BEFORE THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

VCI Company d/b/a
Vilaire Communication, Inc.,

Appellant,

vs.

Florida Public Service Commission,

Appellee.
_____/

Lower Case No.: DOCKET NO.: 080065-TX
ORDER NO.: PSC-08-0387-F0F-TX
ISSUED: June 13, 2008

MOTION FOR EXPEDITED STAY

COMES NOW the Appellant, VCI Company d/b/a Vilaire Communications, Inc. ("VCI"), by and through its undersigned attorneys, and moves for the expedited issuance of an order staying the final order of the Appellee, Florida Public Service Commission, issued June 10, 2008 (Appendix 1), which imposes, as a sanction, the adoption and consummation of Appellant's February 13, 2008 Proposed Agency Action Order ("PAA") (Appendix 2) (the June 10, 2008 order and the PAA are referenced in combination hereinafter as the "Final Order"). In sum, Appellee has revoked Appellant's certificate to provide competitive local exchange telecommunications service ("Certificate"), rescinded Appellant's status as an Eligible Telecommunications Carrier ("ETC"), and ordered the transfer of Appellant's existing Florida customers to an alternative carrier, Bellsouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida ("ATT-Florida"). By the Final Order, Appellee has put Appellant out of business in Florida. Appellant maintains that Appellee does not have jurisdiction over the subject matters of the proceeding below and the existence of subject matter jurisdiction goes to

the very power of the Appellee to maintain those proceedings and issue lawful orders therein. For the Appellant to conduct the proceeding below without subject matter jurisdiction is, by the very definition, an *ultra vires* act. Appellee's actions prior to and throughout the proceeding below, culminating in the Final Order, have harmed Appellant's financial standing and reputation in the market-place, and jeopardized Appellant's ability to operate as a competitive local exchange carrier and an ETC in states other than Florida. For these reasons and additional reasons set forth below, it is urgent and imperative that a stay be issued immediately by this court of the Appellee's Final Order pursuant to the provisions of §120.68 (3), Florida Statutes:

1) Appellant has appealed Appellee's Final Order by filing, on June 13, 2008, its Notice of Administrative Appeal of the Final Order revoking the company's Certificate and rescinding its ETC status. The notice was filed with the clerk of the Florida Public Service Commission and with the clerk of the First District Court of Appeal.

2) Pursuant to Section 120.68 (3), Florida Statutes, if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted, as a matter of right, upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. Pursuant to this provision, the appellant/licensee is not required to file the motion for stay with the agency prior to filing the motion for stay with this court.

3) Pursuant to Section 120.52 (9), Florida Statutes, it is provided:

> "License" means a franchise, permit, **certification**, registration, charter, or **similar form of authorization** required by law, but does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act. (Emphasis added)

4) Appellant's Certificate and ETC designation are licenses, as defined under Section 120.52(9), Florida Statutes, that have been revoked by Appellee in the Final Order. As such, the Appellant is entitled to a stay of the Final Order as a matter of right pursuant to the provisions of Section 120.68 (3), Florida Statutes.

5) The Certificate is a "certification" or "authorization" issued by Appellee under Florida law and Appellee's rules, permitting Appellant lawfully to provide competitive local exchange telecommunications services in Florida.

6) Appellant's ETC designation was granted by Appellee pursuant to state and federal law and rules. An ETC designation authorizes the Appellant to seek reimbursement from the Federal Universal Service Fund ("FUSF") for providing qualified low-income consumers with discounted local exchange service and toll-limitation service at no charge (Lifeline service) and discounted service connection fees (Link-Up service) to qualified Florida low income consumers. Without the ETC designation granted by Appellee, the Appellant would neither discount its services for the benefit of low-income consumers nor be qualified or authorized to seek reimbursement from the FUSF for offering the supported discounted services. Accordingly, the revocation of the ETC designation by the Appellee also is the revocation of a license within the purview of Section 120.52 (9), Florida Statutes, and Section 120.68 (3), Florida Statutes.

7) In the Final Order, the Appellee presents the facts and circumstances of this case and its reasons for issuance of the Final Order in a manner most prejudicial to Appellant. However, the facts of this case implicate far more than Appellant's noncompliance with Appellee's discovery order and decision to cease participating in the proceedings below. Because Appellee has refused and failed to do so, this court must determine the boundaries of

Appellee's jurisdiction with respect to competitive local exchange carriers and competitive ETCs.

8) At the heart of this matter is the whether the Florida legislature has granted Appellee jurisdiction to audit a carrier for compliance with federal rules and federal law pertaining to the FUSF, a federally administered program, and the jurisdiction and right of the Appellee to issue the PAA, forcing Appellant to defend itself against threatened revocation of its CLEC certification and ETC designation through Appellee's unauthorized audit and subsequent interpretation of and enforcement of federal law and rules. Appellant will maintain that Appellee was delegated no such authority. Further, Appellee's unique interpretations of FUSF rules and federal law pertaining to ETCs are entitled to *no deference* by any court.

9) Appellant will maintain that the Florida legislature did not enact the provisions of federal law that Appellee sought to enforce against Appellant. Appellant further will maintain that the Florida legislature did not authorize the Appellee to adopt the FCC's universal service rules it sought to enforce against Appellant and that the Appellee did not adopt or attempt to adopt such rules pursuant to the procedures required by Chapter 120, Florida Statutes. Appellant, further, will maintain that the United States Congress delegated to the FCC sole authority to administer the FUSF and that Appellant has no authority from Congress or the FCC to maintain the proceedings below.

10) If the Appellee did not have subject matter jurisdiction to investigate Appellant's operations for compliance with federal laws and rules administered by and enforced solely by the FCC, Appellee did not have the power or authority to issue the PAA, conduct the proceedings below, or issue the Final Order sought to be reviewed. Thus, all Orders, including orders compelling discovery, issued by the Appellee in the proceedings below are void *ab initio*.

11) Contrary to Appellee's contentions, Appellant challenged the Appellee's jurisdiction on numerous instances, both before and during the proceedings below, but Appellee refused to address the issue of jurisdiction. Indeed, at the June 4, 2008 final hearing, the Appellee failed to take advantage of its final opportunity to address its subject matter jurisdiction, which Appellant raised during numerous discussions and in two of Appellant's motions. Florida law and Appellee's rules provide that the Appellee has authority only over matters within Appellee's jurisdiction. In refusing to determine its jurisdiction, the Appellee violated Florida law and failed to comply with its own rules. Appellant imposed the harsh sanction of revocation of Appellant's CLEC certificate and rescission of its ETC designation without due regard for the legality of its actions, including whether the Florida legislature has delegated Appellant the authority to issue "sanctions" for any reason.

12) When it became clear to Appellant that Appellee would refuse to address subject matter jurisdiction, Appellee sought the assistance of this court by requesting a writ of prohibition against the Appellee. This court denied the petition on the ground that Appellee should have the right to determine its own jurisdiction. In a further effort to have Appellee's subject matter jurisdiction determined, the appellant sought injunctive relief in the United States District Court, Northern District of Florida. The federal court denied appellant's request for preliminary injunctive relief on the ground that Appellee's subject matter jurisdiction is a matter of state law. However, the federal district court did not dismiss Appellant's complaint for declaratory relief alleging that the Appellee's actions are pre-empted by federal law. No tribunal, including Appellee, has yet reviewed or decided the extent of the Appellee's jurisdiction over the subject matters in the proceedings below.

13) If a stay is not granted in this case, Appellant is out of business in the State of Florida, sustaining severe financial harm and continuing harm to its reputation in the marketplace. Further, Florida low-income consumers will not receive sorely needed discounted local exchange service from Appellant, or, due to bad credit and inability to pay service deposits, such consumers may be without telephone service altogether. It is, therefore, imperative that a stay be granted in this case, not only to protect Appellant's valid interests and rights but also the interests of Florida low-income consumers.

14) For the reasons above, this court should issue a stay/supercedeas of the Final Order. Anticipating that Appellee will contest the court's grant of a stay, Appellant addresses below the issue of whether the grant of a stay would constitute a probable danger to the health, safety or welfare of the state. It would not.

15) Pursuant to § 120.68 (3), when the agency decision has the effect of suspending or revoking a license, supersedeas is to be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety or welfare of the state.

16) Pursuant to Rule 9.190 (e), (2) (C), F.R.A.P, when an agency has suspended or revoked a license other than on an emergency basis, a licensee may file with the court a motion for stay on an expedited basis. The agency may file a response within 10 days of the filing of the motion, or within a shorter time period set by the court. The appellant requests that the court consider this motion for stay on an expedited basis and require the Appellee to file a response to the motion contending that there is a probable danger to the public health safety and welfare of the state, if such is the position of the Appellee, within 5 days of service of this motion. If such reply is filed by the Appellee, the Appellant requests leave to file a reply within the parameters

of the court's decision in *Ludwig v. Department of Health*, 778 So.2d 531 (1st DCA 2001). It is clear, however, that a supersedeas/stay granted by this court in these circumstances would not constitute a probable danger to the health, safety, or welfare of the state.

17) The license revocations at issue are not licenses to practice medicine or dispense alcohol, they are licenses to provide telephone service and to receive reimbursement from a federal fund for passing through federally mandated service discounts to consumers. Thus, the health, safety or welfare of the state is not implicated as it would be in circumstances where the license of a physician found to have committed malpractice is revoked or a liquor license is revoked for service to minors.

18) The June 10, 2008 Order No. PSC-08-0387-FOF-TX specifically provides:

> This docket shall remain open in order for VCI to complete the required refund of excess E-911 overcharges and verify the transaction of VCI customers to ATT, after which time this docket shall be closed administratively. Our staff is directed to closely monitor VCI's activities in this regard and to bring the matter back before us if VCI's fails to complete them in a timely fashion.

19) With respect to E-911 charges, Appellee maintained in the proceedings below that Appellant overbilled some Florida customers $0.25 in E911 fees by billing a $0.75 surcharge when §365.172 (8) (3) (f), Florida Statutes prohibits the assessment of a fee in excess of fifty cents per month. However, Appellant conceded that it inadvertently overcharged customers, provided Appellee with requested documentation of the amount of the overcharge, developed a refund plan, also provided to Appellee, and refunded the overbilled customers according to the submitted plan. Appellant is now billing the correct E911 surcharge and informed Appellee of this. Appellant's past overbilling of $0.25 per customer cannot constitute a probable danger to the health, safety or welfare of the state. Should Appellee submit, without grounds, that Appellant continues to overbill the E911 surcharge, a $0.25 overcharge does not rise to the level

of a probable danger to the health, safety or welfare of the state. Further, customers who have been overbilled for any reason are made whole by receiving refunds or credits for the amount of the overcharge.

20) Finally, in the PAA the Appellee submits that an audit of Appellant's operations as an ETC in Florida revealed irregularities that Appellant alleges are violations of federal law and FCC rules pertaining to the FUSF. As stated above, Appellant maintains that Appellee was without subject matter jurisdiction to audit Appellant for compliance with federal law and rules. Further, Appellee has no expertise with respect to the FUSF to make such determinations. Should Appellee oppose the issuance of a stay on the ground that Florida consumers will suffer continuing harm, the court should reject it. Throughout the proceedings below, Appellee has failed to properly understand how the FUSF mechanism provides benefits to Florida's low-income consumers and, as a matter of fact, there is no probable harm to the health, safety or welfare of Florida's consumers.

21) The federal universal service system permits carriers such as Appellant to offer discounts to qualifying low-income consumers.[1] Appellant is doing just that. Even if the court fully accepts the Appellee's allegations as true, that Appellant has received more than one discount from the federal fund, low-income consumers receiving those discounts are not harmed. During the pendency of this appeal, Appellant's low-income customers will continue to receive discounted telephone service at the appropriate level.

22) In fact, the only way that these qualifying consumers could be harmed is if the Appellee were to prematurely disqualify Appellant from participating in the federal program. In doing so, Appellee would be cutting low-income consumers off from discounted telephone service, which would cause actual harm. While the Appellee has ordered Appellant's customers

[1] See 47 C.F.R. Section 54.400 et seq.

to be transferred to ATT-Florida, not all customers may be able to obtain service from ATT-Florida because of previous unpaid ATT-Florida telephone bills and/or inability to pay a service deposit. Thus, some of Appellant's customers may be without telephone service at all. In the alternative, consumers not qualifying for service with ATT-Florida or other competitive ETCs may seek service with higher priced prepaid local exchange carriers. Such harm, however, would not be caused by the Appellant, but instead, would be caused by the Appellee.

23) Appellee may argue that Florida consumers are being harmed because each Floridian pays into the federal universal service fund, and is therefore harmed if any portion of their contribution is provided to a company that is not complying with the federal rules. While such an argument is facile, it completely ignores how the federal mechanism operates.

24) Holding aside the merits of whether the Appellee even has jurisdiction to sanction a company (which it does not) and even assuming everything the Appellee alleges about Appellant's conduct is true, lifting the automatic stay is not going to mitigate any harm allegedly suffered by any Florida consumer. This is because the federal universal service mechanism collects contributions from every consumer nationwide, which contributions are placed in a fund administered by the Universal Service Administrative Company ("USAC") in Washington, DC.[2] Funds do ***not*** flow from Florida contributors to Florida beneficiaries.

25) Accordingly, there is no mechanism and no possible way for Florida's consumers, or any consumer, to be refunded any contributions made as a result of any enforcement action the FCC may take. The FCC may recover any federal program funds improperly distributed to a participating carrier.[3] Any funds recovered through FCC action stay in the program for later distribution throughout the country. To the extent that recovered funds result in the lowering of

[2] See 47 C.F.R. Section 54.701.
[3] See, e.g., 47 C.F.R. Section 54.8.

funding requirements in future periods, USAC will reduce the amount that all consumers contribute nationwide in such future periods. Here, where the amount at issue is very small, compared to an annual federal fund of well over $7 billion, it is unlikely that any significant adjustments to consumer contributions would result, no matter what action the FCC takes.

26) In sum, even assuming everything Appellee alleges in the PAA to be true, it is impossible for Florida consumers who benefit from the program to be harmed, unless the Court lifts the automatic stay and removes their benefits.

WHEREFORE, Appellant respectfully request that this court immediately issue a supersedeas/stay of the final orders of the Appellee revoking the Appellant's Certification and ETC designation pending the outcome of this appeal.

Respectfully submitted,

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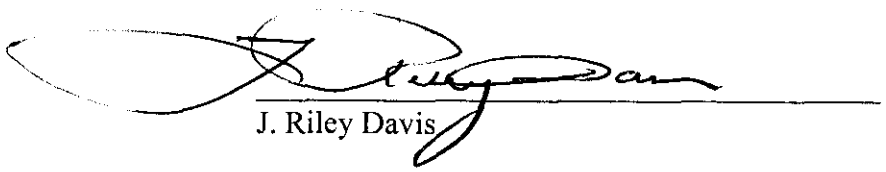
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Stay was hand delivered this 13 day of June, 2008 to: Ann Cole, Clerk of The Commission, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399, Lee Eng Tan, Senior Attorney, Florida Public Service Commission, Office of The General Counsel, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850.



J. Riley Davis

BEFORE THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

VCI Company d/b/a
Vilaire Communication, Inc.,

Appellant,

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_____/

Lower Case No.: DOCKET NO.: 080065-TX
ORDER NO.: PSC-08-0387-F0F-TX
ISSUED: June 10, 2008

APPENDIX

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.	DOCKET NO. 080065-TX ORDER NO. PSC-08-0387-FOF-TX ISSUED: June 10, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING MOTION TO IMPOSE SANCTIONS; DENYING MOTION TO DISMISS OR ABATE PROCEEDINGS; DISMISSING PROTEST OF ORDER NO. PSC-08-0090-PAA-TX AND REQUEST FOR HEARING WITH PREJUDICE; AND CONSUMMATING ORDER NO. PSC-08-0090-PAA-TX

BY THE COMMISSION:

I. Background

By Order No. PSC-08-0090-PAA-TX, issued February 13, 2008, in this docket (PAA Order), we proposed to rescind Vilaire Communications, Inc.'s (VCI or company) eligible telecommunications carrier (ETC) status and to cancel its Competitive Local Exchange Company (CLEC) certificate. On March 5, 2008, VCI timely filed a protest of the PAA Order and a petition for formal hearing. Therefore, this matter was scheduled for a formal hearing on June 4, 2008. An Order Establishing Procedure, Order No. PSC-08-0194-PCO-TX, was issued on March 26, 2008.

On March 31, 2008, our prosecutorial staff served its First Set of Interrogatories and First Request for Production of Documents on VCI (Discovery). VCI timely filed general and specific objections thereto on April 7, 2008, and a partial response to the Discovery on April 15, 2008. On April 22, 2008, the prosecutorial staff filed a Motion to Compel Discovery (Motion to Compel), seeking full and complete responses to the Discovery by 12 p.m. on April 30, 2008.

By Order No. PSC-08-0258-PCO-TX, issued April 25, 2008, the Prehearing Officer granted the Motion to Compel and required VCI to respond to the Discovery within seven days of the issuance date of the Order, by May 2, 2008. On May 2, 2008, VCI instead filed a Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008 (Discovery Order), we denied VCI's Motion for Reconsideration and

ordered VCI to fully answer the Discovery by the close of business on Friday, May 9, 2008. Rather than complying with the Discovery Order, on May 9, 2008, VCI instead filed a letter stating that it declined to provide the information sought by the Discovery. On May 13, 2008, the prosecutorial staff filed a Motion to Impose Sanctions Due to VCI's Failure to Comply with the Discovery Order (Motion to Impose Sanctions). VCI filed no response to the Motion.

In its May 9, 2008, letter, VCI states that it is unwilling to waive its objections to the Discovery because the Discovery is integrally related to the jurisdictional question presented in its Motion to Dismiss Proceedings for Lack of Subject Matter Jurisdiction or in the Alternative, to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction (Motion to Dismiss or Abate), filed May 13, 2008. VCI contemporaneously filed a Request for Oral Argument on the Motion. The prosecutorial staff filed a Response to the Motion on May 12, 2008.[1]

On May 27, 2008, VCI filed a letter stating that it will no longer participate in any aspect of this docket, including the prehearing scheduled for May 28, 2008, and the hearing scheduled for June 4, 2008. The Prehearing Officer convened the prehearing and took appearances. VCI did not appear. Therefore, the Prehearing Officer found it unnecessary to address the draft prehearing order and no prehearing order was issued in the case.

On June 2, 2008, at the Prehearing Officer's directive, our advisory staff filed a recommendation for our consideration as a preliminary matter at the start of the June 4, 2008, hearing, to address VCI's May 27, 2008 letter, as well as the pending Motion to Impose Sanctions and Motion to Dismiss or Abate. We convened the hearing on June 4, 2008, and VCI failed to appear.[2] No full evidentiary hearing was conducted.

This Order memorializes our decision made at the start of the June 4, 2008 hearing on the two pending motions and consummates the PAA Order. We have jurisdiction pursuant to Sections 120.80(13), 364.10(2), 364.27, 364.285, 364.335, 364.337, and 364.345, Florida Statutes (F.S.).

II. Motion to Impose Sanctions

The prosecutorial staff filed its Motion to Impose Sanctions pursuant to Rule 28-106.206, Florida Administrative Code (F.A.C.), and Rule 1.380, Florida Rules of Civil Procedure. Prosecutorial staff requests that we dismiss VCI's Protest of the PAA Order and Request for a Section 120.57(1), F.S., administrative hearing and that the PAA Order be reinstated and consummated as a final order. The prosecutorial staff argues the following.

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[1] VCI served its Motion to Dismiss on the prosecutorial staff on May 5, 2008, but did not perfect the filing of the Motion until May 13, 2008.

[2] We note that on June 2, 2008, the Federal District Court for the Northern District of Florida denied VCI's Motion for Preliminary Injunctive Relief of an Emergency Nature, which VCI filed in that Court in an effort to restrain us from exercising subject matter jurisdiction in this proceeding. We further note that on May 16, 2008, the First District Court of Appeal per curiam denied VCI's Petition for Writ of Prohibition filed May 15, 2008, in that Court, also in an effort to restrain us from exercising subject matter jurisdiction in this proceeding. VCI Co. d/b/a Vilaire Communications v. FPSC, Case No. 1D08-2383.

A. Legal Authority

The prosecutorial staff points out that we may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt. Rule 1.380, Florida Rules of Civil Procedure, sets forth in pertinent part that:

> (b) Failure to Comply With Order.
>
> (2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:
>
> (A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.
>
> (C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

Prosecutorial staff further points out that striking pleadings or entering a default judgment against a party is the most severe of all sanctions, which should be employed only in extreme circumstances.[3] However, a "deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, . . . as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness."[4]

B. VCI's Refusal to Comply

Prosecutorial staff points out that on pages 10-11 of its protest of the PAA Order, VCI specifically requested that this Commission set this matter for hearing "to resolve the disputed issues of fact and law identified herein, and to allow VCI a full opportunity to present evidence and arguments as to why [the PAA Order] should be rescinded." Subsequently, VCI and the prosecutorial staff mutually agreed upon the issues at an Issue Identification Conference. The prosecutorial staff served its Discovery on VCI on March 31, 2008, seeking to discover matters that are clearly within the scope of the agreed upon issues. The Discovery concerns matters

[3] Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983); Neal v. Neal, 636 So. 2d 810, 812 (Fla. 1st DCA 1994).
[4] Id. at 946 (citations omitted).

regarding VCI's operations as an ETC in Florida and its operations as a certificated CLEC in Florida. VCI has failed to respond to Interrogatory Nos. 1-13, 15-36 and 39 and Document Request Nos. 1-10, citing, among other things, this Commission's lack of subject matter jurisdiction. However, VCI did not request that we address subject matter jurisdiction as a threshold issue in this proceeding.

The prosecutorial staff argues that although as a matter of law, a party may raise subject matter jurisdiction at any point in a proceeding, VCI's refusal to respond to the Discovery without having made any formal request that we address subject matter jurisdiction prior to filing its objections to the Discovery was a transparent attempt to delay our resolution of the proceeding and impeded our ability to conduct an orderly administrative hearing on the matter. By Order No. PSC-08-0258-PCO-TX, the Prehearing Officer granted the prosecutorial staff's Motion to Compel and required VCI to serve its Discovery responses by May 2, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. It was in that filing that VCI first notified us of its intent to file a Motion to Dismiss or in the alternative, hold the proceeding in abeyance pending a determination of this Commission's subject matter jurisdiction.

The prosecutorial staff further argues that VCI's refusal to comply with the Discovery Order denying VCI's Motion for Reconsideration and requiring VCI to submit its full and complete responses to the Discovery by May 9, 2008, appears to be a deliberate and willful attempt to delay this Commission's ability to conduct an orderly administrative hearing as requested by VCI. The prosecutorial staff notes that VCI has continued to apply for and receive universal service funding during the pendency of this proceeding. VCI received $51,966 and $53,461 in universal service funds for March and April 2008 for its operations as an ETC in Florida.

C. Commission Should Not Be Misled by VCI's Claim that PSC Lacks Jurisdiction

Prosecutorial staff argues that VCI's claim that we lack subject matter jurisdiction to revoke its ETC designation is an attempt to justify its refusal to comply with the Discovery Order, and that we should not be misled by that claim. The Discovery to which Order No. PSC-08-0304-PCO-TX compels VCI to respond seeks information relevant to VCI's operations as a CLEC in Florida. VCI has not challenged our subject matter jurisdiction over its CLEC certificate. Specifically, prosecutorial staff seeks information regarding the scope of VCI's admitted overcharging of the E911 fee and VCI's alleged misapplication of late payment charges. Further, VCI agreed to Issue 11, which asks whether VCI has willfully violated any lawful rule or order of the Commission, or provision of Chapter 364, F.S., and if so, whether VCI's CLEC certificate should be revoked. In his prefiled rebuttal testimony at pages 2-3, staff witness Robert J. Casey alleges that VCI has failed to accurately report its gross operating revenues on its 2006 and 2007 regulatory assessment fee (RAF) forms, in violation of section 364.336, F.S.

Moreover, prosecutorial staff argues that VCI has acknowledged our authority pursuant to section 364.27, F.S., to investigate violations of the rulings, orders, or regulations of the FCC. On page 32 of its Motion to Dismiss or Abate, VCI states that

> [t]he Commission is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or the FCC's orders and regulations. But the Commission's power with respect to such interstate matters is limited to referring violations to the FCC by petition.

According to the prosecutorial staff, VCI's acknowledgement that we have explicit authority to investigate such matters is demonstrative of VCI's deliberate and willful disregard of the Discovery Order. VCI's acknowledgement also further supports prosecutorial staff's argument set forth in its Response to VCI's Motion to Dismiss or Abate that VCI has failed to exhaust its administrative remedies in this proceeding.

Finally, the prosecutorial staff points out that VCI did not include Interrogatory Nos. 1, 3, 6, 34, and 39 and Document Request Nos. 1 and 10 in its objections to the Discovery on the grounds that we lacked subject matter jurisdiction. On pages 3-4 of VCI's Motion for Reconsideration, VCI states that "[t]he Discovery Requests that will be most directly impacted by VCI's motion to dismiss are those touching on, wholly or in part, VCI's operations as an ETC, specifically Interrogatory Nos. 2, 4, 5, 7, 8-32, 35, 36 and 38 and Request Nos. 2, 3, 4, 5, 6, 7, 8 and 9." Prosecutorial staff argues that because VCI did not identify Interrogatory Nos. 1, 3, 6, 34, and 39 and Document Request Nos. 1 and 10, it cannot now claim lack of subject matter jurisdiction in failing to comply with the Discovery Order. This is yet another example of VCI's deliberate and willful disregard of the Discovery Order.

III. VCI's Statement of Non-Participation

In its May 27, 2008, letter, VCI gives five reasons why it will no longer participate in any aspect of this docket, as follows:

1) Information forming the basis for this proceeding was obtained through improper channels by way of an unauthorized Commission audit, and pertains to matters that are outside our jurisdiction;

2) We are without subject matter jurisdiction to initiate, prosecute or adjudicate matters concerning VCI's operations as an ETC, and thus we are without authority to issue orders in this proceeding. Any and all current or future orders that we issue in this proceeding are unenforceable. We have refused to decide our jurisdiction over this matter, which suggests that we are willing to prejudice and punish VCI regardless of our authority, and which results in VCI being forced to allocate its limited resources to pursuing relief in other judicial forums;

3) Our prosecution of VCI in this proceeding violates VCI's Constitutional rights. We failed to provide VCI with proper notice in contravention of VCI's rights to due process under the Florida and U.S. Constitutions;

4) VCI can no longer afford to allocate company resources to defend itself in this proceeding. VCI is a small company with limited financial resources, and has been expending upwards of $40,000 in legal fees per month; and

5) VCI will discontinue participation in this proceeding in order to direct its attention and resources to pursuing its claim against this Commission filed in the Federal District Court for the Northern District of Florida.

IV. Analysis and Rulings

The Order Establishing Procedure issued in this case states that "[d]iscovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 364, F.S., Rules 25-22, 25-40, and 28-106, F.A.C., and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer."[5] The "Tentative List of Issues," as agreed upon by the prosecutorial staff and VCI, are attached to that Order as Attachment A.[6] Whether we have jurisdiction to address VCI's ETC status is specifically identified in those issues, as follows.

7. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?

8.(a) Has VCI violated any FCC statute, rule or order pertaining to ETC status, or Lifeline and Link-Up service?

(b) If so, what is the appropriate remedy or enforcement measure, if any?

9.(a) Has VCI violated any PSC rule or order applicable to VCI pertaining to ETC status or Lifeline and Link-Up service?

(b) If so, what is the appropriate remedy, if any?

10.(a) Does the Commission have authority to rescind VCI's ETC status in the state of Florida?

(b) If so, is it in the public interest, convenience, and necessity for VCI to maintain ETC status in the state of Florida?

For VCI to request a hearing on the PAA Order and agree to litigate these issues only to object to the Discovery pertaining to them on the basis that we lack the jurisdiction to even ask

[5] Order No. PSC-08-0194-PCO-TX at 2.
[6] Id. at 10.

for information about them, let alone address and rule on them, is incongruous, at best. VCI also objected to much of the Discovery on the basis that it was overly burdensome and time-consuming, yet at no point in time did VCI request an extension of time to file its responses to any of the Discovery. And as prosecutorial staff points out in its Motion to Impose Sanctions, certain of the Discovery does not even pertain to the issues which VCI argues are beyond our jurisdiction to address.

VCI's objections were overruled by Order No. PSC-08-0258-PCO-TX, granting the prosecutorial staff's Motion to Compel, and VCI's Motion for Reconsideration of that Order was denied by Order No. PSC-08-0304-PCO-TX. Order No. PSC-08-0304-PCO-TX expressly required VCI to fully answer the Discovery by the close of business on Friday, May 9, 2008. Rather than complying with the Discovery Order, VCI elected to file a letter on that date, stating its unwillingness to waive its objections by providing further discovery, and expressly declining to provide the information that we ordered it to provide because VCI believes we lack jurisdiction in this matter. VCI has no legal right to disregard our Discovery Order simply because it disagrees that we have jurisdiction over this matter. As noted in the First District Court of Appeal's opinion per curiam denying VCI's Petition for Writ of Prohibition requesting that the Court prohibit us from ruling on this matter, the lower tribunal has jurisdiction to determine its own jurisdiction.[7]

In requesting that we dismiss VCI's Protest and reinstate and consummate the PAA Order as a final order, the prosecutorial staff acknowledges that striking pleadings or entering a default judgment against a party is the most severe of all sanctions, which should be employed only in extreme circumstances.[8] We agree that the circumstances of this case are extreme. As evidenced by its letter dated May 9, 2008, VCI has deliberately and willfully defied the Discovery Order after requesting a hearing on the matter and agreeing upon the issues to be litigated. As prosecutorial staff points out, a "deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, . . . as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness."[9]

We are mindful that the severity of the sanction for noncompliance with an order compelling discovery should be commensurate with the violation, and that dismissal is inappropriate when the moving party is unable to demonstrate meaningful prejudice.[10] Our prosecutorial staff is clearly prejudiced by VCI's willful defiance of the Discovery Order. VCI has prevented the prosecutorial staff from preparing for the hearing through the use of the

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[7] Supra, at note 2. The Court cited to Mandico v. Taos Const., Inc., 605 So. 2d 850 (Fla. 1992) (holding that the lower tribunal has jurisdiction to determine its own jurisdiction and prohibition will not lie to divest a lower tribunal of jurisdiction to hear and determine that question); and Board of County Comm'rs of Metro-Dade County v. Wood, 662 So. 2d 417 (Fla. 3d DCA 1995) (reversing circuit court's granting of prohibition relief where board had not ruled on issue of its jurisdiction).

[8] Mercer, 443 So. 2d at 946; Neal, 636 So. 2d at 812 (supra, at note 3).

[9] Mercer, 443 So. 2d at 946 (supra, at note 3).

[10] Neal, 636 So. 2d at 812 (supra, at note 3) (citations omitted).

discovery process.[11] Moreover, as prosecutorial staff points out, VCI has prevented us from conducting an orderly proceeding and considering evidence on the issues from both parties in making our final factual determinations.

VCI's May 27, 2008, statement of non-participation in this proceeding further shows that the ultimate sanction of dismissal is warranted in this case. VCI failed to participate in the prehearing and in the hearing that it requested. Pursuant to the Order Establishing Procedure, the failure of a party to appear at the prehearing and hearing constitutes a waiver of that party's issues and positions and the party may be dismissed from the proceedings.[12]

Rule 1.380(b)(2)(C), Florida Rules of Civil Procedure, expressly provides us with the authority to grant our prosecutorial staff's Motion to Impose Sanctions under these circumstances. Despite its willful disregard of the Discovery Order and its pronouncement that it will no longer participate in this proceeding, throughout the pendency of the proceeding VCI has continued its operations as a CLEC in Florida and has continued to receive universal service funding for its operations as an ETC in Florida. By its willful disregard of the Discovery Order and failure to participate in the prehearing and hearing, VCI has forfeited its right to a hearing in this matter.

Based upon the foregoing, we grant our prosecutorial staff's Motion to Impose Sanctions. VCI's protest of the PAA Order and request for hearing are dismissed with prejudice and the PAA Order is hereby made final and effective upon the issuance of this Consummating Order. Moreover, VCI's Motion to Dismiss or Abate and Request for Oral Argument on the Motion are denied as moot. In so ruling, we note that we determined our jurisdiction to rule on this matter in the PAA Order and, as previously stated herein, we have jurisdiction pursuant to Sections 120.80(13), 364.10(2), 364.27, 364.285, 364.335, 364.337, and 364.345, F.S.

This docket shall remain open in order for VCI to complete the required refund of excess E911 overcharges and verify the transition of VCI customers to AT&T, after which time this docket shall be closed administratively. Our staff is directed to closely monitor VCI's activities in this regard and to bring the matter back before us if VCI fails to complete them in a timely fashion.

It is, therefore,

ORDERED by the Florida Public Service Commission that our prosecutorial staff's Motion to Impose Sanctions Due to VCI's Failure to Comply with the Discovery Order is granted and Vilaire Communications, Inc.'s protest of Order No. PSC-08-0090-PAA-TX and request for hearing are dismissed with prejudice. It is further

[11] We note that on May 23, 2008, the prosecutorial staff filed a letter stating that VCI had also indicated that it would only make its witness, Mr. Stanley Johnson, available for deposition on 3 of the 11 issues identified in the case.

[12] Order No. PSC-08-0194-PCO-TX at 5 and 7.

ORDERED that Vilaire Communications, Inc.'s Motion to Dismiss Proceedings for Lack of Subject Matter Jurisdiction or in the Alternative, to Abate Proceedings Pending Federal *District Court Decision on Subject Matter Jurisdiction* and *Request for Oral Argument* are denied as moot. It is further

ORDERED that Order No. PSC-08-0090-PAA-TX is hereby made final and effective upon the issuance of this Order. It is further

ORDERED that this docket shall remain open in order for Vilaire Communications, Inc. to complete the required refund of excess E911 overcharges and verify the transition of its customers to AT&T, after which time this docket shall be closed administratively. Our staff is directed to very closely monitor Vilaire Communications, Inc.'s activities in this regard and to bring the matter back before us if Vilaire Communications, Inc. fails to complete them in a timely fashion.

By ORDER of the Florida Public Service Commission this 10th day of June, 2008.

/s/ Ann Cole
ANN COLE
Commission Clerk

This is an electronic transmission. A copy of the original signature is available from the Commission's website, www.floridapsc.com, or by faxing a request to the Office of Commission Clerk at 1-850-413-7118.

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any judicial review of Commission orders that is available pursuant to Section 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.	DOCKET NO. 080065-TX ORDER NO. PSC-08-0090-PAA-TX ISSUED: February 13, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION
ORDER RESCINDING ELIGIBLE TELECOMMUNICATIONS CARRIER STATUS AND CANCELLATION OF CLEC CERTIFICATE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Background

Vilaire Communications, Inc. (VCI or Vilaire) is a Florida Public Service Commission (FPSC or Commission) certificated competitive local exchange company (CLEC) which provides service in BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida's (AT&T) territory. On May 22, 2006, we designated VCI as an Eligible Telecommunications Carrier (ETC) in AT&T's service area.[1] VCI's purpose in seeking ETC status was solely to provide Link-Up and Lifeline services to low-income Florida consumers. All VCI customers participate in the Lifeline program. No Universal Service high-cost funding has been sought by VCI in Florida. VCI is a privately held company headquartered in Lakewood, Washington, and is authorized to conduct business as a foreign corporation in the state of Florida. It operates or has obtained authority to operate in 15 states.

[1] Order PSC-06-0436-PAA-TX, issued May 22, 2006, in Docket No. 060144-TX.

As part of our ongoing effort to monitor Universal Service Funds being distributed to ETCs in Florida, our staff reviews the Universal Service Administrative Company's (USAC) disbursement database on a monthly basis. Because of the rapid growth in Lifeline customers served by VCI,[2] and this Commission's commitment to monitor Universal Service Funds received by ETCs, a data request was sent to VCI on May 4, 2007, seeking information on VCI's policies regarding Link-Up and Lifeline. VCI provided its responses to the data request on June 15, 2007.

On August 15, 2007, the Federal Communications Commission (FCC) released a "Notice of Apparent Liability for Forfeiture and Order"[3] against VCI. The Order found that VCI violated FCC rules by repeatedly failing to keep and provide the USAC accurate records of revenues it was forgoing in providing Link Up and Lifeline service in Minnesota, Oregon, and Washington. In addition, the FCC found that VCI violated federal law by willfully or repeatedly receiving duplicate reimbursement for qualifying low-income consumers served and determined that VCI is liable for a total forfeiture of $1,047,500. The FCC ordered VCI to submit revised Form 497s to USAC within 30 days excluding all requests for duplicate universal service reimbursement for qualifying low-income customers served from August 2004 to August 2007. VCI relinquished ETC status and ceased all telecommunications service operations in Washington on January 11, 2007, and in Oregon on February 1, 2007.

On September 7, 2007, VCI received notification via letter that an audit of the low-income Florida USAC programs would be conducted in accordance with our audit procedures. On September 18, 2007, VCI called and sent a subsequent email questioning our authority to conduct an audit of Universal Service Funds. VCI requested something in writing defining our authority to initiate an audit. On September 19, 2007, a conference call was conducted with VCI explaining our authority to conduct an audit, after which VCI withdrew its request for a written explanation concerning our legal authority.

Our staff auditor's report was issued November 5, 2007. A post-audit conference call was held with VCI on November 27, 2007, to discuss the audit findings. VCI was advised during the call that it had the opportunity to submit a written reply to the audit if it chose to do so. No written reply was received from VCI. On January 9, 2008, another conference call was held with VCI to provide it the opportunity to explain some of the audit findings and additional information obtained from USAC and AT&T. This Order addresses our staff auditor's findings, information received from USAC, and information obtained by subpoena from VCI's underlying carrier in Florida, AT&T.

Time is of the essence in addressing VCI's apparent misconduct. Since VCI began receiving reimbursement for low-income support in August 2006, it has received over $1.3

[2] VCI's Florida reimbursements from USAC went from $5,197 in August 2006 to $80,004 in December 2007 with the highest month being March 2007, with $157,041 being reimbursed.

[3] In the Matter of VCI Company Apparent Liability for Forfeiture, File No. EB-07-IH-3985, NAL/Acct. No. 200732080033, FRN No. 0015783004, FCC 07-148, Released August 15, 2007.

million in Universal Service Funds for providing Link-Up and Lifeline services to consumers in Florida. During November and December 2007, VCI received an average of over $20,000 a week in Universal Service Fund disbursements for Link-Up and Lifeline reimbursement in Florida. Our staff also discovered VCI was overcharging customers for E911 service. We are vested with authority under Section 364.10(2), Florida Statutes (F.S.), to regulate eligible telecommunications carriers pursuant to 47 C.F.R. Section 54.201.

II. Analysis and Decision

A. Refund of Excess E911 fees.

During the audit of VCI's Link-Up and Lifeline procedures, our staff auditors requested a sample of VCI's monthly customer bills. While analyzing the monthly bills, it was discovered that VCI was billing its customers $0.75 per month for an E911 fee. Section 365.172(8)(3)(f), F.S., provides that:

> The rate of the fee shall be set by the board after considering the factors set forth in paragraphs (h) and (i), but may not exceed 50 cents per month per each service identifier. The fee shall apply uniformly and be imposed throughout the state, except for those counties that, before July 1, 2007, had adopted an ordinance or resolution establishing a fee less than 50 cents per month per access line. In those counties the fee established by ordinance may be changed only to the uniform statewide rate no sooner than 30 days after notification is made by the county's board of county commissioners to the board.

Our staff advised VCI of the maximum E911 fee allowed in Florida during the January 9, 2008, conference call. Some monthly bills included customers who were located in counties which have an E911 fee less than the maximum $0.50 monthly fee. VCI indicated that it would refund any excess E911 fees collected. We requested that VCI provide a worksheet showing the total amount of E911 overcharges, along with its proposed plan for refunding the excess fees to current and former customers.

On January 16, 2008, VCI provided a worksheet showing E911 overcharges and its proposed plan for refunds. However, the worksheet showed almost 60,000 less access lines than VCI claimed for Lifeline reimbursement from the USAC. Therefore, we find it appropriate to order VCI to provide a revised worksheet showing the total amount of E911 overcharges since VCI received certification in Florida. The worksheet shall be provided within 30 days of this Order, and VCI shall refund those overcharges within ninety days of this Order in accordance with Rule 25-4.114, Florida Administrative Code (F.A.C.). In addition, a preliminary refund report shall be made within 30 days after the date the refund is completed and again 90 days thereafter. A final report shall be made after all administrative aspects of the refund are completed. Unclaimed refunds and refunds less than one dollar shall be remitted to this Commission for deposit in the state of Florida General Revenue Fund.

B. Rescinding VCI's eligible telecommunications carrier status

Under the low-income support mechanism, the Link-Up and Lifeline programs provide discounts to qualifying low-income consumers for basic telephone service. In addition, qualifying low-income consumers have the option to elect Toll Limitation Service (TLS) at no extra charge to avoid a deposit requirement. Link-Up provides qualifying low-income consumers with a 50% discount (maximum $30) on initial costs of installing telephone service. The low-income mechanism allows an ETC providing services to qualifying low-income consumers to seek and receive reimbursement from the Federal Universal Service Fund (USF) for revenues it forgoes as a result. In order for a carrier to receive low-income support, the carrier must first be designated as an ETC.

We granted ETC status on May 22, 2006. By receiving ETC status in Florida, VCI is able to receive low-income support from the USF. The following table shows the amounts received by VCI since becoming an ETC in Florida.

Month/Year	Lifeline	Link-Up	TLS	Total
December 2007	$57,955	$14,912	$7,137	$80,004
November 2007	$66,634	$14,728	$6,200	$87,562
October 2007	$41,492	$10,410	$5,103	$57,005
September 2007	$59,693	($1,876)	$5,632	$63,449
August 2007	$53,871	$23,877	$(18,204)	$59,544
July 2007	$33,405	$4,261	$11,556	$49,222
June 2007	$64,246	$51,378	$25,353	$140,977
May 2007	$71,442	$33,420	$27,881	$132,743
April 2007	$81,093	$24,690	$32,244	$138,027
March 2007	$79,913	$41,400	$35,728	$157,041
February 2007	$61,936	$30,845	$32,285	$131,066
January 2007	$37,839	$67,689	$29,466	$134,994
December 2006	$19,825	$7,527	$8,162	$35,514
November 2006	$8,333	$16,989	$7,062	$32,384
October 2006	$4,681	$4,030	$2,483	$11,194
September 2006	$1,651	$3,090	$1,321	$6,062
August 2006	$1,021	$3,060	$1,116	$5,197
Total	$745,030	$350,430	$224,525	$1,319,985

Lifeline

47 C.F.R. Section 54.201(d)(1) provides that an ETC must offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. 47 C.F.R. Section 54.201(i) provides that an ETC cannot offer the services that are supported by federal universal service support mechanisms exclusively through the resale of another carrier's services. At the time of its ETC designation petition, VCI stated that it would offer all of the supported services using a combination of its own facilities and resale of another carrier's services.[4]

[4] See February 16, 2006, VCI Application for Designation as an Eligible Telecommunications Carrier in the State of Florida in BellSouth Telecommunications Inc. service area. (Page 7, ¶ 14)

ETCs in Florida provide a $13.50 discount to Lifeline customers' monthly bills. For ETCs that serve the Lifeline customer through a leased network element, $10.00 of that discount is reimbursable from the USF through the USAC. For ETCs which serve the Lifeline customer through resale of Lifeline service, a $10.00 credit is applied to that ETC's monthly bill by the underlying ETC which in this case is AT&T. The ETC is not entitled to directly collect $10.00 from the USAC. AT&T in turn files for, and receives reimbursement from, the USAC for the $10.00 credit provided to VCI. The other $3.50 discount for consumers is provided by VCI.

VCI is receiving double compensation by receiving a $10.00 Lifeline credit from AT&T for each resale Lifeline customer, and also filing for and receiving a $10.00 reimbursement from the USAC for each resale Lifeline customer. Our analysis also shows that from June 2006 through November 2006, VCI received USF monies but did not provide universal service support using a combination of its own facilities and resale of another carrier's services, as required by 47 C.F.R. Section 54.201(i). It operated strictly as a reseller in those months. We find that VCI was overpaid $744,880 from the USF for Lifeline customers from June 2006 through December 2007.

Link-Up

The Link-Up program helps low-income consumers initiate telephone service by paying one-half (up to a maximum of $30) of the initial installation fee for a traditional, wireline telephone or activation fee for a wireless telephone. It also allows participants to pay the remaining amount on a deferred schedule, interest-free.

VCI has a normal $150 installation fee for initiation of service. For Lifeline customers, VCI charges a $120 installation charge after a $30 Link-Up credit for initiation of service. VCI allows the customers to pay this hook-up charge at $10/month for 12 months. AT&T's tariffed connection charge is $46.00. For resold services, AT&T's connection charge is $35.96 (after a 21.83% resale discount) to VCI. Since this connection is for a Lifeline customer, AT&T passes through a credit of $23.00 (50% of $46.00) to VCI and receives reimbursement from the USAC for passing through this Link-Up credit. VCI's final cost for the Lifeline customer hook-up charge is $12.96 ($35.96-$23.00).

Our analysis of VCI's Link-Up charges for Lifeline customers shows that in addition to receiving a $23.00 USF resale Link-Up credit from AT&T, VCI files for and receives a $30.00 Link-Up reimbursement from the USAC for its resold Lifeline access lines. The maximum credit allowed by Federal rule is 50% of the hook-up charge or $30, whichever is greater. Based on conversations with the USAC, only one Link-Up USAC payment is allowed per access line. In this case, the appropriate Link-Up credit would be $23.00 (50% of the AT&T tariffed charge of $46.00) for the resold Link-Up line. VCI cannot file for a $30.00 reimbursement or the $7.00 difference between the $23.00 credit and the $30.00 maximum cap. In addition, our staff auditors discovered that VCI submitted 546 duplicate phone numbers to the USAC for reimbursement of Link-Up monies during the period June 1, 2006 through June 30, 2007. We find that VCI was overpaid $350,370 from the USF for Link-Up customers since becoming an ETC in Florida.

TLS

Toll Limitation Service (TLS) is an optional service which includes toll blocking (allows subscribers to block outgoing toll calls) and toll control (allows subscribers to limit in advance their toll usage per month or billing cycle). An ETC may not collect a service deposit in order to initiate Lifeline service if the qualifying low-income consumer voluntarily elects toll blocking. If the qualifying low-income consumer elects not to place toll blocking on the line, an eligible telecommunications carrier may charge a service deposit. Section 364.10(2)(b), F.S., provides that:

> An eligible telecommunications carrier shall offer a consumer who applies for or receives Lifeline service the option of blocking all toll calls or, if technically capable, placing a limit on the number of toll calls a consumer can make. The eligible telecommunications carrier may not charge the consumer an administrative charge or other additional fee for blocking the service.

ETCs are allowed to receive reimbursement from the USF for the incremental costs of providing TLS. By definition, incremental costs include the costs that carriers otherwise would not incur if they did not provide toll-limitation service to a given customer. ETCs are not allowed to receive support for their lost revenues in providing toll-limitation services (defined as the amount customers normally would pay for the service).[5] Incremental costs do not include overhead and costs for services or equipment used for non-toll limitation purposes.

In VCI's original petition for ETC status in Florida, it stated that it will provide the toll limitation service that AT&T has the technological capacity to provide.[6] In response to a November 30, 2007, staff data request, AT&T stated that it does not bill VCI for providing TLS to VCI's Lifeline customers. The USAC disbursement records show that VCI has received $224,525 in TLS reimbursement from the USF from June 2006 through December 2007.

When VCI was questioned about claiming the incremental cost of providing TLS from the USAC, it stated that AT&T's toll-blocking has leaks and it had to develop its own TLS system in addition to using AT&T's toll blocking to plug the leaks. VCI stated that customers would incur toll costs by dialing 411 or the operator. A subsequent inquiry to AT&T shows that VCI customers are unable to dial 411 or the operator using AT&T's toll-blocking service. VCI claimed customers could dial around and incur toll charges. When asked how VCI Lifeline customers can dial 411, it replied by using a 1-800 number to VCI's offices to get a VCI operator. We believe this does not create a leak in AT&T's toll-blocking service. It only creates an avenue for VCI to charge for 411 or operator services using VCI operators.

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[5] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Released May 8, 1997, FCC 97-157 (¶ 386).

[6] See February 16, 2006, VCI Application for Designation as an Eligible Telecommunications Carrier in the State of Florida in BellSouth Telecommunications Inc. service area. (Page 10, ¶ 16)

During the January 9, 2008, conference call with VCI, VCI was asked to provide a detailed breakdown of VCI's incremental cost showing recurring and non-recurring costs incurred to provide TLS service to Lifeline customers. VCI filed its response on January 16, 2008, providing a listing of equipment and costs to provide TLS service to Lifeline customers. Since the equipment listed by VCI could also be used for purposes other than TLS, we find that the equipment is not reimbursable from the USAC through the TLS program.

Since AT&T does not charge VCI for its toll-blocking service for Lifeline customers, VCI does not incur any incremental cost for providing TLS to its Lifeline customers. Therefore, we find that VCI was overpaid $224,525 for reimbursement of costs to provide TLS.

USAC Form 497

In order for ETCs to receive reimbursement for providing Lifeline, Link-Up and TLS services to customers it serves using its own facilities,[7] ETCs file what is known as Form 497 with the USAC. The form is divided into three categories – Lifeline, Link-Up, and TLS. ETCs enter the number of Lifeline, Link-Up and TLS customers in each category along with the dollar amounts requested from the USAC. An officer of the ETC company is required to sign the form certifying that the data contained in the form has been examined and is true, accurate, and complete.

As part of the investigation of VCI's Lifeline and Link-Up practices, we reviewed each monthly Form 497 submitted to the USAC by VCI for Florida. We also obtained (by subpoena) information from VCI's underlying carrier (AT&T) in order to compare the number of resale and leased network element Lifeline access lines provided to VCI by AT&T, and the number of Lifeline, Link-Up, and TLS access lines claimed on VCI's Form 497s submitted to the USAC. Our examination showed that VCI improperly completed the Form 497s by claiming multiple thousands of access lines which were actually resale Lifeline customers for which it had already received reimbursement through AT&T's resale Lifeline program.

The disparity between actual AT&T access lines used by VCI and the amount of access lines claimed on the Form 497s has increased dramatically in recent months. Based on access line information obtained by subpoena from AT&T, VCI has been reporting not only resale Lifeline access lines for which it already receives a credit for from AT&T, but also non-existent access lines in the thousands for which it received reimbursement from the USAC.

C. Designation and Revocation of ETC Status

State commissions have the primary responsibility for performing ETC designations. 47 C.F.R. Section 54.201(c), provides that:

[7] Resale Lifeline and Link-Up reimbursement is received through an ETC's underlying ETC carrier.

> Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

CFR Rule 54.201(d), provides that carriers designated as ETCs shall, throughout the designated service area: (1) offer the services that are supported by federal universal support mechanisms either using their own facilities or a combination of their own facilities and the resale of another carrier's services, and (2) advertise the availability of such services and the related charges therefore using media of general distribution.

In addition to state commissions having the primary responsibility for performing ETC designations, they also possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Telecommunications Act or any other conditions imposed by the state.[8] The FCC found that individual state commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements.[9]

Section 214(e) requires that an ETC offer the services that are supported by Federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. For six months, VCI operated as a strict reseller and did not meet this requirement. Section 214(e) also requires that VCI's ETC designation should be consistent with the public interest, convenience, and necessity.[10] Based on our investigation, we believe this requirement has not been met by VCI.

Our analysis indicates that VCI has been receiving USAC payments for Florida Link-Up and Lifeline customers and also receiving credits from AT&T for the same Link-Up and Lifeline customers. VCI has consistently overstated the number of access lines eligible for reimbursement from the USAC. Based on access line information obtained by subpoena from AT&T, VCI has been reporting ineligible resale Lifeline access lines and non-existent access lines in the thousands for which it received reimbursement from the USAC.

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[8] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Released March 17, 2005, FCC 05-46 (¶ 71-72)

[9] Id.

[10] § 54.201(c), Code of Federal Regulations.

VCI has received a $10 monthly credit for Lifeline customers from AT&T and also filed for and received a $10 Lifeline payment from the USF fund for each resale Lifeline customer. VCI has been receiving a $23.00 resale Link-Up credit from AT&T and has also filed for and received a $30 Link-Up reimbursement for the same customers. VCI has filed for and received reimbursement for incremental costs of providing TLS when VCI did not incur any TLS incremental costs.

We find that VCI was overpaid $1,319,775 in Florida through the Link-Up, Lifeline, and TLS programs from August 2006 through December 2007. VCI has been obtaining double compensation by receiving resale Link-Up and Lifeline credits from AT&T, while at the same time receiving Link-Up, Lifeline, and TLS monies from the USF for the same customers. We find that because of VCI's misuse of the Federal Universal Service Fund, it is no longer in the public interest to allow VCI to retain ETC designation in Florida. Therefore, we find it appropriate to rescind VCI's ETC status. We direct our staff to forward the results of our investigation along with this Order to USAC, the Federal Communications Commission, and the Department of Justice for further follow-up to recover federal USF funds obtained by VCI through misrepresentations made to USAC.

D. Cancellation of CLEC Certificate

Vilaire Communications, Inc. was granted Certificate No. 8611 to provide Competitive Local Exchange Company (CLEC) service in Florida on January 10, 2006.[11] In that Order, we noted that it appeared that Vilaire had sufficient technical, financial, and managerial capability to provide such service. Based on our investigation, we find that VCI no longer has the technical, financial, and managerial capability to provide CLEC service in the state of Florida. Rule 25-24.572(1) provides that this Commission may cancel a company's certificate for any of the following reasons:

> (a) Violation of the terms and conditions under which the authority was originally granted;
> (b) Violation of Commission rules or orders; or
> (c) Violation of Florida Statutes.

In addition, we discovered the following during our investigation:

- Seven phone numbers of the 130 sample invoices from Florida obtained by our staff auditors contained area codes for Canada, Georgia, Texas, Michigan, one fictitious area code, and two area codes that are not even assigned yet. However, each of the addresses on the bills had Florida addresses. These bills may not represent real customers.

- The telephone numbers provided on the 130 invoices were called and we determined that 77 numbers were disconnected, 9 had recordings that the numbers were not in service, 4 were

[11] PSC-06-0035-PAA-TX, issued January 10, 2006, in Docket No. 050865-TX.

business numbers not eligible for Lifeline, 2 were consumers that stated they were not customers of VCI, and 1 was a consumer who stated he was a VCI customer but not on the Lifeline program. Two customers confirmed that VCI was their provider of service and that they were participants in the Lifeline program.

- A check of the 130 sample VCI invoices also showed that every customer was paying a $10 late fee. VCI was asked how all 130 customers in the random sample could have paid their bill late. VCI replied that it was a coincidence. During calls to verify the VCI customers, one customer stated that VCI's payment was automatically paid from his checking account, and it still showed a late payment on his invoice.

We find that it is no longer in the public interest to allow Vilaire to provide telecommunications service in Florida. Vilaire's certificate was granted based on Vilaire having sufficient technical, financial, and managerial capability to provide CLEC service. Given the issues brought to light, we find that that Vilaire no longer possesses the technical, financial, and managerial capability as required by Section 364.337(3), F.S., to provide CLEC service in the state of Florida. Therefore, we find it appropriate to cancel Vilaire Communications, Inc.'s Competitive Local Exchange Company Certificate No. 8611 for its demonstrated lack of technical, financial, and managerial capability to operate a telecommunications company in Florida, effective as of the date of the consummating order. VCI shall continue to have an obligation to pay the applicable regulatory assessment fees (RAFs) and determined refund of the E911 overcharges. If Vilaire Communications, Inc.'s certificate is cancelled and the company does not pay its RAFs, the collection of the RAFs shall be referred to the Florida Department of Financial Services, for further collection efforts.

E. Waiver of carrier selection requirements of Rule 25-4.118, F.A.C.

The Code of Federal Regulations addresses situations where ETCs voluntarily request relinquishment of its ETC status. In this case, VCI is not requesting relinquishment of its ETC status in Florida. However, it is our concern that existing VCI Lifeline customers continue to be served once VCI's ETC status is rescinded and CLEC certification cancelled. 47 C.F.R. Section 54.205(b) provides that:

> Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the state commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The state commission shall establish a time, not to exceed one year after the state commission approves such relinquishment under this section, within which such purchase or construction shall be completed.

We find it appropriate that VCI's underlying carrier, AT&T, shall provision service to VCI's customers. We also find it appropriate that AT&T serve VCI's existing Lifeline customers during a transitional period where former VCI customers can choose to stay with AT&T or select another carrier of their choice.

Pursuant to Rule 25-4.118(1), F.A.C., a customer's carrier cannot be changed without the customer's authorization. Rule 25-4.118(2), F.A.C., provides that a carrier shall submit a change request only if one of the following has occurred:

> (a) The provider has a letter of agency (LOA) . . . from the customer requesting the change;
>
> (b) The provider has received a customer-initiated call for service . . . ;
>
> (c) A firm that is independent and unaffiliated with the provider . . . has verified the customer's requested change . . .

Pursuant to Rule 25-24.845, F.A.C., Rule 25-4.118, F.A.C., is incorporated into Chapter 25-24, and applies to CLECs. Section 364.337(2), F.S., states in pertinent part;

> A certificated competitive local exchange telecommunications company, may petition the commission for a waiver of some or all of the requirements of this chapter, except ss. 364.16, 364.336, and subsections (1) and (5). The Commission may grant such petition if determined to be in the public interest.

The authority for Rule 25-4.118, F.A.C., is found in Section 364.603, F.S., which is a section that we are authorized to waive under Section 364.337(2), F.S.

AT&T shall provide for a seamless transition with the least amount of disruption to the customers. The customers should not experience any interruption of service or switching fees. We direct our staff to contact VCI's affected customers to notify them of the change to AT&T and to advise them of their available choices. AT&T shall provide all necessary customer information of current VCI customers to allow notification.

Additionally, we find it appropriate to waive the carrier selection requirements of Rule 25-4.118, F.A.C. If prior authorization is required in this event, customers may fail to respond to a request for authorization or neglect to select another carrier. Furthermore, we find that granting this waiver will avoid unnecessary slamming complaints during this transition.

Therefore, we hereby approve the waiver of the carrier selection requirements of Rule 25-4.118, F.A.C., to allow VCI customers who do not select another carrier to seamlessly transfer over to AT&T effective as of the date of the consummating order. AT&T shall serve VCI's existing Lifeline customers during a transitional period where former VCI customers can choose to stay with AT&T at AT&T's Lifeline existing rates and terms or select another carrier of their choice. AT&T shall also provide all necessary customer information of current VCI customers to allow for notification.

If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this Order shall become final and effective upon issuance of a Consummating Order. This docket shall remain open in order for VCI to complete the determined refund of excess E911 overcharges and verify the transition of VCI customers to AT&T after which time, this docket shall be closed administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Vilaire Communications, Inc. shall provide our staff with a revised worksheet showing the total amount of E911 overcharges since it received certification for Florida within 30 days of this order. It is further

ORDERED that Vilaire Communications, Inc. shall refund those overcharges within 90 days of this Order in accordance with Rule 25-4.114, F.A.C. A preliminary refund report shall be made within 30 days after the date the refund is completed and again 90 days thereafter. A final report shall be made after all administrative aspects of the refund are completed. Unclaimed refunds and refunds less than one dollar shall be remitted to this Commission for deposit in the state of Florida General Revenue Fund. It is further

ORDERED that Vilaire Communications, Inc.'s eligible telecommunications carrier status is hereby rescinded. It is further

ORDERED that for its demonstrated lack of technical, financial, and managerial capability to operate a telecommunications company in Florida, Vilaire Communications, Inc.'s Competitive Local Exchange Company Certificate No. 8611 is hereby cancelled. It is further

ORDERED that Vilaire Communications, Inc. shall continue to have an obligation to pay the applicable regulatory assessment fees (RAFs). It is further

ORDERED that if Vilaire Communications, Inc.'s certificate is cancelled and the company does not pay its RAFs, the collection of the RAFs shall be referred to the Florida Department of Financial Services, for further collection efforts. It is further

ORDERED that the carrier selection requirements of Rule 25-4.118, F.A.C., be waived to allow Vilaire Communications Inc.'s customers who do not select another carrier to seamlessly transfer over to BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida. It is further

ORDERED that BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida shall serve VCI's existing Lifeline customers during a transitional period where former VCI customers can choose to stay with AT&T at AT&T's existing Lifeline rates and terms or select another carrier of their choice. It is further

ORDERED that BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast Florida shall provide to our staff all necessary customer information of current Vilaire Communications, Inc. customers to provide notifications of transfer of service. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall remain open in order for Vilaire Communications, Inc. to complete the determined refund of excess E911 overcharges and verify the transition of VCI customers to AT&T after which time, this docket shall be closed administratively.

By ORDER of the Florida Public Service Commission this 13th day of February, 2008.

/s/ Ann Cole
ANN COLE
Commission Clerk

This is an electronic transmission. A copy of the original signature is available from the Commission's website, www.floridapsc.com, or by faxing a request to the Office of Commission Clerk at 1-850-413-7118.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 5, 2008.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.