

State of Florida



## Public Service Commission

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

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**DATE:** April 21, 2005

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Division of Competitive Markets & Enforcement (Isler, R. Kennedy)  
Office of the General Counsel (McKay)  
Division of Regulatory Compliance & Consumer Assistance (Vandiver)

**RE:** Docket No. 050238-TX – Application for certificate to provide competitive local exchange telecommunications service by USA Telephone Inc. d/b/a Choice One Telecom.

**AGENDA:** 05/03/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\050238.RCM.DOC

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### Case Background

This docket addresses USA Telephone Inc. d/b/a Choice One Telecom's (Choice One) settlement offer and application to obtain a Certificate of Public Convenience and Necessity to operate as a Competitive Local Exchange Telecommunications Company (CLEC) in Florida. Choice One originally obtained authority (Certificate No. 5647) from the Commission to operate as a CLEC on June 13, 1998. Choice One registered as an Interexchange Telecommunications Company (IXC) on December 27, 2001.

Choice One's CLEC Certificate No. 5647 was cancelled by the Commission effective November 5, 2004, in Docket No. 040845-TX, In Re: Compliance investigation of USA Telephone Inc. d/b/a Choice One Telecom for apparent violation of Section 364.183(1), F.S., Access to Company Records, and Rule 25-4.0161, FAC, Regulatory Assessment Fees; Telecommunications Companies.

Docket No. 050238-TX

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Docket No. 040845-TX was established as a result of a random audit of the company's 2002 Regulatory Assessment Fee (RAF) Return. Choice One failed to provide staff sufficient information to validate payment of fees to the Florida Telecommunications Relay, Inc. (FTRI). Rule 25-4.160, Florida Administrative Code, Operation of Telecommunications Relay Services, requires that local exchange companies impose a monthly surcharge on all local exchange telecommunications company subscribers. The surcharges fund the operation of the Florida Relay Service. The Commission imposed a \$10,000 penalty upon the company for its apparent violation of Section 364.183, Florida Statutes, Access to Company Records.

There was another issue in Docket No. 040845-TX as well. Choice One had failed to pay its 2003 RAF. This was the company's second violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, and the Commission imposed a penalty of \$1,000.

Choice One failed to protest the Commission's Proposed Agency Action Order, PSC-04-0994-PAA-TX, issued on October 11, 2004, in Docket No. 040845-TX. Choice One did not pay the penalties; therefore, Choice One's CLEC certificate was cancelled.

In a related action, Docket No. 040920-TI, In Re: Compliance investigation of USA Telephone Inc. d/b/a Choice One Telecom for apparent violation of Section 364.336, Florida Statutes, Choice One's IXC tariff was cancelled and its name was removed from the register. The Commission imposed a \$500 penalty for Choice One's violation of Section 364.336, Florida Statutes, Regulatory Assessment Fees. The company failed to protest the Commission's Proposed Agency Action Order, PSC-04-1198-PAA-TI, issued on December 3, 2004, and failed to pay the \$500 penalty.

Choice One continues to operate as a CLEC in Florida, currently serving more than 3,000 customers. Staff learned this in mid-March 2005, when Mr. Jean Cherubin, vice-president of Choice One, contacted staff seeking information about reacquiring a CLEC certificate. Mr. Cherubin advised staff that the company does not offer IXC services and indicated that he would not pursue registration as an IXC.

The Commission has jurisdiction over these matters pursuant to Sections 364.04, 364.285, 364.336, and 364.337.

### **Discussion of Issues**

**Issue 1:** Should the Commission accept the settlement offer proposed by USA Telephone Inc. d/b/a Choice One Telecom, and grant USA Telephone Inc. Certificate No. 8587 to operate as a competitive local exchange telecommunications company in Florida as provided by Section 364.337(1), Florida Statutes?

**Recommendation:** Yes. The new certificate should not, however, become active until full compliance with the settlement offer. (Isler, R. Kennedy, McKay)

**Staff Analysis:** Section 364.337(1), Florida Statutes, provides in part:

The commission shall grant a certificate of authority to provide competitive local exchange 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.

As described in the Case Background, Choice One is not currently authorized by the Commission to provide CLEC services in Florida. Even though Choice One's CLEC authority was revoked by the Commission, the company continues to provide local exchange telephone services, reportedly, to more than 3,000 customers. Choice One has submitted an application to obtain authority from the Commission to operate as a CLEC in Florida.

Choice One has also proposed a settlement in an attempt to rectify the deficiencies detailed in the Commission's Proposed Agency Action Orders, PSC-04-0994-PAA-TX, issued on October 11, 2004, in Docket No. 040845-TX and PSC-04-1198-PAA-TI, issued on December 3, 2004, in Docket No. 040920-TI.

To summarize, the previous issues that were not satisfied by Choice One are as follows:

#### **Order PSC-04-0994-PAA-TX**

- Payment of penalties in the amount of \$11,000,
- Payment of the 2003 RAF, plus statutory late payment charges, and
- Required information as described in Attachment A.

#### **Order PSC-04-1198-PAA-TI**

- Payment of a penalty in the amount of \$500, and
- Payment of the 2003 RAF, plus statutory late payment charges.

Choice One has now paid all outstanding 2003 and 2004 RAF, plus statutory late payment charges, for both its CLEC and IXC operations. The company reported \$1,940,300.94 gross intrastate operating revenue for its CLEC operations in 2004. In addition, the company proposes the following:

- Pay \$7,500 as settlement of the total assessed penalty of \$11,500.
- In the future, respond promptly and pay RAF on a timely basis.
- Provide data described in Attachment A and upon analysis, pay all required fees to the FTRI.

In developing its recommendation in this docket, staff considered such factors as management, financial, and technical capability of the applicant. Staff also considered historical information about the company and the impact of the abrupt loss of local telephone service by more than 3,000 customers.

Regarding the management capability, Choice One's recent performance is poor as evidenced by the fact that its CLEC certification was cancelled and its IXC registration was revoked by the Commission. When questioned about why Choice One did not resolve the issues in Docket Nos. 040845-TX and 040920-TI, Mr. Cherubin stated that he left the matter with an associate to handle and the associate failed to perform properly. He learned that the company's certificate and registration were cancelled when he found an unopened envelope from the Commission regarding the dockets. Mr. Cherubin stated that he understood that the company was providing telecommunications services in violation of the Commission's Orders.

The company has offered competitive local exchange telecommunications services in Florida since June 13, 1998. Prior to 2004, there was one compliance action against the company in Docket No. 011135-TX, In Re: Cancellation by Florida Public Service Commission of Alternative Local Exchange Telecommunications Certificate No. 5647 issued to USA Telephone Inc. for violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies, in which the Commission accepted the company's settlement offer.

In reviewing the data compiled in the Commission's Consumer Activity Tracking System, a total of 15 complaints have been filed by customers against the company's CLEC operations since May 2000. Only one complaint was filed by a customer against the company's IXC operations. These numbers indicate that consumers have generally demonstrated a history of satisfaction with the company's products and services. At this time, there are no active consumer complaint cases.

Regarding the company's financial capability, staff has been advised by at least one underlying local exchange carrier that the company's payments for wholesale services are up-to-date. The company has also paid all outstanding RAFs, plus statutory late payment charges, owed the Commission. In general, the company has paid its RAF timely and based upon an audit of its 2002 RAF Return, it appears that the amounts owed are accurate, at least for the year audited. In addition, the company has offered a cash settlement of \$7,500, for which the company appears to have the financial resources to pay.

Staff is unsure of the amount of money the company may owe FTRI. Given the fact that the company is up-to-date in payment of wholesale services to a major supplier is a positive indicator that the company should be able to pay what is owed FTRI, if any. To ensure that there

are no misunderstandings, Choice One has acknowledged in writing that retention of its CLEC authority, if approved by the Commission in this docket, is contingent upon its fulfillment of the requirements of Attachment A, including full payment of any fees to FTRI.

Choice One has indicated that its underlying carriers are waiting on the Commission's vote, approval required, before making a final decision on disconnection of wholesale local exchange services due to lack of certification.

The company's technical capability generally relates to that provided it by the underlying carriers. In Choice One's case, underlying carrier services are provided by the major local exchange companies. Thus, staff believes that the company's technical capability is not at risk.

The Commission has approved a similar settlement in Docket No. 001621-TX, In Re: Application for certificate to provide alternative local exchange telecommunications service by Comm South Companies, Inc. d/b/a Florida Comm South. In this instance, the applicant's CLEC certificate was previously cancelled in Docket No. 000230-TX, In Re: Initiation of show cause proceedings against Onyx Distributing Company, Inc. d/b/a Florida Comm South for apparent violation of Section 364.183(1), F.S., Access to Company Records. In Order PSC-01-0477-PAA-TX, the Commission accepted the company's offer of \$7,500 to settle the unresolved issues for which the company's CLEC certificate was cancelled in a prior docket.

Based on the above, staff recommends that the Commission accept the settlement offer proposed by USA Telephone Inc d/b/a Choice One Telecom, and grant USA Telephone Inc. Certificate No. 8587 to operate as a competitive local exchange telecommunications company in Florida. The new certificate should not, however, become active until full compliance with the settlement offer.

**Issue 2:** Should this docket be closed?

**Recommendation:** The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Choice One fails to pay the amount of the voluntary contribution (including RAF collection costs), submit the required fees to FTRI, and provide a written report summarizing the fee amounts paid to FTRI within 15 days of the issuance of the Consummating Order resulting in the new certificate not becoming active, staff will notify underlying carriers to discontinue providing the company wholesale local exchange services and the company should be required to immediately cease and desist providing any telecommunications services in Florida. Payment of the voluntary contribution (including RAF collection costs) should be made to the Florida Public Service Commission, identified by docket number, and subsequently deposited in the General Revenue Fund, less the costs associated with the collection of RAFS. RAF collection costs should be deposited in the Public Service Regulatory Trust Fund. This docket should be closed administratively upon either receipt of the payment of the voluntary contribution and verification that required fees have been paid to FTRI, or upon notification to underlying carriers to discontinue providing the company wholesale local exchange services. The company is responsible for the payment of Regulatory Assessment Fees for the entire period it provides telecommunications services in Florida for 2005, whether or not the new certificate becomes active. (McKay)

**Staff Analysis:** Staff recommends that the Commission take action as set forth in the Recommendation above.

**Required Information**  
**USA Telephone Inc. d/b/a CHOICE ONE Telecom**

1. List of underlying carriers from which the company obtains wholesale local exchange services, e.g., BellSouth, Sprint, Verizon, etc., identified by year beginning January 1, 2002, to the current date.
2. List of the types of wholesale services acquired from each underlying carrier, e.g., resale, UNE-P, etc., and the date when wholesale services were switched from resale to UNE-P, if applicable for the period January 1, 2002, to the current date.
3. Statements (billing statements or correspondence from the underlying carrier) showing that each underlying carrier collected relay surcharge payments from the company and submitted payment to the Florida Telecommunications Relay, Inc. (FTRI) on behalf of the company. Billing statements or correspondence are required for the period January 1, 2002, to the current date.
4. List of dates when the underlying carrier(s) stopped collecting relay surcharges from the company.
5. Copies of checks paid to the FTRI beginning January 1, 2002, to the current date.
6. Copies of returns submitting surcharges to the FTRI beginning January 1, 2002, to the current date.
7. Billing data indicating the number of subscribers served by the company for each January 1 and July 1, 2002 through 2004.