

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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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  
DATED: MAY 13, 2008

**PROSECUTORIAL STAFF'S MOTION TO IMPOSE SANCTIONS DUE TO VILAIRE COMMUNICATIONS, INC'S FAILURE TO COMPLY WITH ORDER NO. PSC-08-0304-PCO-TX**

The Prosecutorial staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.380, Florida Rules of Civil Procedure, moves the Florida Public Service Commission (Commission) to enter an order imposing sanctions on Vilaire Communications, Inc. (VCI) because its failure to respond to Prosecutorial staff's discovery requests constitutes a willful and deliberate failure to comply with Commission Order No. PSC-08-0304-PCO-TX, issued May 8, 2008. Prosecutorial staff respectfully requests the Commission dismiss VCI's Protest of Order No. PSC-08-0090-PAA-TX and Request for a Section 120.57(1), Florida Statutes, administrative hearing and that Order No. PSC-08-0090-PAA-TX be reinstated and consummated as a final order. As grounds therefore, staff states:

Background

On February 13, 2008, the Commission issued Order No. PSC-08-0090-PAA-TX ("PAA Order"), which proposed the Commission rescind VCI's Eligible Telecommunications Carrier ("ETC") status and cancel VCI's Competitive Local Exchange ("CLEC") Certificate. An ETC is a telecommunications company that is designated to offer Lifeline and Link-Up programs<sup>1</sup> to qualified low-income consumers.<sup>2</sup> In response, VCI filed its Protest of PAA Order PSC-08-0090-PAA-TX, issued February 13, 2008, and Petition for Formal Hearing ("Protest"). An Issue Identification Conference held between Prosecutorial staff and VCI, on March 13, 2008,

- CMP \_\_\_\_\_
- DOM 5 \_\_\_\_\_ <sup>1</sup> Lifeline service in Florida provides a \$13.50 discount on basic monthly telephone service to qualified low-income individuals. Eligibility can be determined by customer enrollment in any one of the following programs: Temporary Cash Assistance (TCA); Supplemental Security Income; Food Stamps; Medicaid; Federal Public Housing Assistance (Section 8); Low-Income Home Energy Assistance Plan; National School Lunch Program's Free Lunch Program; or Bureau of Indian Affairs Programs. In addition to the program-based criteria, AT&T, Embarq, and Verizon customers with annual incomes up to 135 percent of the Federal Poverty Guidelines may be eligible to participate in the Florida Link-Up and Lifeline programs.
- STR \_\_\_\_\_
- SCP \_\_\_\_\_
- CCI \_\_\_\_\_
- OPC \_\_\_\_\_
- RCA \_\_\_\_\_ <sup>2</sup> As defined by Section 364.025(1), Florida Statutes, the term "universal service" means "an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas." The Federal Universal Service Fund pays for four programs. They are Link-Up/Lifeline, High Cost, Schools and Libraries, and Rural Health Care.
- SCR \_\_\_\_\_
- SGA \_\_\_\_\_
- SEC \_\_\_\_\_
- OTH \_\_\_\_\_

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identified 11 tentative issues. An Order Establishing Procedure ("OEP") was issued on March 26, 2008, setting out the procedure for the Section 120.57(1), Florida Statutes (F.S.), hearing requested by VCI.

On March 31, 2008, staff served VCI with Commission Staff's First Set of Interrogatories (Nos. 1 - 39) and Production of Documents Nos. (1-10). On April 7, 2008, VCI filed their Objections to Commission Staff's First Set of Discovery. Prosecutorial staff filed a Motion to Compel VCI to respond to Prosecutorial staff's discovery requests on April 22, 2008. Order No. PSC-08-0258-PCO-TX, Granting the Motion to Compel was issued on April 25, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration. Prosecutorial staff filed its Response in Opposition on May 5, 2008. By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008, the Commission denied VCI's Motion for Reconsideration and ordered VCI to submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008. On May 9, 2008, VCI filed a letter with the Commission stating, "it was intent on preserving the issue of the Commission's jurisdiction for judicial review and is unwilling to waive its objections by providing further discovery."

#### Motion for Sanctions

Pursuant to Rule 28-106.206, Florida Administrative Code, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.390, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanction 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.

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. Neal v. Neal, 636 So.2d 810, 812 (Fla. 1st DCA 1994), Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983). 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.” Id.

The FPSC has found that the dismissal of a proceeding, even a dismissal without prejudice, is a severe penalty to impose upon a party. It requires an express finding of a willful or deliberate refusal to obey an order regarding discovery.<sup>3</sup>

Whether to impose the sanction of dismissal is within the sound discretion of the trial court. W. G. C., Inc. v. The Man Co., 360 So.2d 1152 (Fla.3d DCA 1978). The exercise of this discretion will not be disturbed absent a clear showing of abuse. Harless v. Kuhn, 403 So.2d 423 (Fla. 1981).

The FPSC has previously recognized its authority to impose sanctions for failure to comply with a Commission Order pursuant to Rule 1.380, Florida Rules of Civil Procedure. See Order No. PSC-03-1025-PCO-SU, issued September 17, 2003, in Docket No. 020745-SU, *In re: Application for certificate to provide wastewater service in Charlotte County by Island Environmental Utility, Inc.* In that Docket, the Commission granted a Motion to Dismiss the party as an intervener because it continued to disobey the Commission’s Orders. See Order No. PSC-03-1389-PCO-SU, issued December 10, 2003.

A. VCI’s refusal to comply with the Commission’s Orders on Discovery is indicative of VCI’s deliberate and willful actions to unduly delay the Commission’s resolution of this proceeding.

In its Protest of PAA Order No. PSC-08-0090-PAA-TX and Request for Formal Hearing, filed March 5, 2008, VCI specifically requested the Commission “[s]et this matter for a Section 120.57(1), Florida Statutes, 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 Order No. PSC-08- PAA-TX should be rescinded.”<sup>4</sup> Subsequently, VCI and Prosecutorial staff

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<sup>3</sup> Order No. PSC-95-1568-FOF-WS, issued December 18, 1995, in Docket No. 950495-WS, *In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.*

<sup>4</sup> Protest at 10-11.

participated in an Issue Identification Conference where the following issues were mutually agreed upon:

1. Is the PSC authorized to audit an ETC's records for compliance with applicable Lifeline, Link-Up, and ETC statutes, rules, processes, procedures, and orders?
2. Did VCI provide Lifeline service to its Florida customers using a combination of its own facilities and resale of another carrier's services between June 2006 and November 2006?
3. Did VCI correctly report Link-Up and Lifeline lines on USAC's Form 497 for reimbursement while operating as an ETC in Florida in accordance with applicable requirements?
- 4.(a) Does VCI provide toll limitation service to Lifeline customers using its own facilities?
  - (b) If so, is VCI entitled to obtain reimbursement for incremental costs of TLS?
  - (c) If yes, what is the appropriate amount of reimbursement?
5. Were late payment charges correctly applied to VCI Florida customer bills?
6. What is the appropriate refund amount for E-911 customer overbilling?
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?
- 11.(a) Has VCI willfully violated any lawful rule or order of the Commission, or provision of Chapter 364?

(b) If so, should VCI's competitive local exchange company certificate be revoked?

On March 26, 2008, the Prehearing Officer issued the Order Establishing Procedure which set forth 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."<sup>5</sup>

On March 31, 2008, Prosecutorial staff served it First Set of Interrogatories (Nos. 1 - 39) and Production of Documents Nos. (1-10). Prosecutorial staff sought discovery on matters clearly within the scope of the issues agreed upon by the parties. More specifically, Prosecutorial staff sought discovery on matters in relation to both VCI's operations as an ETC in Florida and its operations as a certificated CLEC in Florida. VCI failed to respond to Interrogatory Nos. 1 - 13, 15 - 36 and 39 and Production of Documents (POD) 1-10. Amongst the several general and specific objections raised by VCI, VCI cited the Commission's lack of subject matter jurisdiction. However, VCI had yet to request the Commission address subject matter jurisdiction as a threshold issue in this proceeding.

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 staff's discovery, without having made any formal request that the Commission address subject matter jurisdiction prior to its objections, was a transparent attempt to delay the Commission's resolution of this proceeding and impeded the Commission's ability to conduct an orderly administrative hearing pursuant to Section 120.57(1), Florida Statutes.

On April 25, 2008, the Prehearing Officer issued Order No. PSC-08-0258-PCO-TX granting Prosecutorial staff's Motion to Compel and required VCI to serve its responses to Prosecutorial staff on May 2, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. It was in this filing that VCI first notified the Commission of its intent to file a Motion to Dismiss or in the alternative, hold the proceeding in abeyance pending a determination of the Commission's subject matter jurisdiction.<sup>6</sup>

By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008, the Commission denied VCI's Motion for Reconsideration and ordered VCI to submit its full and complete responses to Staff's First Set of Interrogatories (Nos. 1-38) and First Request for Production of Documents (Nos. 1-10) by the close of business on Friday, May 9, 2008. On May 9, 2008, VCI filed a letter with the Commission stating, "it was intent on preserving the issue of the Commission's jurisdiction for judicial review and is unwilling to waive its objections by providing further discovery." VCI's refusal to comply with Order No. PSC-08-0304-PCO-TX appears to be a

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<sup>5</sup> Order Establishing Procedure at 2.

<sup>6</sup> VCI filed its Motion to Dismiss or in the alternative, hold the proceeding in abeyance on May 5, 2008.

deliberate and willful action to further its attempts to delay the Commission's ability to conduct an orderly administrative hearing as requested by VCI.

Staff notes that VCI has continued to apply for and receive universal service funding during the pendency of the Commission's proceeding. Specifically, VCI received \$51,966.00 and \$53,461.00 in universal service funds from USAC for March and April for its operations as an ETC in Florida.

B. The Commission should not be misled by VCI's claim that the Commission lacks subject matter jurisdiction to justify its refusal to comply with Order No. PSC-08-0304-PCO-TX.

1. Prosecutorial Staff's discovery seeks information that addresses matters for which VCI has not challenged the Commission subject matter jurisdiction.

Putting VCI's claim that the Commission lacks subject matter jurisdiction to revoke VCI's ETC designation aside, Order No. PSC-08-0304-PCO-TX, compels VCI to respond to staff's discovery which seeks information relevant to VCI's operations as a CLEC in Florida. Specifically, staff seeks information regarding the scope of VCI's admitted overcharging of the E-911 fee and VCI's alleged misapplication of late payment charges. Furthermore, VCI agreed to Issue 11, which asks the Commission to determine if:

11. (a) Has VCI willfully violated any lawful rule or order of the Commission, or provision of Chapter 364?

(b) If so, should VCI's competitive local exchange company certificate be revoked?

Prosecutorial staff notes further that Prosecutorial staff Witness Robert J. Casey has included in his rebuttal testimony allegations that VCI has failed to accurately report its gross operating revenues in its 2006 and 2007 regulatory assessment fee form in violation of Section 364.336, Florida Statutes.<sup>7</sup> Concerns regarding VCI's regulatory assessment fee form were first identified in Staff Audit Finding No. 2.<sup>8</sup>

2. VCI has acknowledged the Commission's authority pursuant to 364.27, Florida Statutes, to investigate violations of the rulings, orders, or regulations of the Federal Communications Commission (FCC).

On page 32 of its Motion to Dismiss, 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

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<sup>7</sup> Rebuttal Testimony of Robert Casey at 2-3.

<sup>8</sup> Direct Testimony of Intesar Terkawi at 5.

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."<sup>9</sup> Prosecutorial staff points out that the Commission has yet to take any final agency action with regard to VCI's ETC status.

VCI's acknowledgement that the Commission has explicit authority to investigate such matters is demonstrative of VCI's deliberate and willful disregard of Order No. PSC-08-0304-PCO-TX. While VCI cites the Commission's lack of subject matter jurisdiction in refusing to respond to Prosecutorial staff's discovery in direct violation of Order No. PSC-08-0304-PCO-TX, it clearly acknowledges in its Motion to Dismiss that Section 364.27, Florida Statutes, explicitly grants the Commission authority to investigate violations of the Federal Telecommunications Act and FCC rulings, orders, or regulations. VCI's acknowledgement also further supports Prosecutorial staff's argument, set forth in its Response to VCI's Motion to Dismiss that VCI has failed to exhaust its administrative remedies in this proceeding.

After the opportunity for a Section 120.57(1), Florida Statutes, administrative hearing the Commission may ultimately find it appropriate to forward its factual findings to the FCC pursuant to Section 364.27, Florida Statutes. However, VCI's deliberate and willful refusal to comply with Order No. PSC-08-0304-PCO-TX prevents the Commission from conducting an orderly proceeding and considering evidence from both VCI and Prosecutorial staff in making its final factual determinations.

3. VCI has willfully and deliberately failed to comply with Order No. PSC-08-0304-PCO-TX, by not responding fully and completely to Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10, for which it did not raise lack of subject matter jurisdiction as an objection.

Once again setting aside VCI's refusal to comply with Order No. PSC-08-0304-PCO-TX due to its claim that the Commission lacks subject matter jurisdiction to revoke VCI's ETC designation, VCI did not include Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 in its objection to Prosecutorial staff's discovery requests on the grounds that the Commission lacked subject matter jurisdiction. Specifically, on

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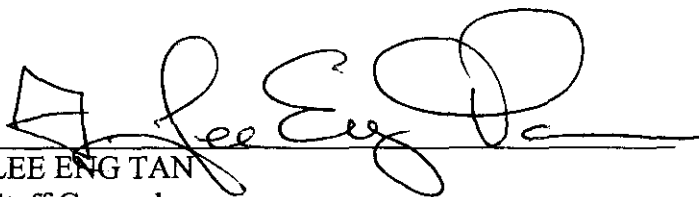
<sup>9</sup> Section 364.27, Florida Statutes, **Powers and duties as to interstate rates, fares, charges, classifications, or rules of practice.**--The commission shall investigate all interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transmission of messages or conversations, where any act relating to the transmission of messages or conversations takes place within this state, and when such rates, fares, charges, classifications, or rules of practice are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934," and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders, or regulations of the Federal Communications Commission, the commission shall apply, by petition, to the Federal Communications Commission for relief and may present to the Federal Communications Commission all facts coming to its knowledge as to violation of the rulings, orders, or regulations of that commission or as to violations of the act to regulate commerce or acts amendatory thereof or supplementary thereto.

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. Because VCI did not identify Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 it cannot now claim lack of subject matter jurisdiction in failing to comply with Order No. PSC-08-0304-PCO-TX.

The nature of this docket requires cooperation and consideration by all parties. VCI's failure to provide full and complete responses to Prosecutorial Staff's Interrogatory Nos. 1, 3, 6, 34, and 39 and Production of Document Request Nos. 1 and 10 is yet another example of VCI's deliberate and willful disregard of Order No. PSC-08-0304-PCO-TX.

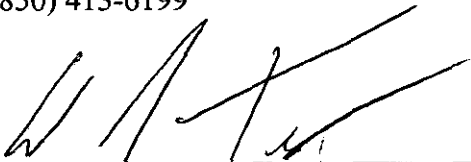
WHEREFORE, for the foregoing reasons, Prosecutorial staff respectfully requests that the Commission grant this Motion for Sanctions, and dismiss VCI's Protest of Order No. PSC-08-0090-PAA-TX and Request for a Section 120.57(1), Florida Statutes, administrative hearing and that Order No. PSC-08-0090-PAA-TX be reinstated and consummated as a final order.

Respectfully submitted this 13th day of May, 2008.



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

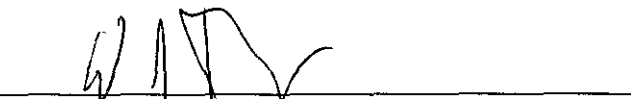
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DATED: MAY 13, 2008

I HEREBY CERTIFY that a true and correct copy of STAFF'S MOTION FOR SANCTIONS has been served by U.S. Mail to Bruce Culpepper, Akerman Senterfitt Law Firm, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, and that a true copy thereof has been furnished to the following by U. S. mail or by (\*) hand delivery this 13<sup>th</sup> day of May, 2008:

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