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

DATE: August 6, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Curry, Earnhart) *KLC JEDM*
Office of the General Counsel (Morrow, McKay) *Vsm jr AT*

RE: Docket No. 090086-TS – Compliance investigation of Roberta L. Marcus, Inc. d/b/a Marcus Centre, for apparent violation of Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required.

Docket No. 090187-TS – Application for certificate to provide shared tenant telecommunications service by Roberta L. Marcus, Inc. d/b/a Marcus Centre.

AGENDA: 08/18/09 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RCP\WP\090086.RCM.DOC

Case Background

On October 24, 2008, staff received a customer complaint against Roberta L. Marcus, Inc. d/b/a Marcus Centre (Marcus Centre). After receiving the complaint, staff determined that Marcus Centre was providing shared tenant services (STS) in Florida and had not obtained a STS certificate from the Commission. Staff notified the company, via certified mail, of its requirement per Rule 25-24.565, Florida Administrative Code (F.A.C.), Certificate of Public

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Convenience and Necessity Required, to obtain a STS certificate and requested that the company resolve the customer's complaint.

After receiving staff's letter, Marcus Centre contacted staff to discuss the matter. The company agreed to submit an application to obtain a certificate to provide shared tenant services. The company also agreed to resolve the customer's complaint. The complaint was ultimately resolved; however, the Commission never received the company's application for a STS certificate. Thus, staff opened Docket No. 090086-TS to address the company's failure to submit an application.

On April 9, 2009, staff filed a recommendation in Docket No. 090086-TS. The Agenda Conference was scheduled for April 21, 2009. After the recommendation was filed, Marcus Centre contacted staff and requested a deferral. Marcus Centre claimed that it mailed a STS application along with the application fee to the Commission on February 5, 2009. However, staff was unable to locate the application or verify that the Commission ever received it. The company resubmitted the application and the application fee on April 14, 2009. Docket No. 090187-TS was established to address the company's application for a STS certificate.

This recommendation addresses Marcus Centre's proposed settlement offer and the company's application for authority to provide shared tenant services in Florida. The Commission is vested with jurisdiction over these matters pursuant to Sections 364.285, 364.33, 364.335, and 364.339, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission accept Roberta L. Marcus, Inc. d/b/a Marcus Centre's proposed settlement offer to submit a payment in the amount of \$500 to resolve the company's apparent violation of Rule 25-24.565, Florida Administrative Code, Certificate of Public Convenience and Necessity Required?

Recommendation: Yes, the Commission should accept Roberta L. Marcus, Inc. d/b/a Marcus Centre's proposed settlement offer to submit a payment in the amount of \$500 to resolve the company's apparent violation of Rule 25-24.565, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. **(Curry, Morrow)**

Staff Analysis:

On April 9, staff filed a recommendation to address Marcus Centre's apparent violation of Rule 25-24.565, F.A.C. The Agenda Conference was scheduled for April 21, 2009. However, the company contacted the Commission and requested a deferral, which was approved.

The company claimed that it mailed a STS application, along with payment (check no. 12149) for the application fee, to the Commission on February 5, 2009. If accurate, this means that the application was mailed prior to the docket opening and prior to the recommendation filing. The company stated that the application and check were mailed to the Commission via First Class Mail. Because the recipient did not have to sign for the information, the company was unable to track the items mailed or verify that they were received by the Commission. Staff was unable to locate the company's application or the application fee, indicating that the Commission never received the items.

According to the company, the items mailed were never returned to Marcus Centre by the U.S. Postal Service and the check for the application fee was never deposited by the Commission. The company stopped payment on the check and resubmitted the application and the application fee via Federal Express. The Commission received the application and the application fee on April 14, 2009. Upon receipt of the application, Docket No. 090187-TS was established to address the STS application (Issue 2). Staff also began negotiating settlement options with the company to resolve the compliance issues in Docket 090086-TS.

During negotiations, the company initially did not want to offer any monetary settlement because it believed that the obligation of submitting an application was met. Staff suggested that the company submit any information that would support its claim that an application and check were mailed to the Commission on February 5, 2009. In response, Marcus Centre submitted copies of the company's check registry showing where the check was written on February 5, 2009. The company also provided a copy of the confirmation letter from the bank verifying that a stop payment request was made. The company recognizes that the documentation provided does not definitively prove that the application and check were mailed. Staff did not note anything unusual about the check registry.

The company also argued that the primary purpose of its business was that of leasing commercial office space. The office spaces are turn-key, meaning that they are furnished. Local

Date: August 6, 2009

phone service, along with a live operator, are also available for use at the option of the tenant. The company offers a PBX system, along with a PBX operator, as a bonus feature to attract tenants. The extent to which the company is offering telephone service is very limited. The company has just the one property that can be configured to lease office space for up to 50 potential tenants.

On May 12, 2009, in an effort to resolve the docketed matter, Marcus Centre submitted a proposed settlement offer. The company proposed to submit a payment in the amount of \$500 to be deposited into the General Revenue Fund.

In other dockets, the Commission has accepted settlement offers in the amount of \$5,000 when a company has failed to register as an intrastate interexchange carrier or a competitive local exchange company. Staff is not aware of any prior dockets that deal with a company's failure to obtain authorization from the Commission to provision shared tenant services. Marcus Centre is aware that the amount of its proposed settlement offer is not consistent with other offers that the Commission has previously accepted. Marcus Centre does not believe that it should be subject to penalties or that it should be required to pay \$5,000 to settle this case.

Further, Marcus Centre attests that at this time, the company is not financially able to pay more than the \$500 amount proposed in its settlement offer. The company's business is limited to one office building in which it provides leased office space for up to 50 tenants. The company claims that due to the recession, it currently has fifteen vacancies. The company submitted its 2007 federal tax return, which shows a monetary loss of more than \$100,000.

Staff also recognizes that the amount of the company's proposed settlement offer is not consistent with past offers accepted by the Commission. In this case, Marcus Centre only offers the shared tenant services, which includes a live phone attendant, thinking that the service will attract tenants. Tenants have the option to obtain services from other telecommunications companies. In most, if not all, prior cases before the Commission, the companies' primary business objectives were to provide interexchange or competitive local exchange services on a state-wide basis. Marcus Centre has no intention of offering STS services on a state-wide basis.

Staff is not able to confirm or deny that the company mailed the application and application fee prior to the docket being opened. Under the circumstances, staff believes that the company has provided sufficient information and explanation to mitigate the requirement for the company to pay a settlement of \$5,000. Therefore, staff recommends that the Commission accept Roberta L. Marcus, Inc. d/b/a Marcus Centre's proposed settlement offer to submit a payment in the amount of \$500 to resolve the company's apparent violation of Rule 25-24.565, Florida Administrative Code, Certificate of Public Convenience and Necessity Required.

Date: August 6, 2009

Issue 2: Should the Commission grant Roberta L. Marcus Inc. d/b/a Marcus Centre a Certificate of Public Convenience and Necessity, STS Certificate No. 8761, to provide shared tenant services at 9990 S.W. 77th Avenue, Miami, Florida?

Recommendation: Yes, the Commission should grant Roberta L. Marcus, Inc. d/b/a Marcus Centre a Certificate of Public Convenience and Necessity, STS Certificate No. 8761, to provide shared tenant services at 9990 S.W. 77th Avenue, Miami, Florida. **(Earnhart, McKay)**

Staff Analysis: Section 364.339(2), Florida Statutes, states:

No person shall provide shared tenant service without first obtaining from the commission a certificate of public convenience and necessity to provide such service. The commission shall grant certificates to telecommunications companies upon showings that the applicants have sufficient technical, financial, and managerial capabilities to provide shared tenant services. The commission may require such service to be offered and priced differently to residential and commercial tenants if deemed to be in the public interest.

On April 14, 2009, Marcus Centre submitted an application to provide shared tenant services. Staff has reviewed the company's application. Staff believes that the company has demonstrated it has sufficient technical and managerial capabilities to provide shared tenant services in Florida. Regarding financial capability, Marcus Centre's 2007 federal tax return shows a loss of more than \$100,000.

The company submitted several letters from various creditors and insurance companies that showed Marcus Centre pays bills timely. All of the creditors stated that Marcus Centre is both in good standing and has never been late on payments. The company also demonstrated that it has a Line of Credit account with Bank Atlantic that is also in good standing. Staff believes that the documentation provided by the company indicates that it has the financial capability to provide STS services at 9990 S.W. 77th Avenue, Miami, Florida.

Section 364.339, F.S., provides the Commission authority to prescribe the type, extent, and conditions under which STS services may be provided. In this case, staff recommends that the Commission limit Marcus Centre's provisioning of STS services to the office building located at 9990 S.W. 77th Avenue, Miami, Florida. Marcus Centre does not object to this limitation as it owns no other facilities and only provides STS services as a way to attract commercial tenants.

Therefore, staff recommends that the Commission should grant Roberta L. Marcus, Inc. d/b/a Marcus Centre a Certificate of Public Convenience and Necessity, STS Certificate No. 8761, to provide shared tenant services 9990 S.W. 77th Avenue, Miami, Florida.

Issue 3: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendation in Issues 1 and 2, this docket should remain open pending the receipt of the \$500 settlement payment. The payment should be received by the Commission within fourteen (14) calendar days after the issuance of the Consummating Order. The payment should be made payable to the Florida Public Service Commission and should identify the docket number and the company's name. Upon receipt of payment, the Commission shall forward it to the Division of Financial Services to be deposited into the General Revenue Fund. If Marcus Centre fails to pay the \$500 within fourteen (14) calendar days after the issuance of the Consummating Order, staff should provide a copy of the Commission's Order to Marcus Centre's underlying carrier and notify the carrier to discontinue provisioning telephone service at 9990 S.W. 77th Avenue, Miami, Florida. This docket should be closed administratively upon receipt of the \$500 settlement payment or upon disconnection of telephone service at 9990 S.W. 77th Avenue, Miami, Florida. **(Morrow, McKay)**

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