
IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1828

On Appeal from a Final Order of the Florida Public Service Commission
Docket No. 060308-TP

NuVox Communications, Inc., et al.,

Appellants,

v.

**The Florida Public Service Commission, AT&T Inc., BellSouth Corporation,
BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc.,**

Appellees.

**ANSWER BRIEF OF APPELLEES
AT&T and BELL SOUTH**

HOLLAND & KNIGHT

Stephen H. Grimes
Florida Bar No. 032005
D. Bruce May, Jr.
Florida Bar No. 0354473
315 South Calhoun Street
Suite 600
Tallahassee, Florida 32301
(850) 224-7000
(850) 224-8832 (facsimile)

Counsel for AT&T Inc.

AUSLEY & MCMULLEN

Major B. Harding
Florida Bar No. 033657
John Beranek
Florida Bar No. 0005419
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115
(850) 222-7560 (facsimile)

**Counsel for BellSouth Corporation,
BellSouth Telecommunications, Inc.
and BellSouth Long Distance, Inc.**

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PRELIMINARY STATEMENT

Appellees AT&T Inc. (“AT&T”) and BellSouth Corporation, BellSouth Telecommunications, Inc. (“BST”), and BellSouth Long Distance, Inc. (collectively, “BellSouth”) respectfully file this brief in support of affirmance of the decision of the Florida Public Service Commission (“PSC”).¹

STATEMENT OF THE CASE AND FACTS

At issue in this case is the indirect transfer of control of telecommunications facilities resulting from the merger between AT&T and BellSouth Corporation.

The PSC and 18 other state commissions have all concluded that the AT&T/BellSouth Corporation transaction accords with the public interest. No state commission has disagreed with that assessment. Moreover, just days ago, the United States Department of Justice (“DOJ”) likewise concluded that this merger raises no anticompetitive concern warranting further investigation under federal antitrust laws. As the DOJ explained, after “thoroughly investigating” this merger, it “determined that the proposed transaction is not likely to reduce competition substantially.”² The DOJ further concluded that the merger “is not likely to harm

¹ For consistency with Appellants’ brief, citations to the record are to the Appendix filed with Appellants’ Emergency Motion for Stay and are designated as “App.” Appellants’ Initial Brief is cited as “Br.” Citations to the Appendix attached to this brief are designated as “Appellees App.”

² *Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth: Investigation*

consumer welfare” and will “likely result in cost savings and other efficiencies that should benefit consumers.”³

The proceeding before the PSC as to this merger began on March 31, 2006, when AT&T and BellSouth filed a Joint Application for Approval of Indirect Transfer of Control Relating to the Merger of AT&T Inc. and BellSouth Corporation (“Joint Application”) pursuant to Section 364.33, Florida Statutes. The Joint Application demonstrated that the merger would be seamless to consumers because (1) it was a holding-company transaction between AT&T and BellSouth Corporation, two companies that do not provide telecommunications service in Florida, and (2) the BellSouth Corporation subsidiaries that do provide service in Florida (BST and BellSouth Long Distance) would continue to provide those existing services just as they do today. *See* App. 7-8, 10-12.

At no point in the proceeding before the PSC did *any* consumer, consumer group, or government agency representing consumers (including the Attorney General⁴ and the Office of Public Counsel) oppose this merger. However, in May

Concludes that Combination Would Not Reduce Competition (Oct. 11, 2006) (“*DOJ Statement*”) (attached hereto as Appellees App. A).

³ *Id.*

⁴ The Attorney General’s letter to the PSC, partially quoted and paraphrased by Appellants, speaks for itself. Appellants, however, fail to advise this Court that, by its terms, the Attorney General’s letter (1) “do[es] not reflect any opposition to a merger in the telecommunications industry or otherwise”; (2) “recognize[s] [that the PSC’s] authority in the matter is limited”; and (3) recommends that the PSC

2006, Appellants Time Warner and NuVox filed petitions to intervene in the PSC proceedings on the basis that the merger would allegedly affect their interests as competitors. *See App. 115-27.* AT&T and BellSouth opposed those petitions because, under a consistent series of prior decisions from this Court, other Florida courts, and the PSC, Appellants lacked standing to participate in a Section 364.33 proceeding because they are competitors alleging economic harm at some indefinite future date. *See App. 143-63.*

On June 12, 2006, the PSC Staff issued its recommendation in this matter. The Staff recommended that the PSC (1) approve the transfer of control; (2) file comments with the Federal Communications Commission (“FCC”) urging the federal agency to consider any competitive issues raised by the merger in its ongoing review of that transaction; and (3) close this docket unless the order issued from this recommendation was protested by a party that had standing. *See App. 208-16.*

At a June 20, 2006 agenda conference, the PSC permitted attorneys for Appellants and several other competitors to present argument on the PSC Staff recommendation. Several competitors took advantage of this opportunity to argue the alleged public-interest harms created by the merger. *See App. 221-73.* During

“file comments with the FCC providing direction on the issues presented by the merger,” which the PSC has done. *App. 219-20.*

that hearing, the attorney for Appellant XO explicitly acknowledged the PSC's limited inquiry under Section 364.33, stating that "XO understands that the [PSC's] authority is what it is in this area and that *ultimately it is the FCC that will make the final call on this.*" App. 242 (emphasis added). XO thus requested that the PSC "strengthen[]" its comments to the FCC, not that the PSC deny approval of the transfer of control. *Id.*

After hearing those arguments, the PSC voted 5-0 to approve the transaction. At the same time, the PSC addressed alleged competitive concerns by voting to file (and later filing) with the FCC comments requesting that the federal agency carefully evaluate the competitive issues raised by competitors such as Appellants. *See* App. 262-72 (transcript of agenda conference); Comments of the PSC, *AT&T Inc. and BellSouth Corp. Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (FCC filed June 20, 2006) ("*PSC Federal Comments*"). Consistent with the statements of XO's counsel before the PSC and the suggestion of Attorney General Crist, *see supra* note 4, the *PSC Federal Comments* recognize that the federal agency was better positioned to take a "more comprehensive approach" to reviewing the transaction because it has so-called "intermodal" authority (not possessed by the PSC) to regulate wireline and wireless telecommunications as well as video services. *See PSC Federal Comments* at 1 (emphasizing that "a more comprehensive approach is required and that approach

should ultimately rest with the FCC”). The PSC urged the FCC to “carefully evaluate the stakeholders’ concerns” in the merger. *Id.* at 2.

On June 23, 2006, the PSC issued its *Notice of Proposed Agency Action; Order Approving Indirect Transfer of Control*, in which it concluded that, “based on the Applicants’ management, technical, and financial capability, the transfer of control is in the public interest.” App. 278.

In filings made on July 14, 2006, Appellants sought to protest the PSC’s *Notice of Proposed Agency Action*. See App. 281-312, 313-33. In response to those protests, AT&T and BellSouth renewed their arguments that, under multiple, established precedents from Florida courts and the PSC, Appellants lacked standing to participate in this proceeding. In particular, BellSouth and AT&T demonstrated that Appellants’ assertions of injury were nothing more than speculative and general claims of future, potential economic harms that disregarded the fact that the merger would not alter the legal and contractual relationships between BellSouth (or AT&T) and Appellants. See App. 334-53. AT&T and BellSouth also separately established that, under a long line of prior decisions, the PSC does not consider the interests of competitors in a Section 364.33 proceeding. See *id.* Rather, the PSC’s inquiry focuses on whether the transfer of control of telecommunication facilities would harm *consumers’* interest in the provision of efficient and reliable telecommunications services. Agreeing

with those arguments, the PSC Staff recommended that the PSC dismiss the protests for lack of standing. *See App. 379-88.*

On August 15, 2006, after the PSC heard argument from counsel for Appellants on the issue of intervention/standing, *see App. 393-403*, it voted, again unanimously (5-0), to adopt the Staff recommendation, *see App. 406*. The PSC issued an order reflecting that conclusion on August 24, 2006. *See App. 409-18*. In accord with the arguments made by AT&T/BellSouth and the recommendation of the PSC Staff, that order contained two independent determinations.

First, relying upon this Court's decision in *AmeriSteel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997) (per curiam), and prior PSC precedent, the PSC determined that Appellants had not carried their burden to establish standing because they had not demonstrated the required threat of sufficiently direct and immediate harm. *See App. 414*. The PSC found that “[w]hile it may be possible to trace the[] effects [alleged by the Appellants] back to the proposed merger ‘the causal chain has too many links in it to view the downstream effects [as] “direct” or “immediate.”’ ” *App. 415* (quoting *In re: Joint Application for Approval of Transfer of Control of Sprint-Florida, Inc. Holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc. Holder of PATS Certificate No. 3822*, 06 F.P.S.C. 1:105, Order No. PSC-06-0033-FOF-TP, at 6, Docket No. 050551-TP, 2006 Fla. PUC LEXIS 24 (Jan. 10, 2006) (“*Nextel Order*”)).

Second, the PSC made an independent determination that Appellants were asserting harms that Section 364.33 was “not designed to protect.” App. 416. The PSC explained that it has consistently “held that the appropriate inquiry in a transfer-of-control proceeding is the effect of the transfer of control on service to consumers, not on the interests of competitors.” *Id.* (citing *In re: Request for Approval of Transfer of Control of MCI Communications Corporation*, 98 F.P.S.C. 5:299, Order No. PSC-98-0702-FOF-TP, at 20, Docket No. 971604-TP, 1998 Fla. PUC LEXIS 1106 (May 20, 1998) (“*MCI Order*”); *In re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation*, 00 F.P.S.C. 3:16, Order No. PSC-00-0421-PAA-TP, at 8, Docket No. 991799-TP, 2000 Fla. PUC LEXIS 253 (Mar. 1, 2000) (“*Sprint Order*”).

SUMMARY OF ARGUMENT

This Court’s precedents establish that PSC decisions such as this one are presumed to be correct and that this Court’s review is highly deferential. This Court’s case law is consistent and extremely clear on these points. Under the deferential standard of review applicable here, the Court should affirm the PSC.

I. Each of the PSC’s two independent determinations in finding that Appellants lacked standing to protest the merger approval is reasonable. The Court thus can and should affirm based on either or both of these grounds.

First, the PSC's decision that Appellants could not show sufficiently direct and immediate harm is plainly reasonable in light of the *undisputed* fact that the merger will not alter the legal and contractual relationships between Appellants and AT&T/BellSouth. Simply put, the completion of the merger will have *no* effect on the existing relationships between AT&T/BellSouth and Appellants. In particular, as a matter of federal law, AT&T/BellSouth will have the *exact same obligations* after the merger that they have today to provide Appellants with the wholesale facilities and services that Appellants in turn use to serve their retail customers. Moreover, all of AT&T/BellSouth's other duties to provide Appellants with nondiscriminatory service under state and federal law will remain in place after the merger. In such circumstances, it was hardly arbitrary or unreasonable for the PSC to determine that Appellants had not demonstrated direct and immediate injury, as is required under the established legal test here.

The PSC's decision on this point is strongly supported by this Court's analogous conclusion in *AmeriSteel*, where the Court affirmed the PSC's finding of lack of standing because the appellant's contractual rights would not be affected by the transaction at issue before the PSC. The PSC's holding also follows naturally from prior decisions of that expert agency, which likewise deny standing in circumstances indistinguishable from those presented here.

Second, and independently, the PSC's adherence to its decades-old reading

of Section 364.33 as contemplating an inquiry only into whether a transfer of control will affect consumers' interest in efficient and reliable service – and thus not authorizing an antitrust-like “merger review” proceeding – is plainly reasonable and consistent with the relevant statutory language. Indeed, for all their rhetoric, Appellants can point to no statutory language or court or agency precedent requiring a different inquiry. In fact, in scores of prior cases, the PSC has applied the same understanding of Section 364.33 that it adopted here, including cases involving some of the Appellants *and* cases involving other incumbent carriers in Florida. The PSC did not make any clear error in applying the same rule here.

Indeed, the PSC's decision is particularly reasonable because, as demonstrated in detail below, the legislature has amended Chapter 364 on multiple occasions without ever altering the PSC's established interpretation of Section 364.33. On the contrary, the legislature has amended *other* provisions to give the PSC the tools to promote competition, but it has never amended Section 364.33 to require that the PSC's long-established scope of inquiry under that section be altered to include an examination of the impact of a transfer of control on competitors.

Nor is it correct that, in this case, the PSC has somehow disregarded the public interest in enhancing competition. Rather, the PSC simply determined that

this interest in promoting competition is more properly addressed by filing comments at the FCC, which Appellant XO has previously recognized is the final arbiter of competitive issues here, and by exercising its other Chapter 364 powers, if necessary, to address any competitive concerns that may arise in the future. That is certainly a reasonable method of addressing the statutory goals that Appellants highlight, and Appellants can cite nothing in Florida law preventing the PSC from taking that approach.

In the end, Appellants' claim on this point boils down to the audacious argument that, for many years and in many different proceedings, the PSC has been acting in blatant disregard of clear statutory requirements. But Appellants can identify no statutory language requiring that the PSC adopt a different interpretation of Section 364.33, nor can they demonstrate that the PSC's analysis was arbitrary or clearly erroneous. Their attempt to subvert the long-established and repeatedly applied understanding by the expert PSC should thus be rejected.

II. The PSC did not err in denying Appellants leave to amend their petitions. The PSC fully explained why those petitions necessarily fail in these circumstances, and Appellants notably do not identify *any* additional facts that they would allege that could cure the fundamental flaws in the petitions they filed.

STANDARD OF REVIEW

This Court’s review of PSC orders is highly deferential. “‘ [O]rders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission’s jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.’” *GTC, Inc. v. Garcia*, 791 So. 2d 452, 456-57 (Fla. 2000) (per curiam) (quoting *United Tel. Co. v. Public Serv. Comm’n*, 496 So. 2d 116, 118 (Fla. 1986)); see *BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998); *General Tel. Co. of Fla. v. Carter*, 115 So. 2d 554, 556-57 (Fla. 1959). As a result, the party challenging a PSC order bears the burden of overcoming these presumptions by showing a departure from the essential requirements of law. See *GTC*, 791 So. 2d at 459; *BellSouth v. Johnson*, 708 So. 2d at 597.

Likewise, under this Court’s precedents, the PSC’s construction of the statute it administers should be reversed by this Court only if it is clearly erroneous. See, e.g., *BellSouth v. Johnson*, 708 So. 2d at 597. Indeed, deference to an agency interpretation is particularly great when, as here, the agency interpretation at issue is consistent with a series of prior determinations. See *City of St. Petersburg v. Carter*, 39 So. 2d 804, 806 (Fla. 1949) (emphasizing that “great weight should be given” to an administrative construction where it had been applied consistently for more than 30 years); *Smith v. Crawford*, 645 So. 2d 513,

521 (Fla. 1st DCA 1994) (“If the agency’s construction is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. Deference to an agency’s interpretation is even more compelling where an agency’s interpretation, as here, is consistent with its prior published opinions.”) (internal quotation marks and citations omitted); *see also BellSouth Telecomms., Inc. v. Jacobs*, 834 So. 2d 855, 859 (Fla. 2002) (affirming under deferential review PSC conclusion that a “late payment charge” was a “telecommunications service” in light of “practice” at the PSC and by BellSouth that had been in place for several decades).

Simply put, the Court has repeatedly made clear that it “*will* approve the Commission’s findings and conclusions if they are based on competent substantial evidence and if they are not clearly erroneous.” *Florida Cable Television Ass’n v. Deason*, 635 So. 2d 14, 15 (Fla. 1994) (citation omitted; emphasis added). Indeed, the Court has applied that highly deferential standard in affirming a past PSC holding that an entity lacked standing to protest a PSC decision – the same issue that is before the Court here. *See AmeriSteel*, 691 So. 2d at 477, 478 (stating that “[w]e will approve the Commission’s findings and conclusions if they are based on competent substantial evidence and if they are not clearly erroneous,” and that the “Commission did not abuse its discretion” in finding that the protesting party lacked standing) (citation omitted).

In light of this abundant precedent, Appellants' suggestion that *de novo* review applies here is untenable. Indeed, that assertion is contradicted by the authority from this Court that they cite. For instance, in *Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (Fla. 2002), cited by Appellants (at 11), this Court explained that the PSC's "interpretation of the statute it is charged with enforcing is entitled to great deference. Further, a court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly erroneous.'" 810 So. 2d at 908 (citation omitted); *see also BellSouth v. Johnson*, 708 So. 2d at 596. For all their emphasis on this point, Appellants cannot point to a single authority from this Court reviewing a PSC order under the *de novo* standard they advocate.⁵

⁵ All of Appellants' cases are from contexts divorced from the specialized expertise of the PSC and the statutes it administers, and, in any event, none of the cases comes from this Court. *See C.F. v. Department of Children & Families*, 934 So. 2d 1, 4-5 (Fla. 3d DCA 2005) (appealing reduction of personal care assistance from six to four hours); *Azra v. Florida Elections Comm'n*, 907 So. 2d 604, 605 (Fla. 3d DCA 2005) (appealing \$500 fine for filing a late campaign treasurer's report); *Manuel v. Department of Children & Family Servs.*, 880 So. 2d 714, 715 (Fla. 2d DCA 2004) (appealing denial of temporary cash assistance to foster parent); *Steward v. Department of Children & Families*, 865 So. 2d 528, 530 (Fla. 1st DCA 2003) (appealing denial of request to remove carpeting in home); *Doyle v. Department of Bus. Reg.*, 794 So. 2d 686, 688 (Fla. 1st DCA 2001) (appealing determinations of employment settlements by the Public Employees Relations Commission); *City of Safe Harbor v. Communications Workers of Am.*, 715 So. 2d 265, 266 (Fla. 1st DCA 1998) (appealing verification of results by the Public Employees Relations Commission of a union representation election); *Board of Trustees of Nw. Fla. Cmty. Hosp. v. Department of Mgmt. Servs.*, 651 So. 2d 170, 171 (Fla. 1st DCA 1995) (appealing enrollment of individual in retirement

Appellants are incorrect that this Court’s uniform precedent should be disregarded because the issues here involve “no special agency expertise.” Br. at 21. The PSC applied considerable expertise in reaching the conclusions at issue here. First, it applied its understanding of the nature of the telecommunications marketplace and continuing federal and state regulation in that marketplace to conclude that the indirect transfer of control attendant to the AT&T/BellSouth Corporation merger did not threaten Appellants with direct and immediate injury. Second, the PSC applied its expertise in interpreting the statute it administers to conclude that the best way to read Chapter 364 as a whole is that Section 364.33 is limited to protecting consumer interests and that the statutory goals that Appellants highlight are best implemented through *other* Chapter 364 proceedings that the legislature has enacted more recently. Determining how the various provisions of Chapter 364 work together certainly requires the PSC’s expertise in applying the statute it administers.

Moreover, although Appellants claim that this case involves only the “plain and ordinary meaning” of the statute, Br. at 22, that claim is demonstrably incorrect. In fact, Appellants do not even claim (nor could they) that there is any

program); *State Bd. of Optometry v. Florida Soc’y of Ophthalmology*, 538 So. 2d 878, 885-86 (Fla. 1st DCA 1988) (appealing board certification rule for optometrists); *Schoettle v. State Dep’t of Admin.*, 513 So. 2d 1299, 1300 (Fla. 1st DCA 1987) (appealing denial of a teacher request for out-of-state service credit).

statutory language directing the PSC to engage in an antitrust-like “merger review” inquiry under Section 364.33. Because no such language exists, the interpretive issue here requires the exercise of administrative discretion.

ARGUMENT

I. THE PSC’S DECISION WAS CORRECT AND FOLLOWS CONSISTENT PRECEDENT FROM BOTH THE AGENCY AND FLORIDA COURTS

The PSC determination at issue here rests on two separate grounds. First, the PSC concluded that Appellants failed to demonstrate a direct and immediate injury sufficient to entitle them to a Section 120.57 hearing.⁶ Second, and independently, the PSC held that, in any case, Appellants’ competitive interests were outside the scope of the transfer-of-control statute, Section 364.33, which all agree is the specific statute governing the issues in this case. On each of these independent points, the PSC’s decision is consistent with both a long line of consistent precedent and the text and structure of the Florida statutes.

A. The PSC Has Consistently Denied Competitors Standing in Cases Such as This One on Two Independent Grounds

Under the rules governing proceedings such as this one, to protest a proposed agency action, a petitioner must provide “an explanation of how the petitioner’s substantial interests will be affected by the agency determination.”

⁶ See § 120.57, Fla. Stat. (prescribing procedures for the conduct of administrative hearings).

Fla. Admin. Code R. 28-106.201(2)(b). As this Court determined in *AmeriSteel*, the proper test to determine “substantial interest” is that announced in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). *See AmeriSteel*, 691 So. 2d at 477; *see also Nextel Order* at 5-7; *Sprint Order* at 6.⁷

Under *Agrico*, a petitioner has a “substantial interest” in the outcome of an administrative proceeding if: (1) the petitioner will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing, *and* (2) the substantial injury is of a type or nature that the proceeding is designed to protect. *See* 406 So. 2d at 482.

The different prongs of the *Agrico* test require separate and independent inquiries: “The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.” *Id.* Appellants had the burden of demonstrating that they met *both* prongs of this test. *See AmeriSteel*, 691 So. 2d at 477.

⁷ This last PSC order, which also approved a holding-company merger, was ultimately vacated because the merger was not consummated, so approval of the transfer of control was no longer necessary. *See In re: Joint Application of MCI WorldCom, Inc. and Sprint Corporation*, 00 F.P.S.C. 9:243, Order No. PSC-00-1667-FOF-TP, Docket No. 991799-TP, 2000 Fla. PUC LEXIS 1066 (Sept. 18, 2000). That has no bearing on the PSC’s reasoning in concluding there was no standing.

The PSC has consistently applied the *Agrico* test to deny standing to competitors in Section 364.33 transfer-of-control proceedings that are legally indistinguishable from this one. For example, in the PSC's 1998 proceeding involving the MCI/WorldCom merger, GTE sought to establish standing based on alleged injuries it would suffer as a wholesale customer due to the decrease in competition between MCI and WorldCom in the wholesale market. GTE also argued that its interests as a competitor would be affected by the merger.

The PSC found that GTE's asserted injuries as a customer and as a competitor were too speculative to confer standing under the first prong of *Agrico*. *See MCI Order* at 14. In this regard, the PSC specifically noted that GTE had an existing contract with WorldCom that would not be affected by the merger and that the existing contract "protects GTE from any price increase in WorldCom's wholesale offerings" that GTE used to serve its retail customers. *Id.* at 17. In light of that fact, "GTE's allegations regarding its ability to negotiate future contracts with WorldCom do not demonstrate an injury of sufficient immediacy to warrant a hearing." *Id.*; *see also id.* (loss of wholesale competitor in a market "does not, in itself, demonstrate a harm to GTE," especially because GTE "appears to be specifically protected by the contract" with WorldCom).

Although the PSC emphasized that it need go no further to dismiss the protest for lack of standing, *see id.*, as in this case, the PSC also *separately* held

that the injuries asserted by GTE were beyond the scope of a transfer-of-control proceeding because Section 364.33 “does not give [it] the ability to protect the competitive interests asserted.” *Id.* Rather, Section 364.33 “gives [the PSC] jurisdiction to approve the transfer of control of telecommunications facilities *for the purpose of providing service to Florida consumers.*” *Id.* (emphasis added).

Two years later, the PSC issued a virtually identical ruling in a proceeding under Section 364.33 involving the proposed merger of MCI WorldCom, Inc. and Sprint Corporation. *See Sprint Order* at 6-8. In that proceeding, TRA, a trade organization representing competitive telecommunications providers, sought to establish standing on the basis that the proposed merger would allegedly “result in a narrowing of competitive network service providers” and therefore “may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network services provided by Sprint or MCI.” *Id.* at 2-3.

The PSC rejected TRA’s petition and again found that it failed to satisfy both prongs of the *Agrico* test for standing. *See id.* at 4. First, the PSC rejected TRA’s contention on the degree-of-injury prong because “the ‘loss’ of a competitor in the market, in itself,” does not demonstrate harm to TRA. *Id.* at 7. Second, and again independently, the PSC reaffirmed its previous holding in the *MCI Order* that Section 364.33 “is *not a merger review statute*” and therefore that TRA’s assertion of the competitive interests of its members was insufficient to

meet the nature-of-injury prong. *Id.* at 8 (emphasis added). Instead, the PSC reiterated, Section 364.33 “gives [it] jurisdiction to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers.” *Id.* at 8.

More recently, and in an analogous situation, the PSC denied the Communications Workers of America’s (“CWA”) attempt to establish standing and to protest the PSC’s approval of the transfer of control of Sprint-Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company pursuant to Section 364.33. *See Nextel Order* at 7. Again, the PSC determined that the proposed transaction did not have a “direct[] and immediate[]” effect on CWA or its members and that “long term financial possibilities” were not within the proper scope of a Section 364.33 inquiry. *Id.* at 6-7. Indeed, although Appellants mistakenly seek to rely upon this order to support their statutory theory, *see Br.* at 15-16, nowhere did the PSC conclude in that case that it was appropriate (much less, mandatory) to consider the interests of competitors in a Section 364.33 proceeding. On the contrary, subsequent PSC orders confirm that the proper Section 364.33 analysis is focused exclusively on the interests of end users. *See In re: Request for Acknowledgement of Transfer of Control of Global Internetworking, Inc. to Mercator Partners Acquisition Corp.*, Order No. PSC-06-0755-PAA-TA, at 1, Docket No. 060483-TA (Fla. Pub. Serv. Comm’n Sept. 6,

2006) (“We have reviewed the petition [and] find it appropriate to approve it. We have based our review and decision upon an analysis of the public’s interest in efficient, reliable telecommunications service.”), *available at* <http://www.psc.state.fl.us/library/filings/06/08155-06/08155-06.PDF>; *In re: Joint Petition of Level 3 Communications, Inc. and TelCove, Inc. for Acknowledgement of Transfer of Control*, 06 F.P.S.C. 6:87, Order No. PSC-06-0505-PAA-TP, at 2, Docket No. 060392-TP, 2006 Fla. PUC LEXIS 306 (June 13, 2006) (“We have reviewed the Petition of Level 3, TelCove-FL and TelCove-Jacksonville, and find it appropriate to approve it. We have based our review and decision upon an analysis of the public’s interest in efficient, reliable telecommunications service.”).

Indeed, in at least 40 approval orders issued under Section 364.33, the PSC held, just as it did here, that its review under Section 364.33 is designed to determine whether the transaction will harm *consumers’ interest in efficient, reliable telecommunications service*, without considering competitors’ interests. *See* Appellees App. B (attached hereto).

The PSC, moreover, applied that same analysis and legal standard in approving transactions involving the same parties that are now Appellants here. *See In re: Request for Approval of Intracorporate Reorganization*, 03 F.P.S.C. 3:13, Order No. PSC-03-0298-PAA-TP, at 2, Docket No. 030019-TP, 2003 Fla. PUC LEXIS 161 (Mar. 5, 2003) (“In accordance with our authority under Section

364.33 . . . we have reviewed the petition of [two Time Warner Telecom affiliates] and find it appropriate to approve it. We have based our review and decision upon an analysis of the public’s interest in efficient, reliable telecommunications service.”); *In re: Application for Expedited Treatment of Transfer of Control of XO Long Distance Services, Inc.*, 02 F.P.S.C. 12:71, Order No. PSC-02-1709-PAA-TP, at 2, Docket No. 021117-TP, 2002 Fla. PUC LEXIS 1087 (Dec. 6, 2002) (“In accordance with our authority under Section 364.33 . . . we have reviewed the Application of XO Long Distance Services, Inc., XO Florida Inc., and their parent, XO Communications, Inc., and find it appropriate to approve it. We have based our review and decision upon an analysis of the public’s interest in efficient, reliable telecommunications service.”).⁸

Finally in this regard, Appellants cannot claim that this standard applies only to mergers involving allegedly fledgling competitors. On the contrary, the same analysis applies to all applicants regardless of the size of the entities involved or whether the parent of an *incumbent* carrier is involved in the transaction. *See, e.g., In re: Joint Petition for Approval of Merger of GTE Corp.*, 98 F.P.S.C. 12:152,

⁸ In the past, Appellant XO apparently endorsed this understanding of Section 364.33. It stated in its October 2002 Application for Approval of the Transfer of Control that the “proposed transaction should enable XO to continue to provide high quality local, long distance, and broadband service to its customer base, thereby serving the public interest.” Application for Approval of Change of Control and Request for Expedited Treatment, at 15, Docket No. 021117-TP (Fla. Pub. Serv. Comm’n filed Oct. 31, 2002).

Order No. PSC-98-1645-FOF-TP, Docket No. 981252-TP, 1998 Fla. PUC LEXIS 2278, at *3 (Dec. 7, 1998) (approving merger of GTE, an incumbent provider like BST in Florida, and Bell Atlantic). In that decision, as here, the PSC determined that its holding that the indirect transfer of control was in the public interest “in no way preclud[ed] [the PSC] from addressing any . . . concerns that may arise regarding [the] transaction to the appropriate federal agency.” *Id.* at *4.

Simply put, in *no* instance has the PSC ever adopted the analysis now urged by Appellants.

B. The PSC Did Not Depart from the Essential Requirements of Law by Following These Established Precedents

The PSC’s adherence to these precedents creates no clear error of the type that would warrant reversal of the PSC under the deferential standard established by this Court’s precedents.

1. The PSC Reasonably Concluded That Appellants Were Not Threatened with Imminent Injury

The PSC reasonably and properly concluded that Appellants’ speculative allegations of potential future economic harm demonstrated no immediate injury of the kind that might satisfy the first prong of the *Agrico* test. The simple fact is that, before the PSC and in this Court, Appellants have not identified – and cannot identify – *any* direct and immediate injury of the kind that would satisfy the first prong of the *Agrico* test.

Consequently, in their filing at the PSC, the Appellants here that identified themselves there as the “Joint CLECs” sought to establish standing through just a few conclusory paragraphs that spoke vaguely of alleged harms to their “ability to compete” and about the supposed “undue competitive advantages” that the merger will allegedly give BellSouth and AT&T, without providing any substance that could even arguably demonstrate the likelihood of imminent harm, as established standards require. *See* App. 290-91. Similarly, Time Warner, in its filings at the PSC, relied on speculation as to what “*could*” occur at some unidentified future date, App. 320 (emphasis added), as well as issues relating to such things as “IP interconnection” that Time Warner *conceded* were beyond the PSC’s jurisdiction under Florida law, *see id.* at 319-20 (citing § 364.011, Fla. Stat.).

In this Court, Appellants continue to rely on the same vague (and unverified) assertions that, at some indefinite point in the future and in some undefined way, the merger will create “undue competitive advantages” and will “negatively impact [their] ability to compete.” Br. at 26. Appellants’ brief contains no specific explanation of a concrete way that the merger will cause them direct and immediate injury.

The failure to provide any cogent allegation of immediate harm is not due to any failing by Appellants’ lawyers. Rather, it reflects the *undisputed* fact that the merger will *not* affect the existing relationship between AT&T/BellSouth and

Appellants. In particular, no Appellant contested before the PSC (or disputes here) that, after the merger, the BellSouth subsidiary (BST) that operates as an incumbent provider in Florida will remain subject to *the same obligations* to provide wholesale facilities and services to Appellants that apply today.

Those obligations are set forth in “interconnection agreements,” which are instruments that BST is *required* to negotiate under the federal Telecommunications Act of 1996, and which the PSC is required to arbitrate if negotiations fail. *See* 47 U.S.C. § 252(a)-(c). These interconnection agreements implement detailed federal access and nondiscrimination requirements; they are approved by and filed with the PSC; and no party contends that the merger will have any effect on their enforceability or validity. *See* 47 U.S.C. §§ 251, 252. All this means that, after the merger, Appellants will be legally and contractually entitled to receive the very same services on the very same terms and conditions from BST (and any AT&T subsidiaries) that they receive today.

Likewise, all *other* current wholesale nondiscrimination and interconnection obligations under the federal Telecommunications Act of 1996, the rules of the FCC, and the rules and orders of the PSC will be unaffected by the merger. Among those PSC rules are performance and penalty plans that contain 600 detailed performance measures that gauge whether BST is providing nondiscriminatory service to companies such as Appellants and that impose

monetary penalties if more than 130 specific of those standards are not met. *See In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies (BellSouth Track)*, Docket No. 00121a-TP (Fla. Pub. Serv. Comm’n). The FCC has specifically concluded that these performance and penalty plans approved by the PSC provide “assurance that . . . local markets will remain open” to competition in Florida. *BellSouth Florida/Tennessee Long-Distance Approval Order*⁹ ¶ 167. These performance and penalty measures, moreover, remain subject to continued review and amendment by the PSC to reflect any marketplace changes, *see id.* ¶ 170, and they will not be affected by this merger.

Thus, regardless of how much emphasis Appellants place on the “size, scope and reach of the new merged company,” Br. at 27, the bottom line here is that the contractual arrangements and the legal rules under which Appellants obtain facilities and services from AT&T/BellSouth to serve their retail customers will not be affected in any way by the merger.¹⁰ Moreover, the PSC’s conclusion on

⁹ Memorandum and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorizations to Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002) (“*BellSouth Florida/Tennessee Long-Distance Approval Order*”).

¹⁰ Likewise, under established precedent, Appellants’ reference (at 26) to the alleged loss of a single wholesale special access supplier (AT&T) does not demonstrate imminent injury because it does not show that no competitive options will remain. *See Sprint Order* at 2-3 (claim that the proposed merger “will result

that point accords with the DOJ's recent conclusion after "investigat[ing] all areas in which the companies currently compete," as well as areas of potential "future competition," that the merger is "not likely to reduce competition substantially." *DOJ Statement* at 1. The expert federal agency's judgment strongly bolsters the PSC's conclusion that the claims advanced by Appellants here are, in the PSC's words, "mere speculation as to perceived economic harm." App. 414. Thus, whether or not claims of competitive economic injury would be speculative in the context of *other* merger transactions, *see* Br. at 29, the undisputed facts here (as well as the recent judgment of the DOJ) demonstrate that the PSC reasonably concluded that any such argument is speculative in this context.

Moreover, and contrary to Appellants' unsupported assertions, the PSC's decision follows directly from the precedents of this Court, other Florida courts, and the PSC itself. In particular, in *AmeriSteel*, this Court approved the PSC's

in a narrowing of competitive network service providers" and therefore "may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network service provided by Sprint or MCI," was insufficient to create standing because "the 'loss' of a competitor in the market, in itself," does not demonstrate harm); *MCI Order* at 17 ("[T]he '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."); *see also, e.g.,* Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, ¶ 173 n.476 (1998) ("We find that there are a sufficient number of market participants on our list below to allay anticompetitive concerns in the larger business market; therefore, we conclude that we need not reach the question of whether the types of companies identified by Applicants are potential competitors in this market.").

finding that AmeriSteel lacked standing to protest a PSC decision and, in so doing, specifically emphasized that, because AmeriSteel’s “position as a customer . . . remains the same under the . . . agreement approved by the Commission,” AmeriSteel was not threatened with “injury in fact of sufficient immediacy to entitle [it] to a . . . hearing.” 691 So. 2d at 477-78 (emphasis added). For that reason alone, AmeriSteel “failed to meet the first prong of the *Agrico* test.” *Id.* at 478.

The same is true here. For all the reasons discussed above, Appellants’ position will likewise “remain[] the same” after the merger because existing interconnection agreements and all other wholesale rules and requirements are unaffected by the transaction. More generally, just as this Court in *AmeriSteel* concluded that the assertion that the transaction at issue could be a “factor” causing “an economic detriment,” *id.*, was not sufficient to show direct and immediate injury, the PSC reasonably concluded here that claims of “perceived economic harm” resulting from the merger were insufficient to establish standing. App. 414; *see also AmeriSteel*, 691 So. 2d at 478 (citing *Florida Soc’y of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279 (Fla. 1st DCA 1988), with approval for the proposition that “some degree of loss due to economic competition is not of sufficient ‘immediacy’ to establish standing”). Thus, this Court’s decision in

AmeriSteel is directly on point and strongly supports the reasonableness of the expert PSC's judgment.

Appellants' attempts to distinguish *AmeriSteel* are unavailing. In particular, they argue that electrical and telecommunications regulations and policy are different. *See* Br. at 30. But, even assuming that to be true, it has nothing to do with whether a party is threatened with sufficiently *direct* and *immediate* injury, which is the first prong of the *Agrico* test, and the one pertinent here. Such a claim would be relevant, if at all, only to the *second* part of *Agrico*, which involves the zone of interests protected under a particular statutory provision (and even there it is incorrect for reasons discussed below).

Similarly, Appellants cannot distinguish the court's holding in *Florida Society of Ophthalmology*, 532 So. 2d 1279, that "some degree of loss due to economic competition" does not satisfy the "'immediacy'" requirement to establish standing, *see id.* at 1285, by confusing the court's *separate* zone-of-interest holding with its immediacy finding. In that case, the court specifically found that the appellants had not satisfied *either* aspect of *Agrico*, and Appellants' arguments do not respond at all to the court's finding on the immediacy issue. *See id.* ("Appellants have failed to satisfy both elements of [the *Agrico*] test."); *compare* Br. at 26-27.

Finally, Appellants do not even dispute that the PSC’s decision follows directly from the agency’s prior analysis in decisions such as the *MCI Order*. As noted above, in that case, the PSC concluded that the existence of contracts between GTE and WorldCom that, like the interconnection agreements in this case, would survive the merger prevented GTE from “demonstrat[ing] . . . an injury in fact which is of sufficient immediacy to warrant a . . . hearing.” *MCI Order* at 19. The same logic applies here.

In short, the PSC’s adherence to the decisions of this Court as well as its own prior determinations in analogous circumstances does not approach the kind of departure from the essential requirements of law that would warrant reversal here. This Court can thus affirm the PSC on the basis of the first *Agrico* prong alone.

2. The PSC Reasonably Concluded That Appellants Were Not Within the Zone of Interests Under Section 364.33

Independently, the PSC also reasonably and properly concluded that Appellants did not meet the second prong of the *Agrico* test. As discussed above, the PSC has explained repeatedly that a transfer-of-control proceeding under Section 364.33 is designed to protect consumers’ interest in receiving efficient, reliable telecommunications service, and not to protect competitors through a “merger review” process. *See supra* pp. 16-20.

Appellants have no tenable basis to claim that Section 364.33 so clearly requires a different inquiry that the great deference due the PSC is overcome. That is particularly the case because, here, the agency has applied the same interpretation to both incumbent and competitive carriers over many years. Indeed, Appellants do not even claim (nor could they) that the PSC's decision is inconsistent with the language of Section 364.33, the specific statutory provision that all parties agree governs transfer-of-control proceedings, or is inconsistent with the PSC's findings in Appellants' own transfer-of-control proceedings.

Instead, they contend that the PSC had no lawful choice but to consider *all* the goals enunciated in Section 364.01, the general statutory enabling provision that sets forth the "powers" conferred on the PSC, in the specific context of a Section 364.33 transfer-of-control proceeding. *See* Br. at 14 (alleging that the "flaw in the Commission's position is its failure to consider and apply all the criteria applicable to its review of this transaction"). But, despite Appellants' emphasis on the "plain and ordinary meaning" of the statute, *id.* at 22, there is simply no statutory text imposing an obligation to engage in the antitrust-like inquiry that Appellants urge under Section 364.33. The statute does not require such an inquiry. Thus, as the PSC reasonably concluded, the fact that Section 364.33 – the specific statute that controls here – contains no indication that the PSC must engage in an inquiry relating to harm to competitors provides strong

support for its decision to adhere to established practice. *See* App. 415-16 (emphasizing the importance of adherence to the more specific statutory provision governing transfers of control); *compare* Br. at 20 (asserting that the PSC erred in reliance on the specific statutory provision relevant to transfers of control).

Contrary to the implications in Appellants' brief, that conclusion by the PSC does not mean that it simply disregarded the competitive issues that Appellants raise. Instead, the PSC correctly concluded that the general statutory goal of enhancing competition could best be furthered through other actions. *Cf.* *AmeriSteel*, 691 So. 2d at 478-79 (noting that, although the PSC denied AmeriSteel standing to protest, it was "not deaf to [its] concerns" because of other actions it took).

In particular, the PSC addressed Appellants' concerns – and the statutory goals on which Appellants rely – in two separate ways. First, at the same time it determined that the merger would not harm consumers, the PSC voted to file comments at the FCC urging it to consider the effect of the merger on competition. Those comments specifically note that competitors had raised concerns on this point and explain that the FCC was better positioned to take a "more comprehensive approach" to such competitive issues because it has "intermodal" authority (not possessed by the PSC) to regulate wireline and wireless telecommunications as well as video services. *See PSC Federal Comments* at 1

(emphasizing that “a more comprehensive approach is required and that approach should ultimately rest with the FCC”). The PSC thus urged the FCC to “carefully evaluate the stakeholders’ concerns.” *Id.* at 2.

Far from disputing the suitability of the FCC to address such issues, Appellants are actively involved in those proceedings and have filed comments there raising the same competitive issues they raise here.¹¹ And, as noted, Appellant XO’s counsel specifically represented to the PSC that “*ultimately it is the FCC that will make the final call on this.*” App. 242 (emphasis added). Additionally in this regard, in their brief here, Appellants confirm that another federal authority, the DOJ, must also “review the proposed merger[] to determine, among other matters, the impact on competition.” Br. at 29. As emphasized above, the DOJ has now completed that review, and it has determined that, contrary to Appellants’ claims here, there are no anticompetitive concerns raised

¹¹ See Petition to Deny of Time Warner Telecom at 1, 3-4, 6-25, 49-74, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (FCC filed June 5, 2006); Joint Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications Inc., and Xspedius Communications at 5-8, 15-60, 78-96, *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No. 06-74 (FCC filed June 5, 2006).

by the merger. In the DOJ's words, "the proposed transaction is not likely to reduce competition substantially." *DOJ Statement* at 1.

Second, and equally important, the PSC explained that it could, as necessary, exercise *other* statutory powers granted under Chapter 364 to protect competition after the merger. *See* App. 416 (explaining that these other statutory provisions provide "the method in which we carry out th[e] duty" to encourage and promote competition). As the PSC reasonably explained, the specific powers that the legislature has granted the PSC to enhance competition include authority under Section 364.16 to require interconnection and number portability (*i.e.*, keeping one's telephone number when switching telephone service providers); authority under Section 364.161 to mandate access to network facilities and resale of services; and authority under Section 364.09 to prohibit certain forms of rate discrimination. *See id.*

Nothing in the text of Section 364.01 renders it unlawful or irrational for the PSC to promote competition through (1) participation in the federal merger proceedings and (2) exercise of other statutory grants of authority that are specifically targeted to competitive issues. Put differently, the legislature has never required the PSC to satisfy all the disparate goals of Section 364.01 within a Section 364.33 transfer-of-control proceeding. Instead, Section 364.01 identifies general goals for the PSC to promote and reasonably leaves it to the expert

discretion of the PSC to determine how best to do so using the tools available to it. That is precisely what the PSC has done here.

Indeed, Appellants' understanding that the PSC must consider all of Section 364.01's general goals in the specific context of a Section 364.33 proceeding cannot be squared with the text of Section 364.01. Many of the general goals enunciated therein, such as ensuring the existence of "a transitional period in which new and emerging technologies are subject to a reduced level of regulatory oversight," Section 364.01(4)(d), Florida Statutes, are quite evidently not applicable to Section 364.33 proceedings. Other provisions of Section 364.01, such as the one that authorizes the PSC to use its jurisdiction to "ensure that all providers of telecommunication services are treated fairly, by . . . eliminating unnecessary regulatory restraint," Section 364.01(4)(g), Florida Statutes, argue strongly *against* applying a standard to AT&T and BellSouth that has never been applied to any other incumbent or competitive carrier in Florida.

Furthermore, the history of Chapter 364 demonstrates that Appellants' position as to how the provisions of this statute should be read together is not even a reasonable one, much less is it so clearly mandated as to justify reversal of the expert PSC's contrary opinion.

Section 364.33, the specific statutory provision requiring the PSC to review transfers of control of telecommunications facilities, first became law in 1953. As

initially enacted, the relevant provision stated that, with exceptions not relevant here, “[n]o person shall hereafter begin the construction or operation of any telephone line, plant, or system, or any extension thereof, *or acquire ownership or control thereof*, without first obtaining approval of the Florida Railroad and Public Utilities Commission,” the predecessor to the current PSC. *See* Ch. 28013, § 1, at 61, Laws of Fla. (1953) (emphasis added). Under that statute, the PSC and its predecessor routinely reviewed transfers of control relating to mergers and similar transactions to determine whether the transaction would negatively affect the service provided to end-user consumers in Florida.¹²

¹² *See, e.g., In re: Joint Petition of Central Telephone Co. of Florida and Florida Central Telephone Co. to Transfer Certificate of Public Convenience and Necessity No. 36 to Central Telephone Co. of Florida*, 7 F.P.S.C. 782, Order No. 9190, Docket No. 790923-TP, 1979 Fla. PUC LEXIS 7, at *3 (Dec. 26, 1979) (“Based on our review we find that none of the rates or services of Centel, nor the rates and services to present customers of Florida Central will be adversely affected by the transfer of Certificate of Public Convenience and Necessity No. 26 now held by Florida Central Telephone Company to Centel of Florida, or by the merger of Centel of Florida and Florida Central and that the request should be granted.”); *In re: Petition of Vista-United Telecommunications for Transfer of Control of Certificate of Public Convenience and Necessity*, Order No. 17763, Docket No. 870050-TL, 1987 Fla. PUC LEXIS 848, at *4 (June 29, 1987) (“Based on the information submitted by the Petitioners, it appears that the transfer of the control of Vista-United’s certificate is in the public interest and should be approved. The reincorporation is transparent to the customers of Vista-United and should not affect them in any way.”); *In re: Transfer of Control of Network I to Metromedia*, 85 F.P.S.C. 318, Order No. 14045, Docket No. 840410-TI, 1985 Fla. PUC LEXIS 965, at *2 (Jan. 29, 1985) (“The transfer of control will have no apparent effect on Network I’s customers, since Network I’s present tariff will remain in effect and Network I’s management personnel will remain substantially the same. After having considered the request for our approval, it appears that

In 1990, the Florida legislature first amended Chapter 364 to include the promotion of competition as one of the numerous goals to be advanced by the PSC, but the legislature did *not* specify which substantive statutory provisions the PSC should use to advance that goal. In particular, the legislature amended Section 364.01, the general enabling statute that gives the PSC “exclusive jurisdiction” to “regulat[e] telecommunications common carriers,” so that one of the general goals that the PSC was to advance was to “[r]ecognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate.” Ch. 90-244, § 1, at 1803-04, Laws of Fla.

However, far from amending Section 364.33 at that time to expand the traditional scope of review in transfer-of-control proceedings, the legislature only amended Section 364.33 in *other* respects. In particular, it required the “approval”

Metromedia is financially stable and technically capable of providing service. Therefore, we find that it is in the public interest to approve the transfer of control.”); *In re: Petition of United Telephone Company of Florida, Florida Telephone Corporation, Winter Park Telephone Company and Orange City Telephone Company for Approval of a Corporate Merger*, 82 F.P.S.C. 216, Order No. 11350, Docket No. 820354-TP, 1982 Fla. PUC LEXIS 119, at *2 (Nov. 23, 1982) (“The proposed merger itself will not result in any changes in calling scopes or rates. Customer deposits will not be impacted and no changes in service will result, except to the extent that the greater efficiencies expected from consolidation should result in improved levels of service.”).

of changes in control of telecommunications facilities as opposed to issuance of a certificate of convenience and necessity. *See id.* § 31, at 1820-21.

In 1995, the Legislature again amended Section 364.01, the general enabling statute, to make clear that competition in telecommunications, among other things, was in the public interest. Thus, as amended, Section 364.01(3) now provides that “the Legislature finds that the competitive provision of telecommunications service . . . is in the public interest,” and Section 364.01(4) charges the PSC with, among other things, “[e]ncourag[ing] competition through flexible regulatory treatment among providers of telecommunications services” and “[p]romot[ing] 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.” Ch. 95-403, § 5, at 3316-18, Laws of Fla.

At the same time the legislature added that general language, it also amended numerous other statutory provisions to give the PSC concrete administrative tools to protect and enhance competition. For instance, the legislature required interconnection of incumbent and competitor facilities and authorized the PSC to arbitrate disputes over such interconnection, *see id.* § 14, at 3326-28 (amending Section 364.16); provided the PSC access to telecommunications companies’ records to police against anticompetitive behavior, *see id.* § 15, at 3328-29 (amending Section 364.161); granted the PSC continuing

regulatory oversight over competitors for purposes of ensuring fair treatment of all telecommunications providers, *see id.* § 23, at 3335-37 (amending Section 364.337); and affirmed the PSC's continuing oversight jurisdiction over cross-subsidization and similar anticompetitive behavior, *see id.* § 26, at 3337-38 (amending Section 364.3381). Significantly in this respect, in providing the PSC with these new tools and amending other existing statutory provisions, the legislature did not amend Section 364.33 to alter the established scope of PSC review of transfers of control of telecommunications facilities.

Moreover, since 1995, the legislature has amended Chapter 364 *ten* more times.¹³ In none of these instances has the legislature altered Section 364.33 to require the PSC to expand the scope of its inquiry in transfer-of-control proceedings such as this one.

In these circumstances it would be inappropriate to conclude that the legislature has required the PSC to interpret Section 364.33 in the way urged by Appellants. As Justice Wells recently explained in a very similar context:

[T]he PSC has not asserted jurisdiction over these cooperatives since this statute was adopted more than twenty-five years ago. *Surely if the*

¹³ *See* Ch. 96-410, § 93, at 2997, Laws of Fla.; Ch. 98-277, § 12, at 2347, Laws of Fla.; Ch. 99-354, § 1, at 3606-08, Laws of Fla.; Ch. 2000-289, § 1, at 2869-71, Laws of Fla.; Ch. 2000-334, § 2, at 3952, Laws of Fla.; Ch. 2003-32, § 2, at 216, Laws of Fla.; Ch. 2003-72, § 16, at 615-16, Laws of Fla.; Ch. 2005-132, § 10, at 15-16, Laws of Fla.; Ch. 2005-171, § 2, at 3-4, Laws of Fla.; Ch. 2006-80, §§ 1-2, at 1-5, Laws of Fla.

Legislature had intended that the PSC assert such jurisdiction, the Legislature would have amended the statute to expressly so state after several legislative sessions of the PSC not so doing. In fact, the Legislature has amended the statute during this period but did not amend it in that manner. Therefore, I think, we should not, after such a long period, hold that the PSC's interpretation of the statute was an error. If it is an error under these circumstances, the Legislature should amend the statute to expressly so state.

Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 301 (Fla. 2002) (Wells, J., concurring) (emphasis added); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 391 n.92 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Finally, Appellants are wrong that the PSC's decision on the second *Agrico* prong is somehow inconsistent with *AmeriSteel* or other cases. In fact, much like the relevant language in Section 364.33, the statutory language in *AmeriSteel* simply authorized the PSC to “‘ approve territorial agreements between and among . . . electrical utilities,’” 691 So. 2d at 478 (quoting § 366.04(2)(d), Fla. Stat.), and the Court affirmed the PSC's understanding of that general language against the backdrop of prior interpretations that the provision did not protect the specific interest asserted by the appellants there, *see id.* That same analysis applies here. Appellants' arguments to the contrary (and their attempts to distinguish the other cases cited by the PSC) all depend on the assertion that the legislature has specifically required the PSC to further the public interest in promoting competition within the context of Section 364.33 proceedings, and not through

other statutory provisions. *See* Br. at 29-31.¹⁴ For all the reasons discussed above, there is no statutory support for the assertion that the legislature has straitjacketed the PSC in this way.

II. THE PSC PROPERLY DENIED APPELLANTS LEAVE TO AMEND

Appellants improperly rely on Section 120.569(2)(c), Florida Statutes, for the proposition that they are entitled to amend their petitions as a matter of right. That section simply provides a conditional opportunity to amend “unless it conclusively appears from the face of the petition that the defect cannot be cured.” *Id.* The PSC correctly held that the defects in Appellants’ petitions – which centered on their failure to satisfy both prongs of the *Agrico* standing test – could not be cured by amendment. Indeed, the defects in those petitions were and are engrained in the undisputed circumstances of this case: as to the first *Agrico* prong, that the merger would not alter Appellants’ relations with AT&T and BellSouth in any way or diminish the PSC’s jurisdiction; as to the second, that Appellants were asserting an interest that is not protected under Section 364.33.

¹⁴ The same flaw applies to Appellants’ discussions of *Florida Society of Ophthalmology*. There, as here, there was no “clear authority for the inclusion of competitive economic considerations into the certification process.” 532 So. 2d at 1283. In arguing to the contrary, Appellants ignore the fact that Section 364.33 contains no such requirement and assume their conclusion that the general language of Section 364.01 somehow mandates a particular inquiry in a Section 364.33 proceeding, which it does not do. The same analysis likewise applies to Appellants’ reliance on *Shared Services, Inc. v. State Department of Health & Rehabilitative Services*, 426 So. 2d 56 (Fla. 1st DCA 1983).

Notably, in this Court, *Appellants do not cite a single additional allegation that they would have made had they been given leave to amend.* They have thus identified no basis for concluding that the PSC was wrong in concluding that Section 120.569(2) did not entitle them to amend in these circumstances.

To the extent that Appellants identify any error at all, they claim that the PSC did not give sufficient reasons to deny them leave to amend. *See Br.* at 35. They claim that the PSC’s explanation was “insufficient” because it allegedly consisted only of the phrase “the defects in the petition cannot be cured.” *Id.* But the PSC’s order earlier explained in detail the substantive defects in the petitions, and then stated – in language notably disregarded by Appellants – that, “[f]or the foregoing reasons, we find that the protests filed by the Joint CLECs [some of whom are Appellants here] and Time Warner and the *Joint CLEC Response* are insufficient to establish standing; *and* that the defects cannot be cured.” App. 416 (emphases added). In other words, the PSC found that the same reasons that the petitions were inadequate to establish standing applied equally to the issue of whether the defects could be cured. That PSC explanation is wholly sufficient to support its conclusion, as demonstrated by the fact that, even in this

Court, Appellants identify no additional facts they could have pled that would have created standing.¹⁵

¹⁵ In this regard, it is instructive to compare this matter to the chief case cited by Appellants in support of their amendment point, *City of Winter Park v. Metropolitan Planning Organization*, 765 So. 2d 797, 797 (Fla. 1st DCA 2000). In *Winter Park*, an administrative law judge was presented with numerous grounds for dismissal of the appellant's petition. Then, "the administrative law judge simply stated that the motions to dismiss were 'well-taken,' granted the motions, and ordered the case file closed. The order failed to identify which grounds were considered well-taken or why any defects in the petition could not be cured by amendment." *Id.* at 798. Such a disposition obviously bears no resemblance to the PSC's careful explication of the standing requirements in this case.

Appellants' other case cited in this section, *McIntyre v. Seminole County School Board*, 779 So. 2d 639 (Fla. 5th DCA 2001), is even less relevant. There, a school board construed an employee's letter as an insufficient request for an administrative hearing. On appeal, the court simply held that the employee did not waive the request for a hearing. *See id.* at 643. That case has no bearing on this matter.

CONCLUSION

The order of the PSC should be affirmed.

Respectfully submitted, this the 13th day of October 2006.

FOR AT&T INC.

FOR BELLSOUTH CORPORATION, BELLSOUTH
TELECOMMUNICATIONS, INC., AND
BELLSOUTH LONG DISTANCE, INC.

Stephen H. Grimes
Florida Bar No. 032005
D. Bruce May, Jr.
Florida Bar No. 0354473
HOLLAND & KNIGHT
315 South Calhoun Street
Suite 600
Tallahassee, Florida 32301
850-224-7000
850-224-8832 (facsimile)

Major B. Harding
Florida Bar No. 0033657
John Beranek
Florida Bar No. 0005419
AUSLEY & MCMULLEN
Post Office Box 391
Tallahassee, Florida 32302
850-224-9115
850-222-7560 (facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via hand-delivery to: Samantha M. Cibula and David E. Smith, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, and Vicki Gordon Kaufman and Jon C. Moyle, Jr., Moyle, Flanigan, Katz, Raymond, White & Krasker, P.A., 118 North Gadsden Street, Tallahassee, FL 32301 this 13th day of October, 2006.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using the Times New Roman font in 14-point size, in compliance with the governing rules.

Attorney

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App. B List of Florida Public Service Commission Decisions

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