 (1997). Even MCI's counsel has admitted that the standard the Commission has applied in the past "is what will be the impact on customers." (Jan. 7, 1998 Agenda Conf. Tr., Item 10, at 11.) These factors--rates, services, competition, and the general effect on customers--are all, of course, public interest considerations.

Because Applicants are wrong in their conclusion that the Commission cannot consider the merger's impact on the public interest, they are, in turn, wrong in their argument that GTE's interest is not within the "zone of interests" this proceeding is intended to address.[2] As GTE pointed out in its Petition, the issues it has raised,

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[2] Although GTE has satisfied the "zone of interest" test, it is worthwhile to note that there is doubt as to whether that test survives in Florida. The Florida Medical Ass'n Court, for instance, included this quote from the leading administrative law treatise: "'Is the 'zone' test the law? The best answer is: Sometimes it is but most of the time it is not, and a criterion for determining when it is the law is completely absent.'" Id., at 1116, quoting Davis, Administrative Law Treatise, sec. 22.0211 (1982 Supp.), "The 'Zone' Test," at 347. Judge Ferguson, dissenting in Int'l Jai-Alai Players Ass'n v. Fla. Pari-Mutuel Comm'n et al., observed: "There is considerable doubt whether that part of the standing test from Agrico Chem. Co. v. Department of Envtl. Regulation, 406 So.2d 478 (Fla. 2d DCA 1981),

concerning rates, services, competitive conditions, and market development, are at the heart of this Commission's regulatory mission. It defies logic, as well as the statutory public interest standard governing this case, to suggest that the Commission should ignore these concerns just because they arise in a merger context.

* * *

For all the reasons stated in this filing, GTE asks the Commission to deny Applicants' Motion to Dismiss GTE's Protest and to instead grant GTE the relief it has requested--denial of the requested transfer of control or at least a section 120.57(1) hearing to determine whether the merger would be in the public interest. As GTE pointed out in its Petition, the Commission need not feel pressured to rush to judgment on this largest-ever merger, because it is still under investigation by federal (and now, European) authorities as well as by other states. In fact, on February 27, the FCC granted an additional pleading cycle to allow parties a meaningful opportunity to comment on information that WorldCom and MCI first filed almost four months after their FCC application for transfer of control. Application of WorldCom, Inc. and MCI Comm. Corp. for Transfer of Control of MCI Comm. Corp. to WorldCom, Inc., Order, CC Dkt. No. 97-211 (Feb. 27, 1998); see also Exhibit 1 (March 4, 1998 article in Agence France Presse) ("The European [C]commission has decided to make a thorough investigation of the merger

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rev. denied, 415 So.2d 1359 (Fla. 1982), which requires a petitioner to assert that his substantial interest is of the nature which the proceeding was designed to protect, has survived the Supreme Court's decision in Florida Home Builders Ass'n." See also Dove, "Access to Florida Administrative Proceedings," 13 Fla. St. U. L. Rev. 965, 1066 (1986).

project."); Exhibit 2, at 7 (March 6, 1998 Order by Pennsylvania Commission ALJ, denying motion to dismiss GTE's protest, and holding that Applicants must affirmatively prove that the merger would be in the public interest; on this issue, "Surely the effect on competition . . . will be germane. . . .").

Respectfully submitted on March 10, 1998.

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- EXHIBIT 1

LEVEL 1 - 1 OF 45 STORIES

March 04, 1998 EU-US-telecom 11:24 GMT

SECTION: Financial pages

LENGTH: 144 words

HEADLINE: EU Commission to probe Worldcom-MCI merger plan

DATELINE: BRUSSELS, March 4

BODY:
The European commission has decided to make a thorough investigation of the merger project announced by US telecommunications groups Worldcom and MCI, a commission spokesman announced on Wednesday.

The commission's competition officials want information on the two groups' combined market shares under terms of the planned merger, and especially in connection with supplying Internet basic architecture services, the spokesman said.

These services relate, inter alia, to supplying a network of high-capacity and long-distance connections able to carry data nationally and internationally, and interconnected with networks of a similar size.

Under the EU procedures, the commission now has 4 months to make a final decision on the project. Commission sources said the launch of a thorough investigation did not in any way prejudge the outcome.

gw/hl

LOAD-DATE: March 04, 1998

EXHIBIT 2

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint Application of WorldCom, Inc., MCI Communications Corporation, MCI Telecommunications Corporation and MCI Metro Access Transmission Services for approval of merger through the transfer of stock.	:	Docket Number A-312025F0002 A-310236F0004

ORDER DENYING MOTION TO DISMISS

Under cover letter dated October 14, 1997, WorldCom, Inc. submitted its Application of WorldCom, Inc. for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc. (Application) to the Pennsylvania Public Utility Commission (Commission). Before the Application was filed by the Commission, WorldCom, Inc., MCI Communications Corporation, MCI Telecommunications Corporation, and MCI Metro Access Transmission Services (joint applicants) filed a Joint Application of WorldCom, Inc., MCI Communications Corporation, MCI Telecommunications Corporation, and MCI Metro Access Transmission Services (Joint Application) on November 26, 1997, as an amendment to the Application. Both the Application and the Joint Application were docketed at Docket Number A-310236F0004 and Docket Number A-312025F0002.

Notice of the filing of the Joint Application was published in the Pennsylvania Bulletin on December 20, 1997, with protests or petitions to intervene being due on or before January 5, 1998.

On January 5, 1998, GTE Corporation and GTE Communications Corporation (joint protestants) filed a Protest (Joint Protest) against the Joint Application.

By Notice dated February 5, 1998, an Initial Prehearing Conference was scheduled for April 3, 1998, and the case was assigned to Administrative Law Judge Louis G. Cocheres.

By Hearing Change Notice dated February 6, 1998, the Initial Prehearing Conference was re-scheduled to February 20, 1998, and the case was re-assigned to me.

By Initial Prehearing Conference Order dated February 5, 1998, I directed joint applicants, joint protestants, the Commission's Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA), all of whom appeared on the service list, regarding preparation for the Initial Prehearing Conference and the submission of Prehearing Conference Memoranda.

On February 13, 1998, Linda C. Smith, Esquire, a member of the Pennsylvania Bar, filed Motions for the admission Pro Hac Vice of Jean L. Kiddoo, Esquire, Pamela S. Arluk, Esquire, Kathy L. Cooper, Esquire, and Michael W. Fleming, Esquire, on behalf of WorldCom, Inc., and Michelle Billand, Esquire, on behalf of MCI

Telecommunications Corporation. These Motions were granted by Orders dated February 13, 1998.

On February 13, 1998, joint applicants filed and served a Motion To Dismiss Protest Or Alternatively To Establish An Expedited Schedule (Motion To Dismiss) directed against the Joint Protest.

Under cover letter dated February 17, 1998, joint applicants submitted Objections and Responses to joint protestants' First Set Of Interrogatories And Requests For Production Of Documents.

On February 18, 1998, Communications Workers of America (CWA) late filed a Petition to Intervene (Petition).

The Initial Prehearing Conference occurred as scheduled on February 20, 1998. Joint applicants, joint protestants, and CWA attended and participated. OTS, OCA, and OSBA did not attend the prehearing conference, nor did they submit the required Memoranda.

By Hearing Notice dated February 20, 1998, an Initial and Further Hearings were scheduled for April 8, 1998 through April 10, 1998.

On February 23, 1998, joint protestants timely filed and served an Answer and New Matter (Answer) to joint applicants' Motion To Dismiss.

By Order Granting Permission To Intervene dated February 24, 1998, CWA's Petition was granted and CWA admitted as an intervenor.

By Scheduling Order dated February 24, 1998, a schedule for the proceedings in this case, to include submission of written testimony and of Briefs, was established.

Under cover letter dated February 25, 1998, joint applicants submitted Additional Responses to questions 1 and 52 of joint protestants' First Set of Interrogatories.

By Amended Scheduling Order dated February 26, 1998, the Scheduling Order dated February 24, 1998 was corrected to add the due date for filing and service of Briefs.

Joint applicants' Motion To Dismiss is procedurally ready to be ruled upon.

The basis for joint applicants' Motion To Dismiss is their contention that the Commission's Order adopted May 23, 1996, entered June 3, 1996, in In Re: Implementation of the Telecommunications Act of 1996, Docket Number M-00960799 (Streamlining Order), specifically that portion of the Streamlining Order pertaining to entry procedures for all interexchange carrier entrants, applies to this case.

In order to comply with the provisions of Section 253 of the Telecommunications Act of 1996, in the Streamlining Order the Commission adopted new application procedures. A significant part of the new procedures dealt with the determination of what constitutes a "legitimate protest". The Commission defined a legitimate (allowable) protest as follows:

> [P]rotests or interventions may only be filed if the protesting party is contesting the

> fitness of the entrant. Competitive protests or protests opposing other aspects of the entrant's provision of service may not be filed and, if submitted, will be returned by the Commission.
>
> Streamlining Order at 8 (emphasis in original).

So as not to be a state facilitated barrier to entry, only protests or interventions challenging an applicant's technical or, alternatively, financial fitness would henceforth be legitimate. Protests or interventions on other grounds would no longer be allowed.

In their Motion To Dismiss, joint applicants posit that because the Joint Protest does not challenge the joint applicants' technical or financial fitness to receive a Certificate of Public Convenience, the Streamlining Order requires that the Joint Protest be dismissed.

If the Streamlining Order applied to this case, the joint applicants would be right. However, the Streamlining Order does not apply to this case.

By its own terms, the portion of the Streamlining Order upon which joint applicants rely is specifically addressed to "[n]ew entrants seeking to commence the provision of intrastate service in Pennsylvania". Streamlining Order at 7. This case does not involve such a situation. Rather, this case requests "Commission approval of the transfer of control of MCI to WorldCom through the transfer of stock." Joint Application at 1. The transfer will be accomplished "pursuant to a Merger Agreement unanimously

approved by the Boards of Directors of both companies". Joint Application at 2. The joint applicants, through their respective operating subsidiaries, are currently authorized to provide, among other services, intrastate telecommunications services in the Commonwealth of Pennsylvania. This case simply does not involve the "new entry" situation which is the express subject of the Streamlining Order. While the philosophy and its implementation found in the Streamlining Order might well be beneficially applied to a situation such as exists in this case, that is a policy decision that must be made by the Commissioners.

It is also interesting to note that the Streamlining Order itself addresses "Equity Transfers and other Financial Transactions" separate and apart from the discussion about protests and interventions regarding "new entry" applications. The Commission pointed out that "[n]o party has argued that the Federal Act has any preemptive effect on these required regulatory approvals." Streamlining Order at 23-24.

The Streamlining Order's separate, and different, discussions regarding new entry application procedures on the one hand and equity transfers on the other, correspond with applicable provisions of the Public Utility Code, 66 Pa.C.S. §101 et seq.. In enumerating actions that require a Certificate of Public Convenience issued upon approval by the Commission, 66 Pa.C.S. §1102 clearly differentiates between the beginning to offer service ("new entry") in 66 Pa.C.S. §1102(a)(1), and the

acquisition of any tangible or intangible property used or useful in the public service by transfer of stock, including a merger, in 66 Pa.C.S. §1102(a)(3). The statute which governs the Commission clearly establishes these two situations as fundamentally different. The Streamlining Order does likewise. It applies to "new entry" situations, it does not apply to merger situations.

Consequently, the Joint Application will be examined under the standards established in City Of York v. Pa Public Utility Comm'n, 449 Pa. 136, 295 A.2d 825(1972). The joint applicants will bear the burden of proving by a preponderance of the evidence that public benefit will result from the merger. Joint applicants will have to prove more than that approval of the merger will not have an adverse effect upon the public. They must prove that the merger "will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way." City Of York, 295 A.2d at 828. A part of the proof will entail "the effect that [the] proposed merger is likely to have on future rates to consumers." Id. at 829. Surely the effect on future competition within the Commonwealth if the merger is approved will be germane to the "future rates to consumers". To the extent that the Joint Protest addresses this issue, even if it does not contest joint applicants' technical or financial fitness, the Joint Protest is a legitimate one under the City Of York standards.

Joint applicants' Motion To Dismiss must be denied.

THEREFORE,

IT IS ORDERED:

1. That the Motion To Dismiss filed February 13, 1998, by WorldCom, Inc., MCI Communications Corporation, MCI Telecommunications Corporation, and MCI Metro Access Transmission Services in the above-captioned case is denied.

2. That an Initial and Further Hearings in the above-captioned case proceed as scheduled.

Date: March 6, 1998

Wayne L. Weismandel
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE's Memorandum in Opposition to Joint Motion of WorldCom, Inc. and MCI Communications Corporation to Dismiss GTE Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action in Docket No. 971604-TI were sent via U. S. mail on March 10, 1998, to the parties on the attached list.

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