

ORIGINAL

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition of MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC for approval for name change and transfer of CLEC Certificate No. 5228 from IDS Telcom LLC to IDS Telcom Corp.; for waiver of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection in connection with the sale of customer-based and other assets from IDS Telcom LLC to IDS Telcom Corp.; and for acknowledgment of registration of IDS Telcom Corp. as intrastate interexchange telecommunications company effective February 8, 2005.

DOCKET NO. 050111-TP

Filed: March 16, 2005

**MCG CAPITAL CORPORATION, IDS TELCOM CORP.,  
AND IDS TELCOM LLC'S  
MOTION TO DISMISS PETITION FOR A FORMAL HEARING AND  
OBJECTION TO APPLICATION  
AND REQUEST FOR EXPEDITED PROCESSING**

MCG Capital Corporation, IDS Telcom Corp. and IDS Telcom LLC (Petitioners), pursuant to rule 28-106.204, Florida Administrative Code, move to dismiss the Petition for a Formal Proceeding and Objection to Application filed by Phyllis Heiffer (Heiffer) on March 11, 2005 and request that this Motion be processed on an expedited basis. As grounds therefore, Petitioners state as follows:

**Introduction**

1. On February 8, 2005, Petitioners filed a Joint Petition seeking approval of a name change and transfer of IDS Telcom LLC's CLEC certificate to IDS Telcom Corp., wavier of rule 25-4.118, Florida Administrative Code, and acknowledgement of IDS Telcom Corp.'s IXC registration.

2. On March 4, 2005, the Commission issued Order No. PSC-05-0251-PAA-TP (Order) in which the Commission approved the requested transfer and waiver and found the grant of the Petition to be in the public interest.

3. On March 11, 2005, Heiffer filed a Petition for a Formal Proceeding and Objection to Application (Objection). Heiffer is a disgruntled ex-employee of IDS Telcom LLC who was terminated for cause in 2001. Heiffer has filed her Objection without basis solely to harass, burden, oppress and delay Petitioners. Heiffer has engaged in, and continues to engage in, litigation with IDS Telcom LLC in a variety of forums in an effort to press unmeritorious claims and interfere in any way she can with the activities of her former employer. The current Objection is simply another in a long line of such unfounded actions and the Commission should not permit Heiffer to abuse the Commission's process and procedures in support of her own personal vendetta.

4. Heiffer's Objection should be dismissed because it fails to raise any material issues and does not state a claim for which relief can be granted.<sup>1</sup> Heiffer's Objection should be summarily dismissed for the following reasons:

a. Heiffer lacks standing to protest the Commission's Order because her substantial interests are not affected by the Commission decision approving the transfer and waiver;

b. Heiffer has not alleged and cannot allege facts in support of any contention that the public interest is not served by the transfer and waiver;

c. The Commission lacks jurisdiction to address Heiffer's claims; and

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<sup>1</sup> "The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993) (citations omitted).

### **Heiffer Lacks Standing And Does Not Allege Public Interest Issues**

5. A person seeking to proceed before this Commission must demonstrate that its substantial interests are affected by the proposed Commission action and that the person complies with the requisite legal standing requirements. “Only persons whose substantial interests may or will be affected by the Commission’s action may file a petition for a 120.57 hearing.”<sup>2</sup> Heiffer fails to meet this standing requirement and thus her Objection must be dismissed.

6. The requirements for standing in an administrative proceeding are set out in the seminal case of *Agrico Chemical Co. v. Department of Environmental Protection*, 406 So.2d 478 (Fla. 2d DCA 1981). That case requires that a two-prong test for standing be satisfied to demonstrate that one’s substantial interests are affected<sup>3</sup>:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

*Id.* at 482. The first test deals with the degree of injury; the second part of the test deals with the nature of the injury. Heiffer can meet neither of these requirements.

7. First, Heiffer has failed to demonstrate that she will suffer any sort of injury which is of sufficient immediacy to entitle her to a hearing. At best, Heiffer’s alleged injury – that she has not received “adequate assurances” regarding payment

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<sup>2</sup> *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477 (Fla. 1997) (the court found that Ameristeel did not have standing in a proceeding before the Commission because its claim of higher rates was not of sufficient immediacy to satisfy the first prong of *Agrico* and its interests were not the type the proceeding was designed to protect so it did not meet the second prong of *Agrico*).

<sup>3</sup> Rule 28-106.201(2)(b), Florida Administrative Code, which governs initiation of proceedings, also requires “an explanation of how petitioner’s substantial interests will be affected by the agency determination,” as does rule 25-22.029, Florida Administrative Code (Point of Entry Into Proposed Agency Action Proceedings).

which is not even due and owing and which may *never* be due and owing<sup>4</sup> and that she has not received “assurances” that a court order will not be violated -- is pure and total speculation. And, it is speculation “twice removed” at that – Heiffer argues, without basis, both that she will receive such a judgment *and* that the judgment will not be paid. *If* the “injury” Heiffer claims occurs at all, it will occur at some undetermined future date. But such unadulterated speculation cannot form the basis for standing before this Commission. *See, Village Park Mobile Home Association, Inc. v. Department of Business Regulation*, 506 So.2d 426, 430 (Fl. 1<sup>st</sup> DCA 1987) (allegations about future value and marketability of homes too speculative to meet injury in fact standard).

8. Heiffer’s main complaint appears to be that as an alleged “creditor”<sup>5</sup> of IDS Telcom LLC, she has not received “sufficient assurances” that (should she prevail on her claim) her claim will be paid. Heiffer’s claim is highly speculative -- she has not received a judgment from a court on her alleged claim and thus, of course, can make no showing at all that should she receive such a judgment, she will not be paid. Further, Heiffer complains that she has not received “assurances” that certain behavior will not be repeated. These allegations are nothing more than pure speculation and cannot be a basis for standing.<sup>6</sup>

9. Second, Heiffer cannot meet the other prong of the *Agrico* test, which requires that she demonstrate that the injury she alleges is of the type this proceeding is designed to address (“zone of interest” test). As Heiffer recognizes in her Objection, this

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<sup>4</sup> Even Heiffer admits her allegations relate to a *disputed* claim for attorneys’ fees and a disputed *contractual* claim for deferred compensation. Objection at ¶ 6b, c.

<sup>5</sup> Heiffer continually uses the term “creditors” throughout the Objection; however, she is the only person to raise such a claim. There are no other “creditors” involved.

<sup>6</sup> In addition, as discussed later in this motion, even were all of Heiffer’s claims true, the Commission would have no jurisdiction to remedy them, as the Commission cannot award damages.

proceeding is designed to review whether the transfer and waiver is in the public interest. The Commission's inquiry into the public interest does not encompass the unfounded allegations of an ex-employee but rather focuses on whether the new company has the ability to provide appropriate service to the public at large.<sup>7</sup> As the Commission found:

The new company has attested that it will provide for a seamless transition while ensuring that the affected customers understand available choices with the least amount of disruption to the customers. Having reviewed the notice that will be sent to the former company's customers, we find it to be adequate. The customers should not experience any interruption of service, rate increase, or switching fees.<sup>8</sup>

10. In *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d. 1189 (Fla. 1985), Microtel (a company certified to provide intrastate long distance service) protested this Commission's certification of a competitive carrier under an earlier version of Section 364.337, Florida Statutes (which provided for the certification of competitive intrastate long distance carriers). Microtel argued that the statute allowing for certification was unconstitutional because it provided this Commission unbridled discretion in the initial certification process. The Florida Supreme Court rejected that argument on the grounds that, taken as a whole, the relevant statutes in Chapter 364 provided the Commission appropriate standards and guidelines to use in granting certifications in the public interest. See *Microtel* at 1191; see also, *Teleco Communications C. v. Clark*, 695 So.2d 304, 308-309 (Fla. 1997) (Commission's authority to act in telecommunications matters is limited by the authority provided under Chapter 364, Florida Statutes).

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<sup>7</sup> As the Commission noted, for example, in Order Nos. PSC-03-0698-PAA-TP and PSC-03-0401-PAA-TI, the public interest inquiry focuses on the company's ability to provide "efficient, reliable telecommunications service."

<sup>8</sup> Order at 3.

11. In this situation, Section 364.337, Florida Statutes, provides this Commission clear guidance on the standards applicable to certification proceedings such as this one. Section 364.337(1) provides, in part, that “[t]he Commission shall grant a certificate of authority to provide competitive local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capacity to provide such service in the geographic area proposed to be served.” Similarly, Section 364.337(3) provides, in part, that “[t]he Commission shall grant a certificate of authority to provide intrastate interexchange telecommunications service upon a showing that the applicant has sufficient technical, financial, and managerial capacity to provide such service in the geographic area proposed to be served.” Furthermore, Section 364.01, establishes this Commission’s powers and subsection (4) puts limits upon this Commission’s exercise of those powers.<sup>9</sup> As Section 364.01(4) makes clear, the factors used to determine public interest and the extent of this Commission’s authority, all deal with promoting

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<sup>9</sup> Section 364.01(4) provides:

The commission shall exercise its exclusive jurisdiction in order to:

- (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.
- (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.
- (c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation.
- (d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies.
- (e) Encourage all providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints.
- (f) Eliminate any rules and/or regulations which will delay or impair the transition to competition.
- (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.
- (h) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis.
- (i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

competition among telecommunications providers and ensuring that the public has access to affordable telecommunications services. It is the concern of the courts of this state, and not this Commission, to settle private contractual disputes, even if such disputes include a carrier subject to this Commission's jurisdiction. *See, Southern Bell Telephone and Telegraph Co. v. Mobile America Corp.*, 291 So.2d 199 (Fla. 1974); *Florida Power and Light v. Glazer*, 671 So.2d 211 (Fla. 3d DCA 1996).

12. Heiffer's Objection makes no mention of IDS customers or the services they receive. In fact, the Objection contains only a single allegation that could even conceivably bear on the public interest factors, the "technical, financial, and managerial capacity" of IDS Telcom Corp. to provide service. Heiffer incorrectly argues that her dispute with IDS Telcom LLC draws into question the qualification of the management team that will oversee the IDS assets should the transaction proceed.<sup>10</sup> Heiffer's assertions are simply incorrect. While the Petition states that IDS Telcom Corp. will continue to have access to the management team of IDS Telcom LLC following the proposed transaction, the management team of IDS Telcom LLC will not oversee the IDS operations following the transaction. Rather, the management team of IDS Telcom Corp. will be comprised entirely of new members - the qualifications of which have already been considered and approved by the Commission. Heiffer's Objection does not dispute or even address the sufficiency of those qualifications. Accordingly, Heiffer's allegations regarding sufficiency of the on-going management team overseeing the IDS operations are inaccurate and simply do not bear on the issues before the Commission in this proceeding.

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<sup>10</sup> Objection at ¶. 10.

13. Heiffer has made no other allegations whatsoever that involve the public interest; all of her remaining allegations pertain solely to Heiffer's particular interest -- a creditor's "claim" (even if one accepts unsubstantiated allegations as a "claim") that does not implicate any public interest standard. An individual's personal litigation cannot and does not rise to the level of the public interest, and, in this case Heiffer's Objection is nothing more than a transparent attempt to hold hostage Petitioners' transfer and waiver request. Carried to its logical extreme, if Heiffer is permitted to proceed, it would mean that any entity that is involved in litigation (no matter how meritless) with a company seeking to transfer its certificate would have the ability to hold up the transfer and any other transactions related to the transfer. Such an outcome is clearly *not* in the public interest under Chapter 364, Florida Statutes, but is the very antithesis of it.

14. The Commission considered an analogous case in *In re: Emergency joint application for approval of assignment of assets and AAV/ALEC Certificate No. 4025 and LXC Certificate No. 2699 from Winstar Wireless, Inc. to Winstar Communications, LLC.*, Docket No. 020054-TP, Order No. PSC-02-0744-FOF-TP (May 31, 2002). There Verizon protested the transfer of various licenses on the grounds that Verizon would not be paid prior amounts due under an interconnection agreement and could not trust the new company to make other payments. In granting Winstar's motion to dismiss the petition for lack of standing, this Commission stated, in pertinent part at page 3, emphasis added:

Verizon has not alleged any injury that it will, in fact, incur by virtue of New Winstar receiving certification through this transfer, but instead argues that conditions should be imposed upon New Winstar *in order to preclude possible future injury resulting from its dealings with the new company*. Conjecture about future economic detriment is too remote to establish standing. Order No. PSC 98-0702-FOF-TP, issued May 20,



1998, at p. 15, citing 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. 1<sup>st</sup> DCA 1988) (some degree of loss due to economic competition is not sufficient immediacy to establish standing). See also Order No. 96-0755-FOF-EU; citing Order No. PSC 95-030348-FOF-GU, March 13, 1995; International Jai-Alai Players Assoc. v. Florida Pari-Mutual Commission, 561 So.2d 1224, at 1225-1226 (Fla. 3<sup>rd</sup> DCA 1990); and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 434 (Fla. 1<sup>st</sup> 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).”

15. Likewise in *In Re: Petition to resolve a territorial dispute with Florida Power & Light Company in St. Johns County, by Jacksonville Electric Authority*, Docket No. 950307-EU, Order No. PSC-96-0755-FOF-EU (June 10, 1996), this Commission dismissed a petition protesting this Commission’s approval of a territorial agreement. In dismissing the petition, this Commission held that potential injury to a steel plant consumer in the form of higher electricity prices was not the type of injury that warranted a Section 120.57 hearing. Additionally, this Commission held that the injury alleged was not the type of injury contemplated by the applicable statutes providing the Commission jurisdiction stating, in pertinent part, at page 4:

Sections 366.04(2) and (5), Florida Statutes, ‘the Grid Bill,’ authorize us to approve territorial agreements and resolve territorial disputes in order to ensure the reliability of Florida’s energy grid and to prevent further uneconomic duplication of electric facilities. The Grid Bill does not authorize use to set territorial boundaries in response to one customer’s desire for lower rates.

The Florida Supreme Court affirmed the Commission’s ruling in *Ameristeel Corp. v. Clark*, 691 So.2d 473 (Fla. 1997). Moreover, this Commission has held that where intervention is based upon an interest in economic competition, that such economic

competition must be clearly outlined in the governing statute. *In Re: Peoples Gas System, Inc. Petition For Approval of Load Profile Enhancement Rider to Rate Schedule RS, SGS, GS, GSLV-1, GSLV-2 and GTSLV-2*, Docket No. 94-1324-GU, Order No. PSC-95-0348-FOF-GU (March 13, 1995) at page 5, *citing, Fla. Society of Ophthalmology v. St. Board of Optometry*, 532 So.2d 1279 (Fla. 1<sup>st</sup> DCA 1988), *rev. denied*, 542 So.2d 1333 (Fla. 1989).

16. Furthermore, Heiffer's Objection fails to allege any adverse consequence or a single fact or interest over which this Commission has authority under Chapter 364, in ruling upon a transfer and waiver request. Heiffer therefore fails to satisfy the second prong of the *Agrico* test. Heiffer's alleged injuries all relate to the suspected inability to pay a court judgment (which has not even been received and which may never be received). This contractual matter between an employer and a disgruntled former employee is clearly outside the scope of this proceeding and any public interest review and is furthermore (as discussed below) entirely outside the Commission's jurisdiction.

17. The public interest standard which this Commission must apply is bounded by the authority provided in Chapter 364, Florida Statutes. Heiffer has not and cannot allege that the transfer of licenses and waiver of commission rules raises any material public interest issue as contemplated by Chapter 364. Indeed, under Rule 25-24.815(5), Florida Administrative Code, Heiffer has the burden of proving that the license transfer is *not* in the public interest. Accordingly, the Objection should be dismissed due to Heiffer's lack of standing.

**Commission Consideration of Heiffer's Claims is Unnecessary and Inappropriate**

18. Even if the Commission were to determine that Heiffer has standing to proceed, Commission action on Heiffer's assertions is unnecessary and inappropriate in the context of this proceeding. As Heiffer's Objection demonstrates, Heiffer's contentions are already before a court of competent jurisdiction in the State of Florida – a court which has already held and continues to hold substantial proceedings. Yet having thus far failed to prevail in that forum, Heiffer now seeks, through her Objection, to drag this Commission into that same unrelated commercial dispute.

19. Heiffer would have this Commission waste its scarce resources to retrace ground already well covered elsewhere, while raising the prospect that Commission could issue an order which is ultimately at odds with the final determination of the court proceedings now underway. Petitioners respectfully submit that that is neither an appropriate nor judicious role for the Commission to play.

20. Indeed, there is good reason for the Commission not to take up Heiffer's commercial dispute in this proceeding. Such a proceeding would serve only to impair the ability of Petitioners to complete the proposed transaction, thereby complicating Petitioners' efforts to ensure that IDS customers in Florida continue to receive service on a seamless, uninterrupted basis. Thus, grant of Heiffer's Objection would be directly adverse to the public interests that the Commission protects.

21. Furthermore, Petitioners respectfully assert that Heiffer's claims are not appropriately considered in this proceeding because the Commission's ability to grant the ultimate relief Heiffer seeks is limited. The Commission is a creation of the legislature, its authority is derived solely from the legislature, and thus it has only that authority

explicitly granted to it.<sup>11</sup> The “claims” Heiffer has raised are far afield from any area over which the Commission has jurisdiction.<sup>12</sup> As noted above, Heiffer claims that *if* she is successful in litigation in circuit court, she has been given no “assurances” that her claim (which has not yet arisen) will be satisfied. Thus, she is seeking to require this Commission to ensure that she will be awarded damages, *if* she should prevail on her claim in circuit court at some unspecified point in the future.<sup>13</sup> Even *if* Heiffer does prevail in her litigation outside of this Commission, the Commission has no jurisdiction to give her the relief she seeks. If such speculative relief became necessary in the future, Heiffer would have to seek it from the court.

22. It is well-established that the Commission, as a legislative agency, has no authority to award money damages. In *Florida Power & Light Company v. Glazer*, 671 So.2d 211, 215 (Fla. 3d DCA 1996), the court held:

This is a civil action to recover damages for breach of contract or for negligence. The Commission has no jurisdiction to award plaintiff damages or to reimburse plaintiff for its losses. Only a court, in accordance with due process, can constitutionally award damages in a civil action.

*See also*, *Sandpiper Homeowners Association, Inc. v. Lake Yale Corp.*, 667 So.2d 921 (Fla. 5<sup>th</sup> DCA 1996). As the Commission lacks jurisdiction to award damages, it follows that it lacks jurisdiction to take action specifically designed to assure that a speculative judgment for damages can be satisfied. Thus, the Commission has no jurisdiction to address this claim.

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<sup>11</sup> *Florida Public Service Commission v. Bryson*, 569 So.2d 1253 (Fla. 1990).

<sup>12</sup> *See*, § 364.01, Florida Statutes.

<sup>13</sup> Petitioners’ view is that Heiffer’s claims are frivolous and without merit. Nonetheless, because such claims are in another forum and not properly before the Commission, Petitioners will not waste the Commission’s time arguing the lack of merit in Heiffer’s claims.

23. Heiffer also claims, without basis, that the transaction at issue violates Chapter 726, Florida Statutes (Uniform Fraudulent Transfer Act). However, the Commission has no authority to review claims or enter judgments pursuant to this statute. Such action lies in circuit court. Again, the Commission has no jurisdiction to grant the relief Heiffer seeks.

**Request for Expedited Relief**

24. The Objection filed in this case is frivolous and fails to meet the most basic standing requirements of Chapter 120, Florida Statutes. Nonetheless, its very filing has already had the effect of delaying the transfer and waiver. Thus, Petitioners request that this Motion be processed as expeditiously as possible.

**WHEREFORE**, Petitioners request that this Motion be processed on an expedited basis and Heiffer's Objection be dismissed.

S/Vicki Gordon Kaufman

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Motion to Dismiss and Request for Expedited Processing was served by electronic mail and U.S.

Mail this 16<sup>th</sup> day of March, 2005 to the following parties of record:

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