

FLORIDA PUBLIC SERVICE COMMISSION
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April 16, 1998

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (BEDELL) *CB MCB*
DIVISION OF COMMUNICATIONS (WILLIAMS) *EW*

RE: DOCKET NO. 971659-TP - ORANGE COUNTY CIRCUIT COURT
REFERRAL OF ISSUES IN CASE NO. CI 96-1812 (WELLINGTON
PROPERTY MANAGEMENT, INC. AND EMERSON COMMUNICATIONS
CORPORATION VS. PARC CORNICHE CONDOMINIUM ASSOCIATION,
INC. AND ORANGE COUNTY, FLORIDA) TO THE FLORIDA PUBLIC
SERVICE COMMISSION FOR REVIEW AND DETERMINATION OF WHAT
ISSUES, IF ANY, THE COMMISSION HAS JURISDICTION OVER.

AGENDA: APRIL 28, 1998 - REGULAR AGENDA - ISSUE 1 ONLY PROPOSED
AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\971659TP.RCM

CASE BACKGROUND

Wellington Property Management, Inc. (Wellington), is the management company for Parc Corniche Condominium Association, Inc. (Parc Corniche). Wellington also owns some of the units in the condominium. Emerson Communications Corporation, Inc. (Emerson), installed telephone lines in the Parc Corniche Condominium in 1989. Emerson owns the lines and has a license agreement with Wellington for the use of telephone lines in the condominium. Emerson and Wellington are both owned by Emerson Financial Corporation. Emerson bills individual condominium unit owners for the use of the telephone lines in the condominium. Based on Commission records, neither Emerson nor Wellington is certificated to be a provider of telephone services in Florida. On January 31, 1996, Parc Corniche met and voted to adopt amendments to the Declaration of Condominium. Ballot Item #6 amended the Declaration to state that the cable television and telephone lines in the condominium building are part of the common elements and are, therefore owned and controlled by Parc Corniche.

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Thereafter, on March 11, 1996, Wellington and Emerson filed a complaint in Orange County Circuit Court to declare the amendments invalid. On November 4, 1997, Judge W. Rogers Turner of the Ninth Judicial Circuit abated action in the Circuit Court for a determination by the PSC of the Commission's jurisdiction over the issues raised by Wellington and Emerson in their complaint.

In addition to the order abating the Circuit Court proceeding, the Commission received a complaint filed by Parc Corniche, the defendant below, for a determination of ownership of cable television and telephone lines at Parc Corniche Condominium. The Commission notified Wellington and Emerson of the filing of the PSC complaint and directed Wellington and Emerson to file a response by January 15, 1998. By Motion For Enlargement of Time filed January 20, 1998, Wellington and Emerson requested an extension of time within which to file the response. On January 30, 1998, the response was filed. Also, on February 12, 1998, Parc Corniche filed a Memorandum of Law in Support of Complaint.

The purpose of this recommendation is: 1) to make a determination of Commission jurisdiction pursuant to the Circuit Court's abatement order; 2) to rule on Wellington and Emerson's Motion for Enlargement of Time in the PSC complaint docket; and 3) to rule on the PSC complaint filed by Parc Corniche. In addition, it appears that one or more parties to this docket may be operating without a certificate or attempting to acquire ownership of telecommunications facilities without prior Commission approval. Therefore, this recommendation also addresses these issues.

DISCUSSION OF ISSUES

ISSUE 1: Over what issue or issues raised by Wellington and Emerson in Circuit Court Case No. CI 96-1812 does the PSC have jurisdiction?

RECOMMENDATION: The PSC has exclusive jurisdiction over the subject telephone lines up to the demarcation point, over the owners and lessees of the lines if they bill for services, and over any transfer of ownership of the lines. The PSC does not have jurisdiction over cable television lines or issues arising out of Chapter 718, Florida Statutes. The Commission should inform the Court of its intent to exercise jurisdiction in this matter and answer the Court's specific questions as set forth in staff's analysis.

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STAFF ANALYSIS: As stated in the Case Background, Wellington and Emerson filed a complaint in the Circuit Court in Orange County to enjoin Parc Corniche from declaring ownership of the cable television and telephone lines serving the Parc Corniche owners. In the order abating action in the Circuit Court, the Judge outlined the specific issues for Commission determination as follows:

1. Whether Wellington and Emerson are "telecommunications companies" within the meaning of Section 364.02(7), Florida Statutes.
2. Whether Wellington and Emerson obtained a Certificate of Necessity as required by Section 364. 33, Florida Statutes and Rule 25-4.004, Florida Administrative Code.
3. Whether Wellington and Emerson have authority to own the television and telephone lines.

Commission Jurisdiction

In the abatement order, the Circuit Court recognized the PSC's exclusive authority to determine issues 1 and 2, above. The Court also recognized the PSC may not have authority over the television cable referred to in issue 3, above, citing Devon-Air Villa Homeowners Association No.4 Inc. v. Americable Associates, Ltd., 490 So. 2d 60 (Fla. 3d DCA 1986).

Staff agrees with the Circuit Court that we do not have jurisdiction over the cable television lines. See, Devon and Section 364.02(12), Florida Statutes, explicitly excluding cable television companies from PSC jurisdiction. Staff also believes that the Commission does not have jurisdiction to determine a dispute under Ch. 718, Florida Statutes, on the validity of Parc Corniche's amendments of its Declaration of Condominium on January 31, 1997. However, pursuant to Section 364.01, Florida Statutes, and applicable rules, the Commission does have exclusive jurisdiction over all of the telephone lines in the building up to the demarcation point. Rule 25-4.0345(1)(b), Florida Administrative Code, defines the demarcation point as the point of physical interconnection between the telephone network and the customer's premises wiring. Paragraph 2. of that section of the rule further provides that for a single line system in a multi customer building, the demarcation point is at a point within the customer's premises. Rule 25-4.0345(1)(d), Florida Administrative Code, defines inside wire as all the wire, other than complex equipment wire, on the customer's side of the demarcation point.

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Pursuant to Rule 25-4.0345(3), Florida Administrative Code, inside wire is not regulated.

"Telecommunications Companies"

Parc Corniche filed a memorandum of law which urges the Commission to determine that it is unlawful for Emerson and Wellington to own the lines in the condominium based on Teleco Communications Company v. Clark, 695 So.2d 304 (Fla. 1997). At first reading the case appears to be on point and to support Parc Corniche's position. In Teleco, an inside wire maintenance company charged a condominium association for the lease and maintenance of telecommunications equipment and wire in a condominium. The Florida Supreme Court affirmed the Commission's findings that the property management company was a telecommunications company within the meaning of Chapter 364, Florida Statutes, and affirmed the Commission's decision to order the transfer of the wire to the condominium association. At that time, which was prior to the 1995 rewrite, there existed no authority for the maintenance company to own or operate the wire or to be certificated. However, today, after the 1995 amendments to Chapter 364, Florida Statutes, such a company could be authorized to own and charge for the use of telephone lines and equipment. Such is the case in this docket. The current statute defines a "telecommunications company" as any company that offers two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. Section 364.02(12), Florida Statutes. A "telecommunications facility" is defined to include real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire. Section 364.02(13), Florida Statutes. Based on the information staff has obtained through the pleadings, it appears that Wellington and Emerson may be operating as telecommunications companies.

Requirement for Certificate of Necessity and Authority to Own Telephone Lines

As stated in the Case Background, staff has determined that Wellington and Emerson have not been issued a certificate of necessity by this Commission. However, the mere fact that Wellington and Emerson have not obtained a certificate does not, *per se*, preclude them from ownership of the lines at Parc Corniche Condominium as Parc Corniche argues. At this time, however, staff is without sufficient information to make a conclusive recommendation on the ownership of the lines at the condominium.

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Staff believes that the information can be discovered through the application process recommended in staff's Issue 3, below.

Conclusion

Therefore, based on the applicable statutes, rules and the analysis above, staff recommends that the Commission file an answer to the Circuit Court's questions as set forth below:

1. Wellington and Emerson may be telecommunications companies under Florida law. There is not enough information, however, to make a final determination at this time. Emerson and Wellington have agreed to cooperate in the PSC application process to determine the need for certification. An application package was sent to counsel for Emerson and Wellington on April 2, 1998.
2. Neither Wellington nor Emerson have certificates from the Commission.
3. Although Wellington and Emerson would have been precluded from owning telecommunications lines under Teleco Communications Company v. Clark, 695 So 2d 304 (FLA. 1997), Chapter 364, Florida Statutes, has been rewritten since the Teleco decision. The rewrite of the statutes opened telecommunications services in Florida to competition and permitted the entry into the market of entities previously precluded. Thus, depending on the services, equipment and lines provided by Wellington and Emerson, they may be permitted to own the lines up to the demarcation point and to provide telecommunications services. However, this issue will not be made by the PSC until their application is received and processed. The Commission does not have jurisdiction to rule on any issue related to cable television lines.

In addition to answering the Court's questions, the Commission should inform the Court of the Commission's intent to exercise jurisdiction over the telephone lines in the Parc Corniche condominium and should attach a copy of the Order issued as a result of this Recommendation.

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ISSUE 2: Should the Motion for Enlargement of Time filed by Wellington and Emerson be granted?

RECOMMENDATION: Yes, the Motion for Enlargement of Time within which to file a response to Parc Corniche's Complaint filed at the PSC should be granted.

STAFF ANALYSIS: As stated in the case Background, Parc Corniche filed a complaint at the PSC on December 26, 1997. Wellington and Emerson were directed to file a response by January 15, 1998. On January 20, 1998, Wellington and Emerson filed a Motion for Enlargement of Time within which to file their response to the complaint. Parc Corniche raised no objections to the late-filing of the motion or the response. Wellington and Emerson referred to the intervening holidays as basis for the need for fifteen additional days for preparation of the response. On January 30, 1998, Wellington and Emerson filed a response. Staff believes that fifteen days for the intervening holidays is not unreasonable, and further notes that no objection to the Motion has been filed. Therefore, staff recommends that the Motion for Enlargement of Time be granted.

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ISSUE 3: How should the Commission rule on the PSC Compliant filed by Parc Corniche?

RECOMMENDATION: If the Commission accepts staff's recommendation in Issue 1, then the Commission will be, in effect, granting Parc Corniche's request to take jurisdiction over the issues before the Circuit Court to the extent described above. A determination over the ownership of the telephone lines should be deferred until the Commission conducts a complete review of the telephone lines, equipment and service at Parc Corniche Condominium. The Commission is without jurisdiction to make a determination on the ownership of the cable television lines.

STAFF ANALYSIS: In its complaint filed on December 26, 1997, Parc Corniche urges the Commission to take jurisdiction over the Circuit Court action and declare that Wellington and Emerson do not have authority to claim ownership of the cable television and telephone lines at Parc Corniche Condominium. The Commission's jurisdiction in this matter is fully discussed in Issue 1, above, and need not be reiterated here. Similarly, our lack of jurisdiction over the cable television lines is fully discussed above.

Staff is not prepared to make a recommendation on the issue of the ownership of the telephone line until there is a more complete record on the telephone lines, equipment and service in the condominium. Without that information, staff cannot determine whether there is any equipment between the connection with the local exchange carrier and the demarcation point or the actual location of the demarcation point. Staff expects to get that information through the application process. Therefore, staff recommends that the Commission defer any ruling on the ownership of the telephone lines until the application process is complete and the Commission conducts a complete review of the telephone lines, equipment and service at the condominium.

Based on the foregoing, staff recommends that the Commission grant Parc Corniche's request for the Commission to take jurisdiction over issues in dispute in Circuit Court except for those related to the cable television lines or Ch. 718, Florida Statutes. Staff further recommends that the Commission address the ownership of the lines based on an analysis of the lines, equipment and service at the condominium as part of the application process.

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ISSUE 4: Should Wellington and Emerson file an application for a Certificate of Necessity pursuant to the provisions of Ch. 364, Florida Statutes?

RECOMMENDATION: Yes, Wellington and Emerson should be required to file a completed application within thirty days of the date of the order issued on this recommendation. Counsel for Wellington and Emerson was very cooperative when contacted concerning the application process. An application package has already been sent to counsel for Emerson and Wellington.

STAFF ANALYSIS: Based on the information received to date, it appears that Wellington and Emerson own, control and charge for telecommunications facilities and that they do so without the benefit of a Certificate of Necessity issued by this Commission. Counsel for Wellington and Emerson was very cooperative when contacted concerning the application process. An application package was mailed to counsel for Wellington and Emerson on April 2, 1998. Staff recommends that Wellington and Emerson be ordered to file an application within thirty days of the order issued on this recommendation. When staff prepares the recommendation on the application, staff will also make recommendations to resolve the ownership of the lines and to determine whether any penalties for operating without a certificate may be appropriate.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No, the docket should remain open until all pending issues are resolved.

STAFF ANALYSIS: Until the application process is complete, staff cannot make a recommendation on the ownership of the telephone lines in dispute in this proceeding. Therefore, the docket should remain open pending the completion of the application process and resolution of all pending issues.