

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: July 7, 2005

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

FROM: Division of Competitive Markets & Enforcement (R. Kennedy)
Office of the General Counsel (Rojas)

RE: Docket No. 030696-TI – Compliance investigation of 9278 Communications, Inc. for apparent violation of Sections 364.02 and 364.04, Florida Statutes.

AGENDA: 07/19/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: Deason, Bradley, Edgar

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\030696.SETTLEMENT.RCM.DOC

Case Background

January 12, 2004 – The Florida Public Service Commission (Commission) issued PAA Order PSC-04-0022-PAA-TI imposing a penalty upon 9278 Communications, Inc. (9278 Communications) for violation of Sections 364.02 and 364.04, Florida Statutes.

February 2, 2004 – 9278 Communications protested the Commission's PAA Order and petitioned that the Commission refer the case to the Department of Administrative Hearings (DOAH).

October 15, 2004 – Staff recommended via memorandum to Chairman Baez that the matter should be set for hearing before the Commission and not be referred to DOAH.

January 28, 2005 – The Commission issued Order PSC-05-0119-PCO-TI establishing the procedure and scheduling the matter for hearing before the Commission.

February 8, 2005 – Staff served 9278 Communications with its First Set of Interrogatories and Request for Production of Documents (PODs).

February 28, 2005 – Staff filed the Direct Testimony of Dale R. Buys and Exhibits DRB-1 through DRB-11.

April 14, 2005 – 9278 Communications' legal counsel (Norman H. Horton) filed a motion for leave to withdraw as counsel.

May 5, 2005 – The Commission issued Order PSC-05-0497-PCO-TI granting staff's motion to compel 9278 Communications to respond to staff's First Set of Interrogatories and request for PODs.

May 6, 2005 – 9278 Communications' legal counsel filed a second motion for leave to withdraw as 9278 Communications' counsel (second motion included Albert T. Gimbal). 9278 Communications' new legal counsel, Mr. Joseph P. Goldberg, contacted staff to discuss the case.

May 20, 2005 – The Commission issued Order PSC-05-0559-PCO-TI granting attorneys Horton and Gimbal's motion to withdraw as counsel for 9278 Communications.

May 24, 2005 – The Commission issued Order PSC-05-0572-PCO-TI revising the Order Establishing Procedure.

June 3, 2005 – Notice of Prehearing Conference on June 22, 2005, published in the Florida Administrative Weekly (FAW).

June 8, 2005 – Staff filed its prehearing statement.

June 17, 2005 – Notice of Hearing on July 7, 2005, published in the FAW.

June 20, 2005 – 9278 Communications, through its legal counsel, submitted a settlement offer to resolve the issues in this docket (Attachment A).

June 21, 2005 – The Commission issued Order PSC-05-0689-PCO-TI granting staff's motion to hold the docket in abeyance until the Commission considers 9278 Communications' settlement offer.

Discussion of Issues

Issue 1: Should the Commission accept the settlement offer submitted by 9278 Communications, Inc. to resolve the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes?

Recommendation: Yes. (R. Kennedy, Rojas)

Staff Analysis: During the period from April 10, 2003, through June 11, 2004, the Commission received nine (9) consumer complaints regarding prepaid phone cards for which it appeared that 9278 Communications was the interexchange service provider. As an interexchange company (IXC), 9278 Communications would be subject to Sections 364.02 and 364.04, Florida Statutes, which requires each IXC to provide the Commission with information to contact and communicate with the company and file a tariff. Section 364.02(13), Florida Statutes, states in pertinent part:

Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a), and (d), 364.285, 364.163, 364.501, 364.603, and 364.604, shall provide the commission with such current information as the commission deems necessary to contact and communicate with the company

Section 364.04(1), Florida Statutes, which states:

Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges that a company for service to be performed within the state.

On January 12, 2004, the Commission issued a Proposed Agency Action Order imposing a penalty in the amount of \$25,000 upon 9278 Communications for the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes. Subsequently, the company protested the Commission's order. Since the time of the protest, staff was unable to communicate with the company until May 6, 2005. From May 6, 2005, through June 17, 2005, staff and 9278 Communications' legal counsel negotiated an agreement to resolve the issues in this case. On June 20, 2005, 9278 Communications submitted its settlement and offers the following.

1. 9278 Communications will pay the total sum of \$12,638 to the Florida Public Service Commission as a voluntary contribution to the Florida General Revenue Fund and payment of the cost of collection in three (3) equal payments of \$4,212.66.
2. The first payment will be remitted within ten (10) calendar days after the Commission votes to approve the settlement offer. The second payment will be

due thirty (30) calendar days after the first payment, and the final payment will be due sixty (60) days after the first payment.

3. 9278 Communications will resolve the four (4) outstanding consumer complaints by issuing the complainants replacement prepaid phone cards of equal value to the original purchase.
4. 9278 Communications will register as an IXC in Florida, and file a tariff which is part of the registration process.
5. In the event that 9278 Communications is in breach of any of its obligations under the settlement agreement, it shall be given prompt notice of any such default via facsimile with copy to counsel and five (5) business days to cure any such default.

9278 Communications also stated in its settlement offer that its settlement agreement shall not be construed as an admission or evidence that 9278 Communications previously acted or conducted business as an IXC in Florida, and that nothing in the settlement shall be construed as an admission of liability or wrongdoing of any kind, or violation of any laws or statutes, or as evidence thereof.

Further, 9278 Communications requested in its settlement offer that the settlement terms shall be kept confidential to the extent permitted by law. 9278 Communications has not, however, filed a request for confidential classification of material pursuant to Rule 25-22.006, Florida Administrative Code, in which 9278 Communications would have to show that the terms of the settlement agreement are bona fide proprietary confidential business information.

If the Commission accepts 9278 Communications' settlement offer, the payments would be due on the following dates:

- 1st Payment: July 29, 2005.
- 2nd Payment: August 29, 2005.
- 3rd Payment: September 27, 2005.

The Commission previously approved a settlement offer in a docket that involved a similar issue with a prepaid phone card service provider. In Order No. PSC-02-0927-PAA-TI, issued July 10, 2002, Docket No. 011140-TI, In Re: Initiation of show cause proceedings against Orion Telecommunications Corp. d/b/a Orion Telecommunications Corp of New York for apparent violation of Rule 25-24.910, F.A.C., Certificate of Public Convenience and Necessity Required, the Commission approved the company's settlement offer of \$20,000, to resolve the company's apparent failure to obtain the Commission's approval to provide prepaid calling services as an IXC in Florida.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes. Accordingly, staff recommends that the Commission accept the settlement offer submitted by 9278 Communications, Inc. to resolve the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes.

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. This docket should be closed administratively upon receipt of the final payment of the voluntary contribution, and confirmation that the company complied with the terms contained in its settlement agreement. If 9278 Communications fails to pay the total amount of the voluntary contribution and comply with the terms in accordance with its settlement agreement, action will be taken pursuant to the provisions in paragraph 6 of that agreement. If 9278 Communications fails to cure any default pursuant to the provisions of paragraph 6 of the settlement agreement, the settlement agreement shall be considered null and void and this docket should remain open pending further action.
(Rojas)

Staff Analysis: Staff recommends that the Commission take action as set forth in its recommendation.