

State of Florida



Public Service Commission

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

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

DATE: February 18, 2021

TO: Office of Commission Clerk (Teitzman)

FROM: Office of Industry Development and Market Analysis (Wendel, Deas, Fogleman)^{CH}
Office of the General Counsel (Passidomo)^{TLT}

RE: Docket No. 20210012-TX – Application for limited designation as an eligible telecommunications carrier (ETC) to receive rural digital opportunity fund (Auction 904) support for voice and broadband services and request for expedited consideration, by Hotwire Communications Ltd.

AGENDA: 03/02/21 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: June 7, 2021 for qualification for RDOF auction disbursement

SPECIAL INSTRUCTIONS: None

Case Background

On January 5, 2021, Hotwire Communications, Ltd. (Hotwire) filed a petition with the Florida Public Service Commission (Commission) seeking designation as an eligible telecommunications carrier (ETC) to receive rural digital opportunity fund (RDOF) support. On December 7, 2020, Hotwire was selected as one of the winning bidders of the Federal Communications Commission's (FCC) RDOF auction. Hotwire is a fixed broadband and voice over internet protocol (VoIP) provider operating in Florida that was granted competitive local exchange carrier certificate No. 8627 on May 22, 2006.¹ On January 29, 2021, Hotwire requested cancellation of its certificate,

¹ Order No. PSC-06-0446-CO-TX, issued May 22, 2006, in Docket No. 20060101-TX, *Application for certificate to provide local exchange telecommunications service by Hotwire Communications, Ltd.*

which is scheduled to be processed on March 8, 2021.² On February 15, 2021, Hotwire provided supplemental information to staff which states that it provides broadband Internet, interconnected VoIP, and video services to residential and business customers.³

The RDOF is a form of high-cost support and is funded through the federal universal service fund (USF). The FCC's RDOF initiative allocates up to \$20.4 billion through a two-phase competitive auction to help connect millions of unserved rural homes and small businesses to high-speed broadband. Phase I of the auction will provide up to \$16 billion to be used over a period of 10 years to service providers that commit to offer voice and broadband services to fixed locations in eligible unserved high-cost census blocks.⁴ In Florida, a total of 11 bidders were selected to receive approximately \$192 million of high-cost support in phase I.⁵ Hotwire will receive \$5.2 million in phase I to be used in specified census blocks in Florida.⁶

An ETC designation is a requirement for telecommunications carriers to receive USF support for the Lifeline and High-Cost programs. The Lifeline program enables low-income households to obtain and maintain basic telephone and broadband services and offers qualifying households a discount on their monthly bills. The High-Cost program helps carriers provide voice and broadband service in remote and underserved communities. Although the FCC did not require RDOF auction participants to be designated as an ETC to apply, they did require winning bidders to obtain ETC designation within 180 days of being selected.

Hotwire asserts that it meets all applicable federal requirements for designation as an ETC in Florida pursuant to 47 U.S.C. 214(e) and 47 C.F.R 54.201. In addition, Hotwire acknowledges and asserts that if approved, it will comply with Sections 364.10 and 364.105, Florida Statutes (F.S.), and Rule 25-4.0665, Florida Administrative Code (F.A.C.), which govern Lifeline service and provide for a transitional discount for those customers no longer eligible for Lifeline.

47 U.S.C. 214(e)(2) authorizes state commissions to designate common carriers as an ETC as follows:

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. 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

² Docket No. 20210033-TX, *Request for cancellation of Certificate of Public Convenience and Necessity No. 8627 by Hotwire Communications Ltd., effective December 31, 2020.*

³ DN 02077-2021 in Docket No. 20210012, filed February 15, 2021.

⁴ FCC, DA 20-1422, Public Notice, 904 Winning Bidders, <https://docs.fcc.gov/public/attachments/DA-20-1422A1.pdf>, accessed February 1, 2021.

⁵ *Id.*, Attachment B, <https://docs.fcc.gov/public/attachments/DA-20-1422A3.pdf>, accessed February 1, 2021.

⁶ *Id.*, Attachment A, <https://docs.fcc.gov/public/attachments/DA-20-1422A2.pdf>, accessed February 1, 2021.

the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). 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.

47 U.S.C. 214(e)(6) provides that the FCC will make such ETC designations in cases where a state commission lacks jurisdiction over the common carrier as follows:

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to 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 under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

The Commission's authority to designate a telecommunications company as an ETC is found at 364.10, F.S. However, pursuant to Section 364.011, F.S., the Commission does not have jurisdiction over wireless/satellite or broadband.

Discussion of Issues

Issue 1: Should the Commission grant Hotwire Telecommunications Ltd. (Hotwire) ETC status in Florida to Receive Rural Digital Opportunity Fund Auction (Auction 904) Support for Voice and Broadband Services?

Recommendation: No. Staff recommends that the Commission lacks jurisdiction to grant Hotwire Telecommunications Ltd. ETC status in Florida. Staff further recommends that, as a facilities-based provider of non-jurisdictional broadband and VoIP services, Hotwire should apply directly to the FCC for a Florida ETC designation. (Passidomo, Wendel, Deas, Fogleman)

Staff Analysis: Pursuant to 47 U.S.C. 214(e)(2), and 47 C.F.R 54.201(b), state commissions designate carriers as ETCs consistent with criteria set forth therein. If a state lacks jurisdiction over a carrier, the FCC is to make such a designation. 47 U.S.C. 214(e)(6). Section 364.011, F.S., identifies services that are exempt from Commission oversight. Included in these non-jurisdictional services are broadband and wireless telecommunications. Until 2011, there was an exception in Section 364.011, F.S., which permitted Commission oversight of a service if “specifically authorized by federal law.” The legislature struck this exception by Section 3, Ch.2011-36, Laws of Florida. Thus, the Commission no longer grants ETC designations to broadband carriers.⁷

There is a pivotal question regarding whether Hotwire meets the definition of a telecommunications company within 364.10, F.S. A “telecommunications company” is an entity offering “two-way telecommunications service to the public for hire within [Florida] by the use of a telecommunications facility.” Section 364.02(13), F.S. Hotwire does not provide switched access or interconnection services to any customers in the state of Florida. Hotwire only provides broadband Internet, interconnected VoIP, and video services to residential and business customers, services explicitly exempt from Section 364.02(12), F.S. As such, because Hotwire does not provide telecommunications “service” in Florida, it does not use or operate “telecommunications facilities” as provided by Section 364.02(14), F.S. Hotwire has not proven to the Commission that it meets this requirement by providing this service and therefore, staff recommends the Commission deny the Company’s petition for ETC status.

Currently, Hotwire is a certificated telecommunications company in Florida. By Section 364.10(1)(a), the legislature defined an ETC as “a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.” Section 364.02(13), F.S. Thus, whether a carrier is offering such a telecommunications service is also a threshold question for whether the Commission has jurisdiction to grant an ETC designation.⁸ While Hotwire is currently a certificated

⁷ The Commission only has the powers, duties, and authority that have been conferred expressly or impliedly to it by the Florida Legislature through statute. *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So. 2d 493, 495-96 (Fla. 1973). Further, the Commission is barred from exercising a power when there is any reasonable doubt as to the lawful existence of that power. *See id.*

⁸ In this context, a “telecommunications facility” includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within [Florida].” 364.02(14). “Service” is to be construed in its broadest and most inclusive sense;” however, the term “does not include broadband service or voice-over-Internet protocol service for purposes of regulation.” *Id.* at (12).

telecommunications company in Florida, staff notes that Hotwire requested cancellation of its certificate, which is scheduled to be processed on March 8, 2021.⁹ Cancellation of its certificate means that Hotwire will not meet the Florida statutory definition of a telecommunications company under Chapter 364.¹⁰ However, whether Hotwire is a certificated telecommunication company in Florida will not assist the company in meeting the 364.02(13), F.S. definition of “telecommunication services”. Therefore, the pending certification cancellation is a compelling reason for staff to recommend denial of the Company’s petition for ETC status.

In conclusion, because Hotwire does not meet the appropriate definition of “telecommunication services” to be considered for an ETC designation, staff recommends that the Commission lacks jurisdiction to grant Hotwire Communications Ltd. ETC status in Florida. Staff further recommends that, as a facilities-based provider of non-jurisdictional broadband and VoIP services, Hotwire should apply directly to the FCC for a Florida ETC designation.

⁹ Docket No. 20210033-TX, *Request for cancellation of Certificate of Public Convenience and Necessity No. 8627 by Hotwire Communications Ltd., effective December 31, 2020.*

¹⁰ See e.g., Sections 364.013 and 364.02(12) and (13), F.S.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the Proposed Agency Action Order, this docket should be closed upon the issuance of a consummating order. (Passidomo)

Staff Analysis: At the conclusion of the protest period, if no protest is filed, this docket should be closed upon the issuance of a consummating order.