MEMORANDUM

May 20, 1998

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) BK MKB

RE: DOCKET NO. 971604-TP - 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 2986, 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.

98-0702-FOF-TP

Attached is an ORDER GRANTING MOTION TO DISMISS, to be issued in the above referenced docket. (Number of pages in order - 22)

See 20 & 20

BK/anr
Attachment
cc: Division of Communications
I: 971604o.bk

Faxed 6/10.
mailed

1 copy (certified to Hoppe 5/21/98.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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 2986, 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.	DOCKET NO. 971604-TP ORDER NO. PSC-98-0702-FOF-TP ISSUED: May 20, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

I. CASE BACKGROUND

By letter dated November 25, 1997, WorldCom, Inc. d/b/a LDDS WorldCom (WorldCom) and MCI Communications Corporation (MCI) (as joint movants, herein referred to as MCI/WorldCom) filed a joint petition seeking our approval of the transfer of control of MCI to TC Investments Corporation (TC Investments), a subsidiary of WorldCom. The companies have stated that upon consummation of the transaction, this new wholly-owned subsidiary of WorldCom will be renamed MCI Communications Corporation.

MCI Communications Corporation is the parent corporation of MCImetro Access Transmission Services, Inc. and MCI Telecommunications Corporation. MCImetro Access Transmission Services, Inc. is the holder of Alternative Access Vendor Certificate, with authority to provide Alternative Local Exchange services (AAV/ALEC), No. 2986. MCI Telecommunications Corporation is the holder of Interexchange Telecommunications (IXC) Certificate No. 61, Pay Phone Certificate No. 3080, and AAV/ALEC Certificate No. 3996.

On December 15, 1997, GTE Corporation and GTE Communications Corporation (GTE) filed a petition requesting leave to intervene in this proceeding. On December 24, 1997, MCI and WorldCom filed a joint response in opposition to GTE's Petition to Intervene. By Proposed Agency Action Order No. PSC-98-0125-FOF-TI, issued January 22, 1998, we approved the transfer of control. On January 26, 1998, GTE filed a Reply to MCI and WorldCom's joint opposition to GTE's Petition to Intervene. On February 6, 1998, MCI and WorldCom filed a Joint Motion to Strike GTE's Reply to WorldCom and MCI's Opposition to GTE's Petition to Intervene. On February 12, 1998, the Communications Workers of America ("CWA") requested leave to intervene in this proceeding and protested Order No. PSC-98-0125-FOF-TI. That same day, GTE filed a protest of Order No. PSC-98-0125-FOF-TI. On February 13, 1998, GTE filed a memorandum in opposition to WorldCom's and MCI's Joint Motion to Strike. On March 3, 1998, MCI and WorldCom filed a Joint Motion to Dismiss GTE's and CWA's protests of Order No. PSC-98-0125-FOF-TP and CWA's petition to intervene, as well as an Answer to the protests. On March 10, 1998, CWA filed a letter asking us to deny MCI's and WorldCom's Motion to Dismiss. Also on that day, GTE filed a Memorandum in Opposition to MCI's and WorldCom's Joint Motion to Dismiss.

Our determination on the Motion to Dismiss is set forth below.

II. PROTESTS OF ORDER NO. PSC-98-0125-FOF-TI

A. GTE

GTE states that it is actively involved in the markets that MCI/WorldCom have described and is also a customer of WorldCom. Thus, GTE argues that it has a substantial interest in participating in this case and in evaluating whether the proposed

acquisition will produce the benefits that MCI/WorldCom have asserted that it will. GTE argues that its substantial interest in this proceeding is based upon the fact that it is a customer and a competitor of the merged entity.

GTE states that it buys most of its long-distance transmission capacity from WorldCom. GTE argues that WorldCom offers much better prices for wholesale supply than its largest rivals AT&T, MCI, and Sprint. In addition, GTE states that WorldCom offers advanced features and capabilities to its wholesale customers that other providers do not offer. Without access to these advanced features, GTE argues that its ability to compete will be detrimentally affected. GTE also asserts that the merger will likely change WorldCom's practices in the wholesale market. In addition, GTE states that it expects that WorldCom will raise its wholesale rates.

In support of its petition, GTE cites a number of our orders granting intervention to resellers, purchasers, and potential purchasers in Commission proceedings. GTE also relies upon a number of other cases in which we have allowed customers of a utility to intervene in proceedings before us. GTE further states that we have also allowed competitors to intervene in our proceedings based solely upon their status as competitors.

GTE argues that its interests will also be affected by the merger because a major competitor will be removed from the market. GTE asserts that this will cause a change in WorldCom's behavior in the market. Without WorldCom's presence in the wholesale market, GTE asserts that its own interest and ability to compete in the wholesale long distance market will be affected. GTE states that

> Thus, GTE's interest is not just a competitive or economic interest. GTE is not seeking to be protected from competition; at present, it is not even a competitor in the wholesale market. Rather, GTE's interest is in assuring the kind of conditions that are necessary to give all market participants a fighting chance of success in the long term, so that long-distance competition can flourish in Florida.

GTE argues that it has raised serious concerns that the merger will affect the long-distance and local market. GTE argues that the Commission must, therefore, further investigate this merger in order to determine if the merger is in the public interest. GTE

argues that MCI/WorldCom must prove that the merger is in the public interest. GTE argues that our proposed agency action order has, effectively, created a presumption that the merger is in the public interest, without requiring any proof from the entities involved. GTE asserts that we should proceed with this matter and require MCI/WorldCom to demonstrate, in accordance with Section 364.335(2) and (4), Florida Statutes, and Rules 25-24.473 and 25-24.730, Florida Administrative Code, that the merger is in the public interest.

GTE also argues that we should reject MCI/WorldCom's challenge to GTE's standing in this case because GTE's participation will help expose some of the important issues involved and because GTE can provide a balance to the perspective presented by MCI/WorldCom. GTE asserts that it has already shown that it can identify important aspects of this merger that we should consider.

GTE notes that MCI/WorldCom did not submit any information or evidence in support of the application for approval of the merger and did not attempt to conform their application to provide any guidance as to the affects that the merger would have on competition. GTE argues that we must require MCI/WorldCom to demonstrate some factual basis for their assertions. GTE argues that only after an inquiry of those facts, will there be an adequate basis for us to find that the merger is in the public interest.

B. CWA

In its Petition, CWA asserts that we should conduct a formal proceeding to determine the impact that the proposed merger will have on Florida consumers. CWA argues that the merger will, in fact, adversely affect consumers because it will hinder the development of competition, it will decrease the quality of service, it will adversely affect the Internet market, and it will result in job loss for communications workers.

Like GTE, CWA argues that the merger will adversely affect the local exchange residential and small business market. CWA argues that the merger will cause a reduction in investment in facilities in local markets, while it will eliminate MCI as an aggressive competitor for residential and small business service. CWA asserts that before the merger, MCI had plans to enter the local market. After the merger was announced, however, WorldCom announced that the merged company would retreat from the consumer/residential

market. CWA further asserts that the companies have reduced their plans for local loop investments. CWA adds that the cost savings that MCI/WorldCom assert will take place due to the merger can only take place if there is some shift in the business focus.

CWA also argues that the merger will result in a shift of revenues from the public switched network to the MCI/WorldCom network. CWA states that because the merged entity will be vertically integrated, MCI/WorldCom will be ". . . ideally positioned to arbitrage business opportunities opened by a competitive, deregulatory policy." CWA Petition at 10. CWA further asserts that while MCI and WorldCom have alleged that the merger will enhance competition, the merged entity will not actually be competing in all markets, but will only compete for business customers.

In addition, CWA argues that the merger will result in a substantial access charge bypass. CWA argues that this will result in a significant loss of revenue to the local exchange companies, and, therefore, a decrease in the quality of service provided by the LECs. CWA further argues that such a decrease in revenue would also reduce investments in upgrading and expanding facilities.

CWA also argues the merger will have a detrimental impact on Internet service. CWA asserts that the merged entity will have 63% of all Internet Service Providers (ISPs) connected to the network. Thus, CWA asserts that the merger will significantly reduce competition in the Internet provider market. This reduction in competition will, argues CWA, allow the dominant entity to control prices and access to the Internet backbone and to further consolidate its control over the Internet network. CWA further argues that this would impede new providers' ability to compete or even to enter the market.

Finally, CWA argues that the merger will reduce employment growth in Florida. CWA asserts that the reduced spending will result in the loss of jobs for Florida communications workers. CWA estimates that the merger will have a detrimental effect on 75,000 communications workers nationwide by the year 2002, including a large portion in Florida. Thus, CWA argues that the merger is not in the public interest. To support its assertions, CWA notes that soon after the merger was announced, MCI stated that 1,500 employees would lose their jobs.

III. MCI AND WORLDCOM'S JOINT MOTION TO DISMISS

In their Motion to Dismiss, MCI/WorldCom state that GTE bases its petition on assertions that GTE will no longer be able to obtain discounts for wholesale long-distance services that it currently receives from WorldCom. MCI/WorldCom argue that GTE is, however, protected from such a threat because the GTE contract with WorldCom includes "multi-year" protection. MCI/WorldCom note that GTE has acknowledged that the contract between WorldCom and GTE includes a "multi-year" provision that would prevent MCI/WorldCom from immediately canceling the contract. MCI/WorldCom also note that GTE has recently announced transactions with Qwest Communications that will allow GTE to have an advanced data network with access nationwide. MCI/WorldCom assert that GTE has indicated that Qwest will be providing GTE with advanced services. MCI/WorldCom assert that this agreement will cover Florida; therefore, GTE does not depend upon WorldCom for such access. Thus, MCI/WorldCom argue that GTE's claim of standing is speculative, because GTE's claim is simply that it may, at some point, wish to order services from WorldCom.

Specifically, MCI/WorldCom argue that GTE's standing claim does not accurately reflect the facts. MCI/WorldCom point out that GTE has announced that it will be able to provide long-distance service in 1998 as a result of arrangements between GTE and Qwest Communications. MCI/WorldCom state that in this announcement, GTE also stated that its national network would be "fully operational next year" and would put GTE in position to "reach virtually the entire U.S. population." See Motion to Dismiss at 4, citing announcement released on GTE's web site (http://www.gte.com/g/news/050697.html). Thus, MCI/WorldCom argue, there is no basis for GTE's claim that it may lose its ability to get wholesale access and advanced services from WorldCom and have to pay higher prices to obtain service from Sprint or AT&T. MCI/WorldCom also note that in that same announcement, GTE stated that its new network will be an advanced data network that will allow GTE to develop new services and Internet offerings to meet customers' needs. MCI/WorldCom emphasize that this network does not depend upon WorldCom.

MCI/WorldCom also assert that GTE's standing claim is not valid because GTE has admitted that it has not tried to buy advanced services from WorldCom. Citing witness Covey's affidavit submitted by GTE, MCI/WorldCom argue that GTE has admitted that it has not decided whether it will try to purchase services from

WorldCom. MCI/WorldCom further argue that the reason for this statement by witness Covey is that GTE has decided to purchase such services from Qwest Communications.

MCI/WorldCom further argue that AT&T and MCI do currently sell to both wholesale and retail customers. MCI/WorldCom argue, therefore, that GTE's argument that it cannot purchase services from another long distance carrier is inaccurate. MCI/WorldCom add that the FCC's prohibitions on resale restrictions, along with market pressure, ensure that interexchange services are available to all resellers on a nondiscriminatory basis.

As for CWA, MCI/WorldCom argue that CWA's assertions of standing are based solely upon speculation that the efficiencies of the merged company will result in fewer jobs for communications workers. MCI/WorldCom argue, however, that CWA is assuming that the two separate companies would grow at the same rate that the new merged entity will grow. MCI/WorldCom argue that due to the efficiencies created by the merger, the merged entity will likely create jobs because it will be more capable of successfully competing against the ILECs.

In particular, MCI/WorldCom state that CWA has not argued that the merged company will spend less than the two separate companies are currently spending and investing in local loops and other network and sales aspects of the business, but, instead, that the merged company will spend less in the future than the separate companies would have spent in the future. MCI/WorldCom argue that CWA's position is based, essentially, upon the argument that the merged company may not employ as many people in the future than the separate companies would if the separate companies are competitively successful.

Furthermore, MCI/WorldCom argue CWA's claim that service quality will suffer because of reduced access revenues is untenable because service will be subsidized in high cost areas by the universal service fund, in accordance with the Telecommunications Act of 1996.

Based on GTE's and CWA's allegations, MCI/WorldCom assert that GTE and CWA have not sufficiently alleged standing under the Agrico test for standing. See Agrico Chemical Co. V. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). MCI/WorldCom argue that GTE and CWA have not demonstrated that they will experience an actual injury from the proposed merger.

MCI/WorldCom assert that CWA and GTE have only alleged potential economic harm that is merely speculative. MCI/WorldCom argue that the courts have already established that the type of harm alleged by CWA and GTE is insufficient to meet the standard set by Agrico.[1] MCI/WorldCom state that we have also stated that such claims do not amount to substantial interest. MCI/WorldCom refer to Order No. PSC-94-0114-FOF-TI, issued January 31, 1994, denying Best Telephone Company's protest of a Proposed Agency Action Order granting a certificate to Atlas Communications Consultants, where we stated that

> Nothing in Chapter 364, Florida Statutes, grants or implies that competitive long distance carriers have a legally cognizable interest in being free from competitive injury. The actions of Atlas about which Best complains are those of any normal competitor in a competitive marketplace.

Motion to Dismiss at 9; citing Order No. PSC-94-0114-FOF-TI, issued in Docket No. 930396-TI, on January 31, 1994. MCI/WorldCom add that if CWA and GTE actually experience any of the problems that they have alleged, either could file a complaint in the appropriate forum at that time. MCI/WorldCom argue that until an actual problem arises, there is no injury in fact. In addition, MCI/WorldCom assert that this transfer will not, by itself, cause any of the problems alleged by GTE or CWA. See Village Park Mobile Home Association v. State Dept. Of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987).

MCI/WorldCom also argue that GTE and CWA have not shown that the problems they have alleged are of a type that a proceeding under Section 364.33, Florida Statutes, is designed to protect against. MCI/WorldCom state that this is a petition for approval of a transfer of majority ownership control, filed pursuant to Section 364.33, Florida Statutes. MCI/WorldCom argue that Section

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[1]Citations in Motion to Dismiss to AmeriSteel Corp. V. Clark, 691 So. 2d 473 (Fla. 1997); ASI, Inc. V. Fla. Pub. Service Comm., 334 So. 2d 594 (Fla. 1976); and Microtel v. Fla. Publ. Service Comm., 464 So. 2d 1189 (Fla. 1985).

364.33, Florida Statutes, is not a merger review statute. MCI/WorldCom assert that this statute allows us to determine who should be allowed to own telecommunications facilities in Florida; it does not allow us to determine whether it is in the "public interest" for companies to merge.

Furthermore, MCI/WorldCom argue that should the merged companies decide at a point after the merger to apply for original certification in Florida, there would still be no basis for rejecting such application under Section 364.335, Florida Statutes. At this time, however, the companies seek only to transfer ownership of facilities through the transfer of stock ownership. MCI/WorldCom add that we have already found that both MCI's and WorldCom's certificates and tariffs are in the public interest. MCI/WorldCom argue that the public interest concerns addressed by Section 364.33, Florida Statutes, do not change simply because the parent companies that own the companies that hold the Florida certificates merge. The companies that hold the certificates in Florida still hold the same certificates. MCI/WorldCom assert that GTE and CWA would like us to conduct a review under Section 364.33, Florida Statutes, that we are without jurisdiction to conduct.

In addition, MCI/WorldCom state that both GTE and CWA assert that their interest is in protecting customers and ensuring that competition is successful. MCI/WorldCom argue, however, that the courts have rejected similar claims as not addressing causes of action that the statute at issue was designed to protect. See Ameristeel Corp. v. Clark, 691 So. 2d 473(Fla. 1997) and Fla. Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279(Fla. 1st DCA 1988). MCI/WorldCom argue that Section 364.33, Florida Statutes, does not allow us to address the economic and competitive consequences of a merger.

Finally, MCI/WorldCom add that the numerous orders granting intervention cited by GTE do not demonstrate that we should grant GTE intervenor status in this proceeding. MCI/WorldCom note that these cases are distinguishable because almost all involve situations wherein the rates or the policies of a particular company were being established or altered and the intervenors would have been directly affected by our action. MCI/WorldCom state that only one, the Application for Approval of Transfer of Certificate from Twin County Utility Company to Southern States Utilities, Inc., Docket No. 881339-WS, involved a transfer of a certificate. MCI/WorldCom argue, however, that the application was filed under Chapter 367, Florida Statutes, and the rules for transferring

certifications of water and wastewater companies are significantly different than those governing a transfer of control under Chapter 364, Florida Statutes.

For the foregoing reasons, MCI/WorldCom request that GTE's Petition on Proposed Agency Action and CWA's Petition to Intervene and Protest of Proposed Agency Action be dismissed for lack of standing.

IV. RESPONSES TO MOTION TO DISMISS

A. GTE

In its Response, GTE argues that MCI/WorldCom have not stated a basis for dismissing GTE's petition. GTE argues that, taking all of GTE's allegations as true, we must find that GTE has a substantial interest in this matter and should, therefore, deny the motion to dismiss. See Varnes v. Dawkins, 624 So. 2d 349(Fla. 1st DCA 1993; Ralph v. City of Daytona Beach, 471 So. 2d 1 (1983); and Kest v. Nathanson, 216 So. 2d 233(Fla. 4th DCA 1968).

GTE argues that MCI/WorldCom's petition for approval of the merger demonstrates that WorldCom's practices with regard to wholesale services and innovative features will change as a result of the merger. GTE further argues that this will affect competition in the wholesale market and will interfere with GTE's ability to compete. GTE adds that the merger will also alter the entire telecommunications market by removing a major competitor. Thus, GTE argues there is no basis for dismissing its petition. Furthermore, GTE argues that if we were to dismiss the protests, then we would essentially be declaring that effects on rates, services and competition are not within the realm of the public interest.

GTE also argues that it has standing because WorldCom is GTE's principal wholesaler in Florida. GTE asserts that WorldCom was an independent supplier that did not supply long distance service; thus, it had incentives to underbid other IXCs to provide wholesale services. GTE argues that if the merger is approved, WorldCom will no longer have incentives to outbid other IXCs, including MCI. GTE adds that its contract with WorldCom does not alter its interest in retaining WorldCom as an independent supplier. GTE states that under the terms of the contract,

> *[t]he 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). (Emphasis in original).

Memorandum in Opposition to Motion to Dismiss at 5. GTE states that because the conditions of the contract will change and it may want to re-negotiate with WorldCom, it has a substantial interest in the proposed merger.

GTE also argues that its purchase of fiber from Qwest Communications does not alter the need for WorldCom to stay in the market separate from MCI. GTE argues that WorldCom has always been the leader in lowering prices for services and that if WorldCom loses its incentive to keep prices low, Florida consumers will, ultimately, pay the price. GTE also states that it uses enhanced services and WorldCom has indicated a willingness to "consider, upon request, a development schedule and cost for adding such features." Memorandum in Opposition to Motion to Dismiss at 7. GTE states that the market for enhanced services is likely to be very competitive in the near future. GTE notes that while it is true that WorldCom is not currently providing most of these types of services, WorldCom's early indication that it is interested in providing enhanced services makes it important to retain WorldCom in the market. If WorldCom is no longer a true competitor, GTE argues that other competitors in the enhanced services market will not feel any pressure to provide such services at a reasonable price.

GTE also argues that MCI/WorldCom have misapplied the legal standards for establishing a substantial interest in this proceeding. GTE argues that the cases cited by MCI/WorldCom for the proposition that GTE's claims amount to competitive claims that do not meet Agrico are distinguishable because none of the interests presented in those cases are comparable to the interests asserted by GTE. GTE states that it has not argued here that it has any right to be free from competition, as was argued in Microtel, Inc. V. Fla. Public Service Commission, 464 So. 2d 1189(1985). GTE also states that there is no statute limiting our discretion like there was in Ameristeel Corp. V. Clark, 691 So. 2d 473(Fla. 1997) and ASI, Inc. V. Fla. Public Service Commission, 334

So. 2d 594(Fla. 1976). In this case, GTE argues that the public interest standard gives us broad discretion to consider all market and consumer issues that may be involved. As a customer/reseller of WorldCom, GTE argues that its substantial interests are undeniable. GTE asserts that the test for substantial interests should be applied broadly and that GTE should be allowed to present its case.

GTE further argues that potential economic injury can confer standing as indicated in Florida Medical Ass'n et al. v. Dept. of Professional Regulation, 426 So. 2d 1112(Fla. 1st DCA 1983). In that case, GTE states that the court overturned an administrative decision dismissing a rule challenge by ophthalmologists for lack of standing. The rule would have allowed optometrists to treat patients that would have, otherwise, had to seek treatment from an ophthalmologist.[2]

Finally, GTE contends that MCI/WorldCom cannot argue now that we do not have jurisdiction to review the merger. GTE argues that this assertion is contrary to MCI/WorldCom's actions in this case. According to GTE, the statutes are clear that the standard of approval of a transfer of control is whether the transfer is in the public interest, as set forth in Section 364.335, Florida Statutes. GTE argues that this section and the rules implementing this section are applicable to both certification proceedings and to transfer proceedings, and thus, GTE argues MCI/WorldCom must now demonstrate that the merger is in the public interest.

B. CWA

In its letter in response to the Motion to Dismiss, CWA asserts that MCI/WorldCom have provided no evidence that the merger will benefit Florida consumers. CWA argues that the evidence suggests, in fact, that the merger will not be beneficial. CWA further argues that there is no benefit to Florida consumers of a merged private company that would remove customers from the public switched network to its private network, unless the merged company has plans to compete for business and residential customers. CWA argues that MCI/WorldCom have not indicated that they plan to

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[2]GTE cites Sierra Club v. Morton, 405 U.S. 727(1972); citing Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159(19700; and Singleton v. Wulff, 428 U.S. 106(1976).

compete in all areas; therefore, CWA asks us to deny the Motion to Dismiss.

V. DETERMINATION

Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief.

We are required to review GTE's Petition and CWA's Protest in the light most favorable to GTE and CWA, in order to determine whether their request is cognizable under the provisions of Section 364.33, Florida Statutes. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the petitions, we have confined our consideration to the petitions 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, we have construed all material allegations against MCI/WorldCom in making our determination on whether GTE and CWA have stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Applying the standard set forth above, we have determined that WorldCom's and MCI's joint motion to dismiss demonstrates that GTE and CWA do not have a right, under the law or the facts, to the relief requested in their petitions. Neither GTE nor CWA have demonstrated that their substantial interests will be affected by this proceeding conducted pursuant to Section 364.33, Florida Statutes.

When a petitioner's standing in an action is contested, the burden is upon 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). To prove standing, the petitioner must demonstrate that he will suffer an injury in fact, which is of sufficient immediacy to entitle him to a section 120.57 hearing, and that his substantial injury is of a type or nature that the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981).

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)[3].

GTE argues that the courts have determined that potential economic injury will confer standing. Florida Medical Association et al. v. Department of Professional Regulation, et al., 426 So. 2d 1112 (Fla.1st DCA 1983). However, the case relied upon by GTE involved a rule challenge. Id. The standing determination therein was specifically distinguished by that same court a few years

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[3] Ameristeel, a customer of Florida Power and Light (FPL), asserted that FPL had become a high cost provider. As a result, Ameristeel asserted that its continued viability in the market was threatened and it might have to relocate. Ameristeel further asserted that this might, ultimately, have a detrimental affect on the local economy. Ameristeel argued, therefore, that its substantial interests were affected by the proceeding to approve the proposed territorial agreement between FPL and Jacksonville Electric Authority because, under the agreement, Ameristeel would remain a customer of FPL. The Court found that Ameristeel met neither prong of the Agrico test. Id. at 476, 477.

later. Florida Society of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988). In the distinguishing case, Florida Society of Ophthalmology, 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 have shown no zone of interest personal to them that would be invaded by the certification process, they have 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). . . . [W]e approve the denial of appellants' standing based on the allegations of economic injury upon the rationale in 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.

Id. at 1286.

The Court then distinguished Florida Medical Association et al. v. Department of Professional Regulation, et al. stating that

> In ruling that the petitioners in that case had standing, we explicitly noted that the fact that petitioners challenged the validity of the proposed rule as an invalid delegation of legislative authority distinguished the case from Agrico Chemical Company v. Department of Environmental Regulation. . . .

Id. at 1287. This case does not involve a rule challenge; therefore, the Agrico test is applicable to determine the standing of GTE and CWA.

In addition, our determination in Order No. PSC-98-0562-PCO-TX, issued April 22, 1998, in Docket No. 971056-TX, that MCI and FCCA did have standing to protest Order No. PSC-97-1347-FOF-TP, in which we granted BellSouth BSE, Inc. an ALEC certificate, is distinguishable from this case for several reasons. First, the entry of BSE, a new competitor, into the local market would directly affect MCI and FCCA's members as competing ALECs. MCI further alleged that under the Telecommunications Act of 1996 (Act)

we must review the application to ensure that there is no abuse of market power by the ILEC in its relationship with its subsidiary, BSE. In this case, there is no alleged abuse of monopoly power by an ILEC that would authorize us to take action under the Act. Finally, BellSouth BSE is seeking certification from us. MCI and WorldCom are not.

Regarding GTE's specific factual assertions that as a result of the merger, WorldCom will no longer have any incentive to offer discounts on its wholesale services, this allegation does not demonstrate that GTE will suffer an injury in fact of sufficient immediacy to warrant a hearing. Both parties have stated that GTE and WorldCom are currently parties to a multi-year contract. GTE has further stated that under this contract, GTE will soon be able to negotiate with other providers, including WorldCom, if it so chooses. WorldCom will, however, remain obligated under the contract. GTE argues, therefore, that it has an interest in retaining WorldCom in the market as an independent competitor so that it can try to negotiate a new, better wholesale services contract. Essentially, GTE seems to argue that we should retain the market at status quo so that GTE's ability to negotiate future contracts with WorldCom will not change. Thus, it will be able to compete successfully and able to better position itself in the market in the future. It appears, however, that the contract between WorldCom and GTE protects GTE from any price increase in WorldCom's wholesale offerings.

In addition, GTE's assertion that it may choose to try to negotiate a better contract with WorldCom in the future is itself speculative and does not demonstrate that GTE will suffer a harm of sufficient immediacy to warrant a hearing. Furthermore, other variables can and may impact GTE's ability to negotiate a better deal with WorldCom in the future. The merger of MCI and WorldCom cannot be defined as the sole event that will affect future negotiations between GTE and WorldCom. Thus, GTE's allegations regarding its ability to negotiate future contracts with WorldCom do not demonstrate that GTE will suffer an injury in fact of sufficient immediacy to warrant a hearing.

GTE also alleged that the merger will, in effect, eliminate from the wholesale market a competitor that had demonstrated a willingness to provide enhanced services. 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. Although the loss of a competitor may have an impact

on other market participants, as well as that competitor's customers, it does not necessarily have a harmful impact. As noted by both parties, there are other competitors in the wholesale market ready to fill the gap, and GTE, as a customer, appears to be specifically protected by the contract between GTE and WorldCom.

Finally, regarding enhanced services offerings, the pleadings demonstrate that both parties agree that GTE has not yet tried to purchase enhanced services from WorldCom. GTE states only that ". . . WorldCom has shown itself willing to consider, upon request, a development schedule and cost for adding such features." Memorandum in Response to Motion to Dismiss at 7. GTE argues, therefore, that WorldCom must be retained as an independent competitor to ensure that there is sufficient competitive pressure to encourage the timely provision of enhanced services at a reasonable price. Again, we note that there are other competitors in the wholesale market, such as Qwest Communications, who appear capable and willing to provide enhanced services. Furthermore, WorldCom is not currently providing enhanced services to GTE and has only indicated a willingness to consider development schedules and costs associated with providing such services. Therefore, GTE would experience no actual harm if WorldCom were to recede from its apparent intent to begin providing enhanced services.

In addition, even if the merger did not take place, it is possible that WorldCom could determine that it is too costly to provide enhanced services at this time. Thus, the link between the harms alleged by GTE and the proposed transfer of control is tenuous, at best. Even taking all of GTE's allegations as true, GTE has not demonstrated that GTE will suffer an injury in fact which is of sufficient immediacy to entitle it to a Section 120.57, Florida Statutes, hearing. See Order Approving Transfer of Control (MCI/WorldCom), issued March 10, 1998, by the North Carolina Utilities Commission, in Docket Nos. P-141, Sub 34; P-283, Sub 20; P-156, Sub 29; and P-474, Sub 5. See also Entry entered December 30, 1997, in Case Nos. 97-1580-CT-ZCO and 97-1581-TP-ACO, by the Public Utilities Commission of Ohio, declining to set MCI/WorldCom merger for hearing, and, thereby, rendering GTE's petition to intervene moot.

As for CWA, it primarily alleges that the merger might have detrimental affects on the market and, specifically, on Internet access. CWA does not, however, identify how these particular concerns relate to CWA's substantial interests. The only allegation raised by CWA of the impact that the merger will have on

CWA and its members is that the merger may result in a decrease in jobs for CWA workers in Florida. CWA can, however, only speculate as to the long term effects the merger may have on the market, and, ultimately, on jobs for communications workers. Such conjecture regarding future economic harm or possible loss of jobs as a result of increased business efficiency is too remote to establish standing in a proceeding conducted pursuant to Section 364.33, Florida Statutes. See Ameristeel, 691 So. 2d at 477, 478. Therefore, taking all of CWA's allegations as true, CWA has not demonstrated that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57, Florida Statutes, hearing.

Although we may grant the motion to dismiss because CWA and GTE have failed to demonstrate that they will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57, Florida Statutes, hearing, it also appears to us that CWA and GTE have not satisfied the second prong of the Agrico test. Section 364.33, Florida Statutes, titled Certificate of necessity prerequisite to construction, operation, or control of telecommunications facilities, states

> A person may not begin the construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organizational control or controlling stock ownership, without prior approval. This section does not require approval by the commission prior to the construction, operation, or extension of a facility by a certificated company within its certificated area nor in any way limit the commission's ability to review the prudency of such construction programs for ratemaking as provided under this chapter.

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).

For the foregoing reasons, we hereby grant the Joint Motion to Dismiss GTE's Petition on Proposed Agency Actions and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action filed by MCI and WorldCom. Even taking all of the petitioners' allegations as true, GTE and CWA have failed to demonstrate standing in this proceeding. Order No. PSC-98-0125-FOF-TI shall be made final and effective the date of the vote at our April 28, 1998, Agenda Conference. By granting the Joint Motion to Dismiss, we have rendered the remaining outstanding procedural motions moot.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Joint Motion to Dismiss filed by WorldCom, Inc. and MCI Communications Corporation is granted. It is further

ORDERED that Proposed Agency Action Order No. PSC-98-0125-FOF-TI is rendered final with an effective date of April 28, 1998. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 20th day of May, 1998.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

BK

CONCURRENCE

Commissioner Jacobs

I concur in the result reached in this docket by the Florida Public Service Commission. However, I write to convey my interpretation of the Commission's underlying authority to approve transfers of controlling interests in Certificates of Authority. It is my opinion that the underlying petition was filed and considered pursuant to the Commission's authority in Section 364.33, Florida Statutes, which requires prior approval of a transfer of control, but is silent as to the criteria which should guide the Commission's deliberations. In the absence of such guidance, parties in this docket argued that this statute becomes ministerial. I disagree. The Commission has available to it the exclusive oversight authority contained in Section 364.01(4), Florida Statutes, which can guide its consideration of the transfer of control. See Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248(Fla. 1993).

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.