ORIGINAL

LAW OFFICES
**MESSER, CAPARELLO & SELF**
A PROFESSIONAL ASSOCIATION

215 SOUTH MONROE STREET, SUITE 701
POST OFFICE BOX 1876
TALLAHASSEE, FLORIDA 32302-1876
TELEPHONE (904) 222 0720
TELECOPIERS (904) 224 4359, (904) 425 1942

March 3, 1998

**BY HAND DELIVERY**
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 971604-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of WorldCom, Inc. and MCI are an original and fifteen copies of the following documents in the above-referenced docket:

1. 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; and

2. Joint Answer of WorldCom, Inc. and MCI Communications Corporation to GTE Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Floyd R. Self

Enclosures
cc: Mr. Brian Sulmonetti

joint motion
DOCUMENT NUMBER-DATE
02831 MAR-3 98
FPSC-RECORDS/REPORTING

joint answer
DOCUMENT NUMBER-DATE
02832 MAR-3 98
FPSC-RECORDS/REPORTING

ORIGINAL

**BEFORE THE**
**FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In Re: Request for approval of merger of MCI Communications Corporation (Holder of AAV/ALEC Certificate 2986 in the name MCI Metro Access Transmission Services, Inc., and IXC Certificate 61, PATS Certificate 3080, and AAV/ALEC Certificate 3996 in the name of MCI Telecommunications Corp.) with TC Investments Corp., a Wholly-Owned Subsidiary of WorldCom, Inc. | ) | Docket No. 971604-TP<br>Filed: March 3, 1998 |

**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**

WorldCom, Inc. ("WorldCom") and MCI Communications Corporation ("MCI"), by their undersigned counsel, hereby move to dismiss the Petition on Proposed Agency Action and Request for Section 120.57 Hearing of GTE Corporation and GTE Communications Corporation (collectively "GTE"), and the Petition to Intervene and Protest of Proposed Agency Action of the Communications Workers of America ("CWA"), filed on February 12, 1998, in the above-referenced proceeding, on the ground that they lack standing.

**Introduction and Summary**

1. GTE bases its standing on the contention that the merger might deprive it of access to favorable discounts for wholesale long-distance services, which it presently obtains under a contract with WorldCom. GTE contends that WorldCom will stop offering such discounts in order

to protect MCI's retail sales.

However, GTE is in no danger, for two reasons. First, its contract with WorldCom provides it "multi-year" protection; WorldCom cannot simply cancel even if it wanted to. Second, GTE itself has announced that it has made arrangements with Qwest Communications for access to a national network that will cover Florida and does not depend on WorldCom.

GTE also argues that it is in danger of losing the ability to obtain advanced services from WorldCom. But GTE's announcement of its arrangement with Qwest also indicates that this national network will provide advanced services. In addition, GTE admits it has never ordered advanced services from WorldCom.

Thus GTE's claim to standing rests on the assertion that sometime in the future it might want to order services from WorldCom which it has already arranged to obtain elsewhere. Nothing in the case law justifies standing on such a speculative basis.

It is also pure speculation that after the merger WorldCom would have an incentive not to offer discounts for wholesale customers, just because it will have a retail operation. In fact, MCI and AT&T presently make significant wholesale sales, despite their large retail operations. GTE's theory that a company cannot make money selling at both wholesale and retail is belied by the facts.[1]

2. CWA's claim to standing rests principally on the contention that the merged company will be more efficient and therefore spend less on operations and investment, thus creating fewer jobs than the two companies would have done separately. But that assumes that the two companies

---

[1] We believe GTE's real motivation for opposing the merger has nothing to do with its professed fear of getting "frozen out" of national networks through loss of its WorldCom wholesale contract. As the Commission is undoubtedly aware, GTE was a disappointed suitor for MCI, and has stated that it still hopes to pursue the acquisition.

separately would achieve the same rate of growth as the merged company, despite lesser efficiency -- an unlikely and entirely speculative assumption. The efficiencies generated by the merger will enhance the chance of a successful competitive challenge to the incumbent local exchange monopolies, thereby creating growth which will generate jobs, not destroy them.

3. Under Florida law, to establish standing a person must demonstrate 1) an injury in fact that is substantial and immediate, not merely speculative or conjectural, and 2) the injury must be of the type which the governing statute was designed to protect. Neither requirement is met here. The injuries GTE and CWA allege are speculative and conjectural. In addition, section 364.33 is not a merger review statute and was not designed to protect against the types of competitive and economic injury that GTE and CWA allege.

## Argument

### I. GTE and CWA Lack Standing to Assert the Public Interest in This Proceeding

#### A. GTE's standing claim is factually flawed.

GTE rests its claim of standing on its contract with WorldCom for long distance service at wholesale. It argues 1) that the merger will deprive WorldCom of the incentive to continue to offer the favorable prices in this contract, and that after the merger the only other alternative sources will be AT&T and Sprint, whose discounts are smaller, and 2) WorldCom will be less likely after the merger to add advanced features and capabilities to the basic service now covered by the contract.

There are several major factual flaws in GTE's claim.

First, GTE itself admits that its contract with WorldCom is "multi-year," thus protecting it

from immediate cancellation. Covey Aff't ¶ 3.[2] Moreover, GTE has already announced that it will be in a position *in 1998* to obtain long-distance service from other sources (not including the supposedly higher-priced AT&T or Sprint). On May 6, 1997, GTE announced a series of transactions (*not involving WorldCom, MCI, Sprint or AT&T*) which will "position GTE to have the fastest, most reliable and most secure national network available, enabling end-to-end managed network solutions that we believe will be unmatched in the industry."[3] GTE explained that this network, which it is purchasing from Qwest Communications, would be "fully operational next year" and that "[a]t that point, we will be in a position to reach virtually the entire U.S. population." *Id.*

There is, in short, simply no basis for GTE's claim that it is in danger of losing its WorldCom contract and being forced to obtain service at a higher price from AT&T or Sprint.

Nor is there any factual basis for the claim that GTE will be harmed because only WorldCom is willing to offer advanced services that GTE wants to buy. In the first place, GTE announced that the network it is acquiring, which will be "fully operational" in 1998, will be an "advanced data network" that will enable GTE to "[d]evelop innovative and value-added communications services

---

[2] The terms of the contract are confidential. If the Commission wishes to request a copy of the contract to ascertain the full extent of the "multi-year" protection GTE enjoys under it, we would be happy to submit a copy pursuant to a confidential request under Section 364.183 and Rule 25-22.006.

[3] The GTE announcement was obtained from GTE's web site. http://www.gte.com/g/news/050697.html. A copy is attached to the Joint Answer of WorldCom, Inc. and MCI Communications Corporation to GTE Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA Petition to Intervene and Protest of Proposed Agency Action, which MCI and WorldCom are filing on the same day as this Motion to Dismiss ("Joint Answer").

to meet customer needs" and "[r]apidly deploy 'next generation' value-added services and Internet Protocol offerings." *Id.*

It is worth repeating that this network does *not* depend on WorldCom or MCI. Instead, GTE has announced its "purchase of a national, state-of-the-art fiber-optic network from Qwest Communications." *Id.* (emphasis in original). The Harris Affidavit, attached to GTE's pleading, states that the Qwest network does not reach Florida. Harris Aff't p. 9 and Exh. 15. But in fact, Qwest has announced that its network will provide service to all the following cities in Florida by the end of 1998: Jacksonville, Daytona Beach, Melbourne, West Palm Beach, Fort Lauderdale, Miami, Orlando and Tampa.[4]

Another flaw with GTE's claim is its own admission that it has not attempted to purchase advanced services from WorldCom. Ms. Covey admits that "GTE LD has not yet chosen to purchase such [advanced] service from WorldCom." Covey Aff't ¶ 5. Perhaps that is because GTE is acquiring this capability through its transaction with Qwest. In any event, GTE's claim to standing rests on the assertion that sometime in the future it might want to acquire from WorldCom advanced services which it has not yet ordered from WorldCom, but has already arranged to obtain elsewhere. Nothing in the case law justifies standing on such a speculative basis.

In addition, GTE has not established that even if it did not have the protection of a long-term contract, WorldCom would stop offering discounts for wholesale customers after the merger. The argument that a long-distance carrier with retail business will not also sell at wholesale is belied by the fact that both MCI and AT&T presently sell on a substantial scale to both wholesale and retail

---

[4] See Affidavit of Dennis W. Carlton and Hal S. Sider ("Carlton/Sider Aff't") at ¶ 15 (attached to the Joint Answer that MCI and WorldCom are filing today).

customers.[5] In fact, the retail and wholesale markets for long-distance service are not separate. Long distance transmission capacity is fungible; resellers simply buy dedicated and switched services in the volumes that qualify them for the same discounts that large retail customers obtain. Moreover, the FCC prohibition against unreasonable restrictions on resale complements market pressure to make interexchange services available to resellers on nondiscriminatory terms and conditions.[6] If carriers were to stop offering discounts, carriers that do not currently market to resellers would fill the market gap, and could use the same capacity that is used for retail services in order to do so.[7]

**B. CWA's claim of standing is factually flawed.**

CWA's claim to standing rests principally on the contention that the merged company will spend less money than the separate companies would have individually on local loops, other network investment and sales and marketing expenses, resulting in a loss of telecommunications jobs in Florida. *CWA Petition* at 1, 2. But CWA does not contend that the MCI WorldCom will spend less money and invest less than the separate companies are *presently* spending and investing; its only contention is that the combined company might achieve economies that enable it to expand its operations more efficiently than he two companies could separately. Nor does CWA contest

---

[5] Carlton/Sider Aff't ¶¶ 18-21.

[6] *See In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980), *aff'd sub nom., National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *see also In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *motion for reconsideration granted in part and denied in part*, 62 F.C.C.2d 588 (1977), *aff'd, AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978).

[7] For a fuller discussion of this point, *see* the Joint Answer that MCI and WorldCom are filing today, at pp. 17-21 .

the fact that by operating more efficiently, the combined company stands a better chance of mounting a successful competitive challenge to the entrenched local exchange monopolies and thus growing more rapidly and creating more jobs. In short, CWA is saying only that the combined company may employ fewer people than the separate companies would *if* the separate companies were as competitively successful and grew as rapidly as the combined company (despite being less efficient). That claim is factually too remote and speculative to form a basis for standing.[8]

In addition, CWA is claiming standing on the basis that the provision of quality service at affordable rates will suffer, because the combined company will pay fewer access charges and will put competitive pressure on business rates, thus diminishing a source of subsidy for service in high-cost areas. However, under the Telecommunications Act of 1996, subsidy for quality service in high-cost areas will come from the universal service fund, financed by contributions from all telecommunications carriers on an equitable basis. Indeed, the Act was intended to eliminate supracompetitive rates as a source of implicit subsidy, replacing them with explicit subsidies, to the extent needed, from a universal service fund financed by contributions on an equitable basis from all telecommunications carriers. CWA has not claimed that users in high-cost areas in Florida will be harmed by this change in the source of subsidy; and in any event, such a change is required by law.[9]

---

[8] For a more detailed discussion of CWA's claims of reduced investment and reduced employment, *see* the Joint Answer that MCI and WorldCom are filing today, at pp. 24-26.

[9] For a more detailed discussion of CWA's claim that subsidized service will be damaged by the merger, see the Joint Answer that MCI and WorldCom are filing today, at pp. 23-24.

**C. The standing claims made by GTE and CWA have no legal basis.**

GTE and CWA filed their protests pursuant to Rules 25-22.029 and 25-22.036, Florida Administrative Code, which permit intervention and requests for hearing by "one whose substantial interest may or will be affected by the Commission's proposed action" and "substantially affected persons." Although "substantial interest" is not defined by statutes, this Commission has utilized the two pronged test first articulated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), rev. den. 415 So.2d 1359 (Fla. 1982). To establish standing under the Agrico test, a person must demonstrate that:

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

2. the petitioner's substantial injury must also be of a type or nature which the proceeding is designed to protect.

Since the advent of Agrico's two-pronged test, a number of cases have reaffirmed the test and/or clarified its application. First of all, in order to satisfy the first prong of the test, a person must show that he has more than a mere interest in the outcome of a proceeding. There must be a showing that the petitioner's respective rights and interests are immediately affected and thus in need of protection. Florida Society of Ophthalmology vs. Board of Optometry, 532 So.2d 1279 (Fla.1st DCA 1988). Proceedings are not open to everyone who may have an interest in the outcome of a particular case. Furthermore, the alleged injury cannot be speculative or conjectural. Village Park Mobile Home Association v. Dept. of Business Regulation, 506 So.2d 426 (Fla.1st DCA 1987). While GTE and CWA, like many others, may be interested in the outcome of the merger, such interest is not enough to satisfy *either* prong of the Agrico test.

As for the first prong of the Agrico test, GTE and CWA have paraded a series of alleged horribles before the Commission suggesting that the merger of WorldCom and MCI will "undermine competition," "alter WorldCom's practices and incentives," "harm competition," result in "expected discontinuation of innovative wholesale features," "result in job loss and reduced living standards for telecommunications workers," and cause a variety of other conjectural harms. As previously explained, none of these arguments have any basis in fact. But as to standing, each of these allegations involve potential economic harm or highly speculative assumptions about future conduct that do not rise to the level of a present, actual injury in fact required by Agrico.

A number of cases support the conclusion that economic or competitive claims raised by GTE and CWA simply do not meet the first prong of Agrico. For example, in AmeriSteel Corp. v. Clark, 691 So.2d 473 (Fla. 1997), the Supreme Court agreed with the Commission that on the basis of Agrico AmeriSteel's complaint of higher rates "is not an injury in fact of sufficient immediacy to entitle AmeriSteel to a 120.57 hearing." AmeriSteel, 691 So.2d at 477. Similarly, in an order that was not appealed, this Commission denied standing to Best Telephone Company's protest of a PAA order granting a certificate to Atlas Communications Consultants on the basis of Agrico. In denying standing, this Commission stated:

> 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.

Order No. PSC-94-0114-FOF-TI, 94 FPSC 1:358 (Jan. 31, 1994). Such a finding is entirely consistent with Microtel v. Fla. Pub. Svc. Comm., 464 So.2d 1189 (Fla. 1985) and ASI, Inc. v. Fla. Pub. Svc. Comm., 334 So.2d 594 (Fla. 1976). If in the future, one of the alleged problems did occur,

and such conduct was unlawful, then GTE or CWA could file the appropriate complaint. But until there is an actual, present controversy that is subject to this Commission's jurisdiction, such speculative conduct is just that – pure conjecture, and not an Agrico injury in fact.

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

If MCI WorldCom, after the merger, were to file an original application for authority to operate telecommunications facilities in Florida, there would be no basis for rejecting the application under section 364.335. The fact that the company is seeking authority to own and operate telecommunications facilities through acquisition of stock ownership does not extend the zone of protection conferred by section 364.33 to issues otherwise beyond the Commission's authority. All of the existing MCI certificates and tariffs have been found to be in the public interest. All of the existing WorldCom certificates and tariffs have been found to be in the public interest. The fact that

the certificates will be owned by companies ultimately controlled by the merged MCI WorldCom rather than MCI and WorldCom separately does not change any of the public interest concerns which the statute addresses. In essence, the Commission lacks jurisdiction under section 364.33 to review the merger, which is what GTE and CWA are asking it to do. *See* Order No. PSC-97-1370-FOF-TP.

GTE claims an interest "in assuring the kind of conditions that are necessary to give all market participants a fighting chance in the long term so that long distance competition can flourish in Florida." Similarly, CWA argues a WorldCom-MCI focus on business customers would be bad for residential customers. However, in both AmeriSteel and Fla. Soc. of Ophthalmology, the courts have upheld denial of standing under the second prong of Agrico to those raising the same type of economic and competitive claims that GTE and CWA are raising here. AmeriSteel, 691 So.2d at 478; Fla. Soc. of Ophthalmology, 532 So.2d at 1285. Given the limited authority granted to the Commission by section 364.33, whatever "public interest" inquiry the Commission may conduct does not extend to the economic and competitive consequences of a merger.

Moreover, the court in Village Park Mobile Home Ass'n. v. State Dept. of Bus. Reg., 506 So.2d 426 (Fla. 1st DCA 1987) specifically found that the agency's "approval of the prospectus does not automatically result in the increase in rents, reduction in services, or changes in park rules or regulations." Village Park, at 433. Rather, it was only through the park's *implementation* of the prospectus that the petitioners might be harmed, and there were numerous legal forums available to the petitioners to have such complaints addressed. Village Park, at 430-31, 433-34. In the instant transfer, approval of the transfer will not in and of itself cause any of the harms alleged by GTE and

CWA. However, if in the future the combined MCI WorldCom engaged in unlawful conduct, forums exist for handling such matters.

The lengthy string citation of Commission orders granting intervention do not confer standing on GTE, or anyone else, under the Agrico standard. In the majority of the cases cited by GTE, rates or policies of a regulated utility were being established or revised and the intervenors would have been affected by the decision. Only one of the cases cited by GTE, Application for Approval of Cert. from Twin County Util. Co. to Southern States Utilities, Inc., 89 FPSC 2:89 (1989), involved a transfer proceeding. That application, however, was filed under Chapter 367 and the rules pertaining to water and wastewater companies are materially different from the instant application under Chapter 364. It is also significant that in Twin County Utilities the customer association addressed issues with respect to rates, service areas, and services, all permissible subject matters under rules of the PSC regarding water and wastewater transfers.

In the final analysis, GTE and CWA have demonstrated neither sufficient immediacy of harm to intervene in this proceeding, nor an interest of the type the statute is designed to protect.

## Conclusion

The Commission should dismiss, for lack of standing, GTE's Petition on Proposed Agency Action and Request for Section 120.57 Hearing and CWA's Petition to Intervene and Protest of Proposed Agency Action.

Respectfully submitted,

**MCI COMMUNICATIONS CORPORATION**

By: _____

Tom Bond
MCI COMMUNICATIONS CORPORATION
780 Johnson Ferry Road
Atlanta, GA 30342
(404) 267-6315 (Tel)

By: _____

Richard D. Melson
HOPPING, GREEN, SAMS & SMITH
123 South Calhoun Street
Tallahassee, FL 32301
(850) 222-7500 (Tel)

Its Counsel

**WORLDCOM, INC.**

By: _____

Jean L. Kiddoo
Robert V. Zener
Kathy L. Cooper
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7834 (Tel)

By: _____

Floyd R. Self
MESSER, CAPARELLO & SELF, P.A.
215 S. Monroe Street, Suite 710
P.O. Box 1876
Tallahassee, FL 32302
(850) 222-0720 (Tel)

Its Counsel

March 3, 1998

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of 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-TP has been furnished by Hand Delivery (*) and/or U.S. Mail to the following parties of record this 3rd day of March, 1998:

Martha Brown, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Mr. Richard Tudor*
Division of Communications, Room 270
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Richard D. Melson*
Hopping Green Sams & Smith
123 S. Calhoun St.
Tallahassee, FL 32301

Thomas K. Bond
MCI Telecommunications
780 Johnson Ferry Road, Suite 700
Atlanta, GA 30342

Mr. Brian Sulmonetti
LDDS WorldCom
1515 S. Federal Highway, Suite 400
Boca Raton, FL 33432

Jean L. Kiddoo, Esq.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, DC 20007

Kimberly Caswell, Esq.*
c/o Ms. Becki Edmondston
GTE Florida Incorporated
106 E. College Ave., Suite 810
Tallahassee, FL 32301

George Kohl
Debbie Goldman
Communications Workers of America
501 Third St., N.W.
Washington, DC 20001

Floyd R. Self