

State of Florida



Public Service Commission

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

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

DATE: July 19, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (McCoy, Kennedy)
Office of the General Counsel (McKay, Mann)

gm *RK*
plw *mm*

RE: Docket No. 070172-TX – Application for certificate to provide competitive local exchange telecommunications service by Premier Telecom-VoIP, Incorporated.

Docket No. 070174-TI – Acknowledgment of registration as intrastate interexchange telecommunications company, effective March 15, 2007, by Premier Telecom-VoIP, Incorporated.

AGENDA: 07/31/07 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\070172.RCM.DOC

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Case Background

On March 15, 2007, Premier Telecom-VoIP, Incorporated (Premier) filed an application (Form PSC/CMP 8 (1/06)) seeking Commission authority to provide competitive local exchange telecommunications services (CLEC) within Florida. The application identified Mr. Joe Vitale as liaison to the Commission regarding the application and for ongoing operations of the company.

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On the same day, Premier filed an IXC Registration Form (PSC/CMP 31 (08/05)), along with an initial tariff, to provide intrastate interexchange telecommunications services (IXC) within Florida. Mr. Joe Vitale is the company's representative that signed the registration form.

This recommendation addresses Premier's CLEC application and IXC registration. Staff is recommending that the Commission deny Premier's CLEC application and cancel the IXC registration.

CLEC Application - Docket No. 070172-TX

In completing the CLEC application, Premier must:

- identify the persons responsible for the application and on-going company operations;
- provide contact information (address, phone number, etc.);
- provide proof of active registration with the Florida Secretary of State;
- complete a series of questions about the company, officers, directors, and stockholders; and
- provide proof that it has the managerial, technical, and financial capability to operate as a CLEC in Florida.

Commission staff reviewed Premier's application for completeness. Staff verified the company's corporate registration, reviewed the managerial, technical, and financial information, and checked the Commission's databases for historical information about the company, officers, and directors. The corporate registration filed with the Secretary of State identifies Premier's officers as:

- Jose. Vitale President
- John W. Little Vice president
- John Vitale Vice president
- Martha Vitale Secretary

The Commission's records indicate that some of Premier's officers may have been associated with other registered or certificated telecommunications companies in Florida. Specifically, staff found the following data in the Commission's Master Commission Directory:

1. Mr. Joe Vitale is listed as the person to receive mailings for UKI Communications, Inc. (UKI). UKI was the subject of Docket No. 020645-TI, In Re: Compliance investigation of UKI Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection. Ultimately, the Commission penalized UKI in the amount of \$250,000 for the apparent violation of PAA Order No. PSC-03-0990-PAA-TI (the company failed to honor its settlement offer).
2. Ms. Martha Vitale is identified as the liaison for Sonic Communications, Inc. (Sonic). Sonic was the subject of Docket No. 930261-TI, In Re: Initiation of show cause proceedings against SONIC COMMUNICATIONS, INC. for violation of Rule 25-4.118,

F.A.C., Interexchange Carrier. Sonic honored its settlement agreement in Docket No. 930261-TI. Ultimately, Sonic's IXC certificate was cancelled in Docket No. 951066-TI, In Re: Cancellation by Florida Public Service Commission of Interexchange Telecommunications Certificate No. 3144 issued to Sonic Communications, Inc. for violation of Rule 25-24.480, F.A.C., Records and Reports; Rules Incorporated.

3. Mr. John W. Little is listed as the president and liaison for America's Tele-Network Corp. (ATN). ATN operated as a CLEC and an IXC in Florida. ATN was the subject of Docket No. 001066-TI, In Re: Initiation of show cause proceedings against America's Tele-Network Corp. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection, and Docket No. 001813-TX, In Re: Initiation of show cause proceedings against America's Tele-Network Corp. for apparent violation of Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries. The company agreed not to object to the Commission's involuntary cancellation of its CLEC and IXC certificates.

Based upon the information above, staff believes that Premier may have failed to accurately complete parts of the CLEC application. Specifically, Part 17.(c) of the CLEC application reads as follows:

Indicate if any of the officers, directors, or any of the ten largest stockholders have previously been an officer, director, partner or stockholder in any other Florida certificated or registered telephone company. If yes, give name of company and relationship. If no longer associated with company, give reason why not.

Premier's response to Part 17.(c) of the CLEC application is "None." On May 8, 2007, staff mailed and faxed a letter to the company seeking clarification of its response in Part 17.(c). Staff also requested supplemental information regarding management resumes. The company did not respond to staff's letter.

On May 25, 2007, staff mailed Premier a certified letter. Staff included a copy of its May 8th letter, and a warning that Premier's CLEC application may be denied should it fail to provide the requested information. According to the certified mail receipt, the United States Post Office made delivery on May 28, 2007. To date, Premier has not provided a response.

Section 2.07.C.5.16.g(1)(2), Administrative Procedures Manual (APM), provides that staff can administratively deny a CLEC application if it is incomplete or inaccurate. To do so, staff must send a certified letter to the applicant requesting completion and/or correction of the application. If the applicant does not respond within 15 days, staff can close the docket upon issuance of an administrative order denying the application. In this case, staff has opted to file this recommendation for Commission consideration.

By not responding to staff's inquiries, Premier has failed to show that it has sufficient managerial capability as required by Section 364.337(1), Florida Statutes, Competitive local exchange telecommunications companies; intrastate interexchange telecommunications services; certification. Premier's failure to respond is also an apparent violation of Section 364.183, Florida Statutes, Access to company records.

IXC Registration - Docket No. 070174-TI

Due to changes in Florida Statutes, IXC's are no longer required to submit an application seeking Commission authority to provide interexchange telecommunications services in Florida. However, a company must submit an IXC Registration Form and file a tariff prior to providing its services to the public.

Upon receipt of Premier's IXC registration, the Commission Clerk assigned the company Registration No. TK143, with an effective date of March 15, 2007.

Even though the IXC registration is active upon receipt by the Commission, staff reviews the registration form and initial tariff, and verifies that the company is actively registered with the Secretary of State. As required, staff coordinates changes to the tariff or registration form with the registrant. When everything is in order, staff submits an acknowledgment memorandum, including a request to close the docket, to the Commission Clerk, with a copy to the registrant in accordance with Section 2.07.C.5.16.i of the APM.

In this instance, Premier filed a complete registration form and a tariff that appears to be in order. However, staff believes that Premier's IXC Registration No. TK143 and tariff should be cancelled and its name removed from the register.

As previously discussed, Premier has demonstrated a lack of management capability in conjunction with its CLEC application. Staff believes it would be negligent to issue an acknowledgment memorandum, close the docket, and not bring this matter of Premier's IXC registration before the Commission for consideration.

The Commission has jurisdiction over these matters pursuant to Sections 364.02, 364.04, 364.183, 364.285, and 364.337, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission deny Premier Telecom-VoIP, Incorporated's application in Docket No. 070172-TX for authority to provide competitive local exchange telecommunications services within Florida for its failure to show that it has sufficient managerial capability as required by Section 364.337(1), Florida Statutes, and its apparent violation of Section 364.183, Florida Statutes, Access to company records?

Recommendation: Yes, the Commission should deny Premier Telecom-VoIP, Incorporated's application for authority to provide competitive local exchange telecommunications services within Florida for its failure to show that it has sufficient managerial capability as required by Section 364.337(1), Florida Statutes, and its apparent violation of Section 364.183, Florida Statutes, Access to company records. **(McCoy, Kennedy, McKay, R. Mann)**

Staff Analysis: Section 364.337(1), Florida Statutes, provides in part that the Commission shall grant a certificate of authority to provide competitive local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served.

As elaborated in the Case Background, Premier has failed to provide a response to staff's inquiries on Part 17.(c) of the CLEC application regarding officers, directors, and stockholders. The applicant's response, among other things, is used by staff for determining the sufficiency of the company's managerial capability. Premier was provided two separate opportunities to respond but failed on both.

In addition, Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports, or other data directly related to matters within the Commission's jurisdiction in the form specified by the Commission and may require such company to retain such information for a designated period of time.

A company's failure to respond to staff's data request denies staff access to its records. As discussed in the Case Background, the names of several of Premier's officers matched names of persons found in the Master Commission Directory (MCD). Staff reviews the Commission's records to determine if officers of a new applicant have any prior association with companies that were involved in compliance dockets. Staff routinely uses this type information to assist in evaluating a company's managerial capability.

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Staff believes that Premier's failure to respond to staff's inquiry was intentional and is a "willful violation" of Section 364.183, Florida Statutes, Access to company records, in the sense intended by Section 364.285, Florida Statutes.

Pursuant to Section 364.285(1), Florida Statutes, the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

Section 364.285(1), Florida Statutes, however, does not define what it is to "willfully violate" a rule or order. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of purposefulness.

However, "willful violation" need not be limited to acts of commission. The phrase "willful violation" can mean either an intentional act of commission or one of omission; that is, failing to act. See, Nuger v. State Insurance Commissioner, 238 Md. 55, 67, 207 A.2d 619, 625 (1965)[emphasis added]. As the First District Court of Appeal stated, "willfully" can be defined as:

An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or *with the specific intent to fail to do something the law requires to be done*; that is to say, with bad purpose either to disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1st DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

Thus, Premier's failure to respond to staff's inquiry meets the standard for a "refusal to comply" and a "willful violation" as contemplated by the Legislature when enacting Section 364.285, Florida Statutes.

"It is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833); see, Perez v. Marti, 770 So.2d 284, 289 (Fla. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunication companies, like Premier, by virtue of their application for CLEC certification, are subject to the rules published

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in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Staff is not recommending a financial penalty in this case. Instead, staff recommends that the Commission should deny Premier Telecom-VoIP, Incorporated's application for authority to provide competitive local exchange telecommunications services within Florida for its failure to show that it has sufficient managerial capability as required by Section 364.337(1), Florida Statutes, and its apparent violation of Section 364.183, Florida Statutes, Access to company records.

Issue 2: Should the Commission remove Premier Telecom-VoIP, Incorporated's name from the IXC register, and cancel its tariff and Registration No. TK143 in Docket No. 070174-TI, on the Commission's own motion, with an effective date of March 15, 2007?

Recommendation: Yes, the Commission should remove Premier Telecom-VoIP, Incorporated's name from the IXC register, and cancel its tariff and Registration No. TK143 in Docket No. 070174-TI, on the Commission's own motion, with an effective date of March 15, 2007. **(McCoy, Kennedy, McKay, R. Mann)**

Staff Analysis: Premier filed a complete registration form and a tariff that appears to be in order. Unlike a company seeking CLEC authority, a demonstration of sufficient managerial capability is not a statutory or Commission rule requirement for companies registering as IXCs in Florida. Nevertheless, the same officers operate Premier's CLEC and IXC operations. Staff argues that the apparent violation of Section 364.183, Florida Statutes, presented in Issue 1, is a Premier Telecom-VoIP, Incorporated management issue. It is not an issue with boundaries defined by the types of telecommunications services provided or by docket numbers.

Companies that are registered as IXCs and are not certificated as CLECs are also subject to rules regarding Commission inquiries. Specifically, Rule 25-24.475(5), Florida Administrative Code, Company Operations and Customer Relations, require that an IXC respond to Commission inquiries within 15 days.

Staff believes that allowing Premier to continue its IXC operations would not be in the public's interest. If the Commission denies Premier's request for CLEC authority in Issue 1, then it should also remove Premier's name from the IXC register, and cancel its tariff and Registration No. TK143.

Based on the above, staff recommends that the Commission should remove Premier Telecom-VoIP, Incorporated's name from the IXC register, and cancel its tariff and Registration No. TK143 in Docket No. 070174-TI, on the Commission's own motion, with an effective date of March 15, 2007

Issue 3: Should these dockets be closed?

Recommendation: Staff recommends that 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 the company fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted and the right to a hearing waived. If the company's authority to provide CLEC services is denied, its IXC Registration No. TK143 and tariff is cancelled and its name removed from the register in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing competitive local exchange telecommunications services and intrastate interexchange telecommunications services in Florida. If there is no protest, these dockets should be closed upon issuance of the Consummating Order. A protest in one docket should not prevent the action in a separate docket from becoming final. **(McKay, R. Mann)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the above staff recommendation.