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State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION  
CLERK

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** January 6, 2005

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Division of Competitive Markets & Enforcement (Buys) *DRB*  
Office of the General Counsel (Fordham, Rojas, Teitzman) *C.F.F. 92 PK*  
Office of Standards Control & Reporting (Lowery) *Lowery*

**RE:** Docket No. 040062-TI – Compliance investigation of New Century Telecom, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

**AGENDA:** 01/18/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\040062.REV3.RCM.DOC

### Discussion of Issues

**Issue 1:** Should the Commission accept New Century Telecom, Inc.'s settlement offer, dated December 14, 2004, to resolve forty-two (42) apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

**Recommendation:** Yes. (Buys, L. Fordham, Rojas, Teitzman)

**Staff Analysis:** New Century Telecom, Inc. (New Century) is a switchless reseller of interexchange telecommunications services headquartered in McLean, Virginia. New Century's interexchange company (IXC) registration and tariff became effective on March 20, 1996.

On January 21, 2004, staff opened this docket to address New Century's apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. Staff filed its recommendation on April 21, 2004, for the Commission to impose a

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\$420,000 penalty upon New Century for 42 apparent slamming violations. The item was deferred from the May 3, 2004, Agenda Conference at New Century's request.

On May 6, 2004, staff filed its recommendation (originally filed on April 21, 2004) for the May 18, 2004, Agenda Conference. New Century submitted a settlement offer on May 12, 2004, to resolve the apparent slamming violations in this docket. Consequently, staff's recommendation was deferred from the May 18, 2004, Agenda Conference to facilitate review of the company's settlement offer.

On June 17, 2004, staff filed its recommendation for the Commission to reject New Century's settlement offer, dated May 12, 2004. At the June 29, 2004, Agenda Conference, the Commission deferred staff's recommendation and directed staff and New Century to negotiate a possible settlement within 30 days. The company submitted a revised settlement offer on July 20, 2004. Staff and the company attempted to reach an acceptable agreement, but there were five (5) issues on which staff and the company could not agree. Those issues were (1) the style of the company's third party verification script, (2) whether the third party verification company was unaffiliated and independent from New Century, (3) whether the company should record telemarketing calls, (4) the posting of a bond to ensure compliance, and (5) providing staff with copies of any additional complaints received directly by the company from Florida consumers.

On September 23, 2004, staff filed its recommendation to reject New Century's settlement offer, dated July 20, 2004, and instead, penalize the company in the amount of \$420,000. During the October 5, 2004, Agenda Conference, the Commission set forth the minimum provisions to be included in a settlement offer that would be considered for acceptance by the Commission.

On December 14, 2004; New Century submitted its latest settlement offer (Attachment A) incorporating the provisions discussed at the October 5, 2004, Agenda Conference. In its settlement offer dated December 14, 2004, New Century is offering the following:

1. Make a voluntary contribution to the Florida General Revenue Fund in the amount of \$151,500. The company is offering to pay \$15,150 within ten days of the effective date of its settlement; fourteen days thereafter, the company will pay the amount of \$5,000 each week, for twenty-seven (27) weeks, and a final payment in the amount of \$1,350 in the final (28<sup>th</sup>) week.
2. Refund or credit the full amount of any charges incurred by each of the 42 customer complaints cited in the recommendation to the extent not already credited or refunded.
3. Establish the telemarketing compliance program included in its settlement proposal submitted on July 20, 2004 (Document No. 08961-04).
4. On a going forward basis, the company will promptly and in good faith address and resolve all complaints regarding its services in a reasonable manner consistent with its settlement offer and its compliance program.

5. Within 60 days from the effective date of its settlement, the company will provide a formal report and additional reports every twelve (12) months, for a total of three reports, continuing for 26 months from the effective date. The reports will include:
  - 1) The status of the company's progress in implementing its settlement.
  - 2) A list of all infractions assigned to personnel related to its settlement.
  - 3) Copies of all customer complaints related to the company's compliance with its settlement for the period since the previous report, including copies of the resolution of any such complaint.
6. Use an unaffiliated and independent company for third party verifications (TPV) subject to staff's approval. The TPV shall not use prerecorded "yes" and "no" questions, and instead, will use live attendants to verify and record customers' orders for service. The company will use the script included in its settlement offer dated July 20, 2004 (Document No. 08961-04), and implement any changes necessary to comply with the Commission's rules, if needed, within 60 days from the effective date of its settlement offer.
7. Agree not to acquire or transfer any customer base in Florida except as provided in Rule 25-4.118, F.A.C.
8. Work with Commission staff to establish a warm transfer line between the Commission and the company's customer service department which shall be operational within 120 days of the effective date of the settlement.
9. Deposit \$15,000 into an escrow account with the Helein Law Firm, LLP as partial security for the payment of its voluntary contribution of \$151,500. The company agrees that upon any default in payment of the voluntary contribution, the remaining balance shall become immediately due and payable, and upon written demand by the Commission, the escrow agent shall pay to the Commission the \$15,000 in the escrow account, and shall be applied by the Commission against the remaining balance due.

This is the first instance in which a third party, the Helein Law Firm, LLP, has held an escrow account for an interexchange telecommunications company that has agreed to make a voluntary contribution. Typically, the Commission is the custodian of escrow accounts held for regulated utilities.

In addition, New Century provided staff with copies of twenty-one (21) informal complaints received directly from Florida customers from August 18, 2003, through February 18, 2004. The company reported that it received more complaints than the 21 represented but those additional complaints were received via telephone and were resolved during the phone call. The company indicated that it does not keep records of telephone complaints and that the company's policy is to ensure the calling customer's complaint is handled to the customer's satisfaction.

Docket No. 040062-TI

Date: January 6, 2005

New Century's monetary offer of \$151,500 is consistent with previous settlement amounts the Commission has approved for similar cases, and the company has revised its settlement offer to include the provisions set forth by the Commission. Therefore, staff recommends that the Commission accept New Century Telecom, Inc.'s settlement offer, dated December 14, 2004, to resolve forty-two (42) apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, Florida Statutes.

**Issue 2:** Should this docket be closed?

**Recommendation:** The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If New Century fails to pay the amount of the voluntary contribution in accordance with its settlement agreement, action will be taken pursuant to the provisions in paragraph 17 of that agreement. If New Century's tariff is cancelled and Registration No. TI427 is removed from the register as a result of such action, the company should be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket should be closed administratively upon either receipt of the final payment of the voluntary contribution or upon the removal of the company's registration number from the register and cancellation of the company's tariff. If New Century, or any of its principles, subsequently decide to reapply for registration as an intrastate interexchange company, it should be required to first pay any outstanding penalties assessed by the Commission. Any action by the Commission, including but not limited to any settlement, should not preempt, preclude, or resolve any matters under review by any other Florida Agencies or Departments. **(L. Fordham, Rojas, Teitzman)**

**Staff Analysis:** Staff recommends that the Commission take action as set forth in its recommendation.

Date: January 6, 2005

# The Helein Law Group, LLLP

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December 17, 2004

**VIA OVERNIGHT MAIL**

Blanca S. Bayo, Director  
Division of the Commission Clerk & Administrative Services  
Florida Public Service Commission  
Capital Circle Office Center  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

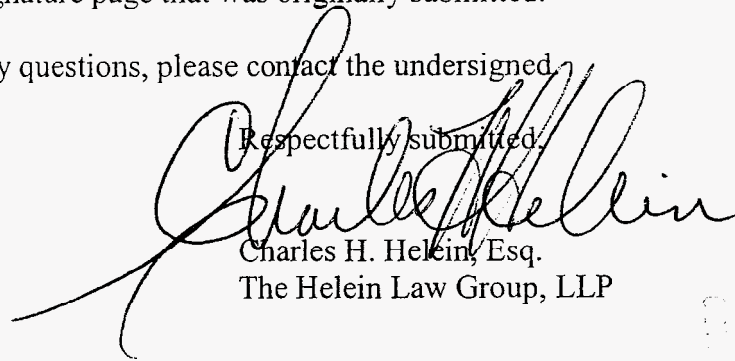
Re: New Century Telecom, Inc.  
Docket No. 040062-TI

Dear Mr. Bayo:

Per the Commission, and on behalf of New Century Telecom, Inc., (NCT) enclosed is a supplement to the executed Offer of Settlement we submitted on December 9, 2004. Please use the signature page that was originally submitted.

Should there be any questions, please contact the undersigned.

Respectfully submitted,



Charles H. Helein, Esq.  
The Helein Law Group, LLP

Enclosure

Cc: E.C. Deeno Kitchen, Dobson, Kitchen & Smith  
Gary M. Ketchum, Dobson, Kitchen & Smith  
Charles Beck, Office of Public Counsel  
Dale R. Buys, Competitive Markets and Enforcement  
Lee Fordham, Esq., Office of General Counsel  
Adam Teitzman, Esq., Office of General Counsel  
Rick Moses, Chief, Bureau of Service Quality

**Offer of Settlement**  
Docket No. 040062-TI

This Offer of Settlement (the "Settlement") is submitted this \_\_\_ day of November 2004 by New Century Telecom, Inc., (the "Company") to the Florida Public Service Commission (the "Commission").

WHEREAS, on April 21, 2004 a Memorandum recommending a Proposed Agency Action (the "PAA") was issued to the Commission's Director, Division of the Commission Clerk & Administrative Services by the Division of Competitive Markets & Enforcement, Office of Standards Control & Reporting and Office of General Counsel (collectively, the "Staff") to be presented at a regular Agenda Conference of the Commission;

WHEREAS, Staff's recommendations for a PAA proposed that the Company be penalized for 42 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection;

WHEREAS, thereafter, the Company's representatives and the Staff engaged in discussions and exchanged certain information relevant to the PAA;

WHEREAS, Staff resubmitted recommendations for a PAA on May 6<sup>th</sup> and again on June 17<sup>th</sup>, 2004;

WHEREAS, the Company's representatives and Staff presented their respective positions concerning the terms of settlement to the Commission at several regular Agenda Conferences;

WHEREAS, at the regular Agenda Conference on October 25, 2004, the Commission issued its Order No. PSC-04-1029-SC-TI (the "ORDER") rejecting the

Company's proposed settlement terms subject however to the submission of revisions to those terms as specified by the Commission in the ORDER;

WHEREAS, the Company has incorporated in this Settlement the revisions to the terms of settlement as specified in the ORDER; and

WHEREAS, this Settlement now satisfies the material issues of the ORDER;

NOW THEREFORE, the Company hereby agrees as follows:

1. This Settlement is in consideration for the termination of Docket No. 040062-TI and upon approval by the Commission shall be incorporated by reference into a final order of the Commission disposing of Docket No. 040062-TI.

2. This Settlement is for settlement purposes only and signing does not constitute an admission by the Company, or its principals, of any violation of law, rules or policy associated with or arising from its actions or omissions as described in the Staff Recommendation and/or the ORDER.

3. In the absence of material new evidence relating to issues described in the ORDER that the Staff did not obtain through its investigation for the PAA or is not otherwise currently in the Commission's possession, the Commission will not use the facts developed for the PAA, or the existence of this Settlement, to institute, on its own motion, any new proceedings, formal or informal, or take any actions on its own motion against the Company, or its principals, concerning the matters that were the subject of the ORDER. Consistent with the foregoing, nothing in this Settlement limits, *inter alia*, the Commission's authority to consider and adjudicate any formal complaints that may be filed by third parties pursuant to the F.A.C., as amended, or to take any action in response to such complaints.

4. For purposes of settling the matters set forth herein, the Company agrees to take the actions described below

- (i) Copies of Settlement to Prospective Successors or Assigns: Prior to any sale, dissolution, reorganization, assignment, merger, acquisition or other action that would result in a successor or assign for provision of the Company's intrastate communications services, the Company will furnish a copy of this Settlement to such prospective successors or assigns and advise same of their duties and obligations under this Settlement.
- (ii) Notice of Settlement Requirements to Officers, Directors, Managers, and Employees: The Company will be responsible for making the substantive requirements and procedures set forth in this Settlement known to its directors and officers, and to managers, employees, agents, and persons associated with the Company who are responsible for implementing the obligations set forth in this Settlement.
- (iii) Provisioning and Verification Code of Conduct: The Company will establish a Compliance Program that will conform to this Settlement and be reviewed by all current provisioning personnel and verification agents. All such persons will reaffirm annually that they have recently reviewed, and fully understand, the Compliance Program. The Compliance Program will establish a strict quality standard, to which all persons will be required to adhere.
- (iv) Compliance Infractions: The Company shall keep records listing material infractions, if any and all personnel and agents shall be informed that a material violation of the Compliance Program will result in immediate termination of employment.
- (v) Complaints: As of the Effective Date, and going forward, the Company will promptly and in good faith address and resolve all complaints regarding its services in a reasonable manner consistent with this Settlement and the Compliance Program. In all cases where the Company concludes that a decision to switch to the Company was not properly verified, the Company will take appropriate disciplinary action against the employee or agent in question, consistent with the standards set forth in the Compliance Program. In all cases where the Company concludes that proper verification was not obtained the Company will contact the Customer and provide appropriate remedies.



- (vi) Reporting: Within 60 days from the Effective Date, the Company will provide a formal report to the Staff. The Company will provide additional reports every twelve (12) months, continuing for twenty-six (26) months from the Effective Date. Each report will include the following: (a) a status report on the Company's progress in implementing this Settlement, (b) a list of all infractions assigned to personnel related to this Settlement during that period, and (c) copies of all Customer slamming complaints for the reporting period since the previous report, including copies of the resolution of any such complaint.
- (vii) Verification: Company will use an unaffiliated and independent company for third party verifications (the "TPV"), its selection subject to the approval of Staff. The script used by the TPV shall not use prerecorded "yes" and "no" questions. The TPV will use live attendants to verify and record customer orders of service. Company shall use the script attached hereto for third party verification based on the fact that to the best of Company's knowledge it complies with the Commission's requirements and sets forth a clear and conspicuous verification. Within 60 days from the Effective Date, Company's representatives and the Staff shall work together to modify the attached script if need be.
- (viii) Transfers of Customer Base: Company will not acquire or transfer any customer base in Florida except as provided in an Rule 25-4.118, Florida Administrative Code.
- (ix) Warm Line Transfer: Company will work with the Commission to establish a warm line transfer between the Commission and Company's customer service department. The warm line transfer will be finalized and ready for operation within 120 days after the Effective Date.

5. The Company will make a voluntary contribution to the Florida General Revenue Fund in the amount of \$151,500.00.

6. On the Effective Date as defined in paragraph 14, Company shall deposit Fifteen Thousand Dollars (\$15,000) into an escrow account with The Helein Law Firm, LLP as partial security for the payment of its voluntary contribution. This escrow shall be maintained until the voluntary contribution has been paid in full. Within ten days of the Effective Date of this Settlement, Company shall pay the

first installment of its voluntary contribution in the amount of \$15,150. Fourteen days thereafter, Company shall pay each week \$5,000 until the balance \$136,350 is retired in full, a period of 27 weeks, with a final payment of \$1,350 in the 28<sup>th</sup> week. Upon any default in payment, the remaining balance shall become immediately due and payable and, upon written demand by the Commission, the escrow agent shall pay to the Commission the \$15,000 in the escrow account, to be applied by the Commission against the remaining amount then due.

7. In addition, Company shall refund or credit the full amount of any charges incurred by each of the 42 customers to the extent not already credited or refunded.

8. The Company shall make the payments of its voluntary contribution in accordance with the written instructions provided by Staff or included in any Commission order approving this Settlement.

9. This Settlement shall satisfy and resolve all issues against the Company as are or may be contained in the ORDER.

10. The Company admits that it operates as a reseller of intrastate telecommunications services and that the Commission has jurisdiction over it and the subject matter for the purposes of this Settlement. The Company represents and warrants that it is the properly named party to this Settlement and has sufficient funds available to meet fully all financial and other obligations set forth herein. The Company further represents and warrants that it has caused this Settlement to be executed by its authorized representative's signature. **Said representative and the Company** respectively affirm and warrant that said representative is acting in her

capacity and within her authority as the corporate officer of the Company, and on behalf of the Company and that by her signature said representative is binding the Company to the terms and conditions of this Settlement. The Company and its principal also represent that they have been represented by counsel of their choice in connection with this Settlement and are fully satisfied with the representation of counsel.

11. The Company represents and warrants that it shall not effect any change in its form of doing business or its organizational identity or participate directly or indirectly in any activity to form a separate entity or corporation which engages in acts prohibited in this Settlement or for any other purpose which would otherwise circumvent any part of this Settlement or the obligation of this Settlement.

12. The Company's decision to enter into this Settlement is expressly contingent upon this Settlement being approved by the Commission without revision, change, addition, or modification.

13. The Company may withdraw from this Settlement if any revision, change, addition, or modification is made to its terms.

14. The Effective Date of this Settlement shall be the date that the Commission enters a final order approving the Settlement. This Settlement shall be attached to and incorporated by reference in any such Commission order.

15. If the Commission brings a judicial action to enforce the terms of this Settlement, Company will not contest the validity of the Settlement, and waives any statutory right to a trial *de novo*. The Company does not waive any statutory right to a trial *de novo* to determine whether it violated this Settlement.

16 In the event this Settlement is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

17. Any material violation of the Settlement will entitle the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order. Except for demand for payment of the amount held in escrow upon any default in payment of the voluntary contribution, before the Commission takes any formal action in connection with any alleged or suspected violation of this Settlement, the Company will be notified of the alleged or suspected violation and be given a reasonable opportunity to respond.

18. The Parties agree that if any provision of the Settlement conflicts with any subsequent rule or order adopted by the Commission, where compliance with the provision would result in a violation, (except an order specifically intended to revise the terms of this Settlement to which the Company and its principals do not consent) that provision will be superseded by such Commission rule or order.

19. By this Settlement, the Company does not waive or alter its right to assert and seek protection from disclosure of any privileged or otherwise confidential and protected documents and information, or to seek appropriate safeguards of confidentiality for any competitively sensitive or proprietary information. The status of materials prepared for, reviews made and discussions held in the preparation for and implementation of the Company's compliance efforts under the Settlement, which would otherwise be privileged or confidential, are not altered by the execution

or implementation of its terms and no waiver of such privileges is made by this Settlement.

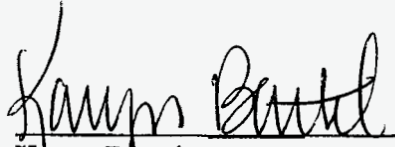
20. The Company will take such other actions as may be reasonably necessary to effectuate the objectives of this Settlement.

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Docket No. 040062-TI  
Date: January 6, 2005

Attachment A


For New Century Telecom, Inc.

  
Karyn Bartel  
President

12-9-04  
Date

The Helein Law Group, LLP executes this Settlement for the sole purpose of agreeing to discharge the obligations of escrow agent under paragraph 6.

For The Helein Law Group, LLP

  
(Insert Name)

12-9-04  
Date