BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide interexchange telecommunications service by Health Liability Management Corporation.	DOCKET NO. 960811-TI ORDER NO. PSC-97-1465-FOF-TI ISSUED: November 20, 1997

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA

ORDER DISMISSING PETITION FOR ADMINISTRATIVE HEARING

BY THE COMMISSION:

On July 8, 1996, Health Liability Management Corporation (HLMC) filed an application for a Certificate of Public Convenience and Necessity to provide statewide interexchange telecommunications service. The application lacked information to support a finding of financial capability as required by Section 364.337(3), Florida Statutes. The statute provides that:

> The commission shall grant a certificate of authority to provide intrastate interexchange telecommunications 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.

HLMC also failed to furnish documentation of registration with the Secretary of State, Division of Corporations, to conduct business within the State of Florida as required in Form PSC/CMU 31 (3/96), incorporated by reference in Rule 25-24.471(1), Florida Administrative Code. As a result, in Proposed Agency Action Order No. PSC-97-0741-FOF-TI, issued June 25, 1997, we denied HLMC's application as not in the public interest. We further instructed

all certificated interexchange carriers in the State of Florida to deny or discontinue service to HLMC, pursuant to Rule 25-24.4701(3), Florida Administrative Code.

On July 21, 1997, HLMC filed a petition for a formal proceeding pursuant to Rule 25-22.029, Florida Administrative Code. Accordingly, we set this matter for a formal administrative hearing on October 22, 1997. The Prehearing Officer issued Order No. PSC-97-0979-PCO-TI on August 14, 1997, establishing the procedure for the case.

Dr. Michael Weilert, 13738 Oxbow Road, Suite 100, Fort Myers, Florida 33905, is the company's chief executive officer. William B. Ellinger, Mitchell & Ellinger, P.A., 115 La Grange Avenue, La Plata, Maryland 20646, is counsel of record for the company in this proceeding.

Following the company's protest, our staff made several efforts to make clear to Dr. Weilert and Mr. Ellinger what were the deficiencies in the company's application, indicating that if these deficiencies were rectified, staff would reevaluate the company's application and thereby possibly avoid the trouble and expense of a formal hearing. The company denied that its application was deficient and expressed a desire to proceed to hearing.

The procedural history of this case thus far is fraught with instances of the company's inability to comply with Commission orders and rules. First, our staff noticed an issue identification workshop by teleconference for August 11, 1997. When staff checked with Dr. Weilert on August 8, 1997, to confirm the company's participation, he stated that he had not received timely notice and that, furthermore, he was otherwise engaged on the scheduled date. With the agreement of Dr. Weilert, the workshop was then rescheduled for August 22, 1997, again to be held by teleconference. At the appointed time, Mr. Ellinger joined the workshop, but Dr. Weilert did not. Unable to reach Dr. Weilert by telephone after more than an hour of trying, staff suspended the workshop. The workshop resumed on August 25, 1997, with everyone participating, and concluded successfully with the identification of four issues for hearing. Our staff advised the company in great detail of the procedure that would be followed to resolve the company's protest.

In the workshop, our staff reminded the company, not for the first time, that it had yet to file an appropriate proposed tariff, which is an essential part of an application for certification. The company agreed to file its proposed tariff by August 29, 1997. When it did not, the time for doing so was extended to September 12, 1997.

By Order No. PSC-97-0979-PCO-TI, the Prehearing Officer required HLMC to prefile its direct testimony on September 12, 1997. When the company failed to make the filing, our staff agreed that the company could file by facsimile on September 17, 1997, a motion for extension of time until September 19, 1997, to file its testimony and tariff. It was expected that the company would follow up immediately with a hard copy of its motion. It did not. Nevertheless, the Prehearing Officer issued Order No. PSC-97-1089-PCO-TI on September 18, 1997, granting the motion, but sternly admonishing the company to adhere to the established procedural requirements. The order also required the company to file its proposed tariff by September 19, 1997.

The company failed to file either its prefiled direct testimony or its proposed tariff on September 19, 1997, and on September 22, 1997, it filed again by facsimile another motion for extension of time until September 22, 1997. On September 23, 1997, our staff received a single copy of Dr. Weilert's direct testimony by facsimile. On September 24, 1997, our staff received by overnight delivery service a single hard copy of Dr. Weilert's testimony as well as a copy of the company's proposed tariff.

At that point, although the company had not raised any objection concerning the procedural schedule, our staff, following consultation with the Prehearing Officer, decided that as initially established the schedule was perhaps too aggressive. The schedule had been established on an expedited basis to provide HLMC with a swift resolution of the problems attending its application. Therefore, in order to assure that the company and staff had sufficient time to prepare properly for the hearing, the Prehearing Officer issued Order No. 97-1198-PCO-TI on October 3, 1997, revising the order establishing procedure to reschedule the hearing for January 13, 1998. Under the revised procedure, the company was permitted until October 10, 1997, to properly file its direct testimony.

On September 28, 1997, our staff wrote a letter to Mr. Ellinger, stating that the Prehearing Officer would be extending the hearing schedule and pointing out a number of matters that required the company's attention. In the letter, staff noted that the company had not filed its direct testimony or its proposed tariff in the manner required by Commission rule. Staff explained these requirements and attached to the letter the relevant Commission rules and materials. In addition, staff noted that the company had requested confidential treatment of certain portions of the materials it had submitted to the Commission, but that it failed to follow the steps prescribed by Commission rule to establish a claim of confidentiality. Again, staff explained those steps and attached the relevant Commission rules.[1] The company was permitted until October 24, 1997, to comply with these rules. As of the date of our decision, it has not done so.

The company failed to file its testimony or tariff on October 10, 1997. The company did not express in advance of the required date any hardship in preparing the filing that would cause it to miss the date. From conversations with Mr. Ellinger and Dr. Weilert on October 14 and 15, 1997, our staff was left with the impression that the company ignored or misapprehended both the revised procedural order, Order No. PSC-97-1198-PCO-TI, and staff's letter of September 26, 1997.

As set forth below, we find it appropriate to dismiss HLMC's petition for a hearing on the grounds that the company has shown a wilful disregard for the Commission's orders and rules.

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[1]Staff discussed the procedures relative to claims for confidential classification with Mr. Ellinger and Dr. Weilert on at least two earlier occasions. Following the first of these discussions, on September 5, 1997, staff wrote a letter to Mr. Ellinger setting out the requirements for confidential classification to assure that the company would be adequately informed. On September 19, 1997, staff forwarded copies of the relevant statute and rule to Dr. Weilert by facsimile.

DISMISSAL

Rule 25-22.042, Florida Administrative Code, provides that:

> The failure or refusal of a party to comply with any lawful order may be cause for dismissing the party from the proceeding. If a dismissal is entered against the party who has the burden of proof, the proceeding will be dismissed ....

As we have chronicled above, HLMC has demonstrated a persistent inability to comply with Commission orders and rules. We find that the company's cumulative conduct amounts to a wilful disregard of or gross indifference to those orders and rules. Accordingly, we find that it is appropriate to impose the sanction in this instance of dismissing the company's petition for a formal administrative hearing on its application for certification as an interexchange telecommunications carrier.

Florida courts have recognized that dismissal of actions is appropriate for noncompliance with orders of the court. In Mercer v. Raine, 443 So.2d 944 (Fla. 1983), the Supreme Court of Florida said:

> We agree that the striking of pleadings or entering a default for noncompliance with an order compelling discovery is the most severe of all sanctions which should be employed only in extreme circumstances. Hart v. Weaver, 364 So.2d 524 (Fla. 2d DCA 1978). A deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, Swindle v. Reid, 242 So.2d 751 (Fla. 4th DCA 1970), as will bad faith, wilful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness. Herold v. Computer Components Int'l, Inc., 252 So.2d 576 (Fla. 4th DCA 1971).

In Commonwealth Federal Savings and Loan Ass'n v. Tubero, 569 So.2d 1271, 1273 (Fla. 1990), the court explained that "[b]y insisting upon a finding of wilfulness, there will be the added assurance that the trial judge has made a conscious determination that the noncompliance was more than mere neglect or inadvertence."

We conclude that HLMC's conduct throughout this proceeding, especially its failure to properly file its direct testimony and proposed tariff on October 10, 1997, cannot be described as "mere neglect or inadvertence." Indeed, our staff took a number of extraordinary steps to give the company, who is represented by counsel, the necessary information and additional opportunities to rectify the deficiencies in the financial data that it submitted, the deficiencies in its claim for confidential classification of imprecisely identified materials, and the deficiencies in the filings of its prefiled direct testimony and proposed tariff. Compliance in any of these cases would have required nothing more than a simple effort that ought to have been well within the capability of a company of the apparent size of HLMC. The company's persistent inability to respond properly can only be ascribed to an attitude of wilfulness, deliberate disregard or gross indifference.

Therefore, pursuant to Rule 25-22.042, Florida Administrative Code, we order that HLMC's petition for a formal administrative hearing on its application for certification as an interexchange telecommunications carrier shall be dismissed. Furthermore, we hereby make Order No. PSC-97-0741-FOF-TI final and effective November 4, 1997, the date of our decision to dismiss. Pursuant to Rule 25-22.042, Florida Administrative Code, since HLMC bears the burden of proof with respect to the requirements for certification set out in Section 364.337(3), Florida Statutes, this docket shall be closed.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the petition for a formal administrative hearing of Health Liability Management Corporation is hereby dismissed. It is further

ORDERED that Order No. PSC-97-0741-FOF-TI shall be made final and effective November 4, 1997. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 20th day of November, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

CJP

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 or judicial review of Commission orders that is available under Sections 120.57 or 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 an administrative hearing or 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 Director, Division of Records and Reporting, 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 Director, Division of Records and Reporting 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.