

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: November 17, 2005

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

FROM: Division of Competitive Markets & Enforcement (M. Watts, Isler)
Office of the General Counsel (Scott)

RE: Docket No. 050526-TI – Acknowledgment of cancellation of IXC Registration No. TJ230 by Radiant Telecom, Inc., effective August 2, 2005.

AGENDA: 11/29/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050526.RCM.DOC

Case Background

On June 2, 2005, a representative of Radiant Telecom, Inc. (Radiant) contacted the Florida Public Service Commission (Commission) staff to request Regulatory Assessment Fee (RAF) return forms for 2004 and 2005 as it expected to request cancellation of its intrastate interexchange telecommunications company (IXC) registration. The Commission received the company's 2004 and 2005 RAF returns, with payment, on June 27, 2005. The company reported \$0 in revenues for each year.

The Commission received Radiant's letter requesting a voluntary cancellation of IXC Registration No. TJ230 on August 2, 2005. Staff was aware that Radiant had been a significant provider in the prepaid calling services (PPCS) market in Florida and nationwide in the past, and

believed that the company may still be providing PPCS in Florida. For this reason, staff delayed processing a voluntary cancellation of the company's IXC registration pending further investigation.

On August 17, 2005, Dickstein, Shapiro, Morin & Oshinsky, LLP, representing APCC Services, Inc. (APCC Services), an organization that represents pay telephone companies, filed a Motion to Intervene and Stay the Proceedings in this Docket. APCC Services claims that Radiant owes its members for unpaid dial-around compensation, and if Florida's Commission grants the company a cancellation, it will impair the pay telephone companies' ability to collect the monies owed them.

On August 18, 2005, staff sent Radiant a letter via certified mail requesting its response to the following by September 9, 2005:

1. An explanation for the apparent discrepancy between the revenues reported for 2004 and 2005 (\$0) and the existence of complaints from Florida consumers (indicating purchases of Radiant products were made during that period);
2. A clarification of Radiant's use of the phrase that "Radiant is winding down," since that would imply that the company was currently operating and providing telecommunications services in Florida;
3. A response to a complaint filed by G. L. Danmeier on May 23, 2005, Complaint No. 653277T, for which no response had been received to date; and
4. An explanation of Radiant's relationship with three other telecommunications companies with the same address as Radiant.

To date, the Commission has not received a response either to its August 18, 2005, letter or to Mr. Danmeier's May 23, 2005, complaint. Additionally, Radiant settled a previous apparent failure-to-respond violation in Docket No. 001329-TI, In Re: Initiation of show cause proceedings against Radiant Telecom, Inc. for apparent violation of Rules 25-4.043, F.A.C., Response to Commission Staff Inquiries, 25-24.480, F.A.C., Records & Reports; Rules Incorporated, 25-24.915, F.A.C., Tariffs and Price Lists, 25-24.920, F.A.C., Standards for Prepaid Calling Services and Consumer Disclosure, and 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

The Commission has jurisdiction over these matters pursuant to Sections 364.02, 364.285 and 364.336, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission grant APCC Services, Inc.'s Motion to Intervene and Request to Stay Proceeding?

Recommendation: No. APCC Services, Inc.'s Motion to Intervene and Request to Stay Proceeding should be denied because it lacks standing. Staff believes that APCC Services, Inc. has not demonstrated a substantial injury sufficient to satisfy the Agrico two-prong test. **(Scott)**

Staff Analysis:

APCC Services, Inc.'s Motion

APCC Services, Inc. (APCC Services) filed its Motion to Intervene and Request to Stay Proceeding (Motion) on August 17, 2005. APCC Services asks the Commission to stay Radiant's request to voluntarily cancel its IXC registration. On August 2, 2005, APCC Services filed a formal complaint with the Federal Communications Commission (FCC) against Radiant, and other affiliated entities, for unpaid dial-around compensation, and other violations of the FCC's payphone compensation rules, pursuant to Section 208 of the Communications Act of 1934, as amended, and Section 1.721 of the FCC Rules.

In support of its Motion, APCC Services asserts that its interests will be substantially and adversely affected if the Commission grants Radiant's request to voluntarily cancel its IXC registration in the State of Florida. APCC Services further asserts that by allowing Radiant to "exit the market," Radiant will be able to effectively abandon its liabilities for unpaid dial-around compensation. APCC Services also requests that the Commission stay Radiant's request for voluntary cancellation until its Complaint with the FCC is fully adjudicated. Furthermore, APCC Services asserts standing on the basis that the public, namely payphone service providers (PSPs), would be adversely affected by allowing Radiant to exit the market because some independent PSPs substantially rely on the payment of dial-around compensation as part of their revenue.

Staff Analysis

Rule 25-22.039, Florida Administrative Code, states in pertinent part:

"[p]ersons...who have a substantial interest in the proceeding...must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding."

In order to demonstrate standing, an individual "must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect." Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d

DCA 1981). The first prong of the test involves the degree of the injury, and the second prong involves the nature of the injury. Id. The “injury in fact” must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also, Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. den., 513 So.2d 1063 (Fla. 1987) (speculation on the possible occurrence of injurious events is too remote).

APCC Services asserts that it has a substantial economic interest in the outcome of the Commission’s decision in this Docket. However, economic injury alone is insufficient to afford standing. Agrico at 482. The Complaint attached to APCC Services’ Motion is still pending before the FCC; therefore, the FCC has yet to render a decision on when and how much monies Radiant owes to APCC Services, and others similarly situated. Staff believes that the uncertainty of the pending Complaint, among other factors, renders APCC Services’ assertions of economic injury in the instant Docket speculative. Staff notes that the possibility exists that an injury may never occur.¹ Staff also believes that if APCC Services does not receive the monies owed to it by Radiant, this will not be a result of either a voluntary or involuntary cancellation of Radiant’s IXC registration.² Consequently, staff believes that APCC Services’ claim of an economic injury is too remote to meet the first prong of the substantial interest test as set forth in Agrico. Intervenor must “demonstrate through their allegations that they [have] sustained either actual injury-in-fact [at the time of filing their petition] or that they [are] in danger of sustaining some direct injury as a result of the agency’s action.” Village Park Mobile Home Association, Inc., at 433. Staff notes that if the Commission approves staff’s recommendation in Issues 2 and 3, the effective date of the cancellation of Radiant’s IXC registration will be December 31, 2005. That being said, staff believes that APCC Services fails to fulfill the immediacy component of the injury-in-fact part of the test.

As stated above, meeting the second prong of the test hinges on whether the injury is of the type the proceeding is designed to protect. Rule 25-24.474, Florida Administrative Code, codifies the Commission’s authority to cancel a company’s certificate on its own motion for violation of Commission rules or orders, or for violation of the Florida Statutes. The Rule is clear, and the intent of the Rule appears to be to protect the interests of the general public, not the economic interests of competitors. In Florida Society of Ophthalmology v. State of Florida Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988), the court found that the “affect [on] the economic affairs of the appellants are legally insufficient because the alleged economic injury does not fall within the zone of interest intended to be protected by the applicable statutes.” Staff believes that based on the intent of Rule 25-24.474, Florida Administrative

¹ See Order No. PSC-00-0757-PCO-SU, Docket 991812-SU, In re: Application for transfer of Certificate No. 492-S in Franklin County from Resort Village Utility, Inc. to SGI Utility, LLC, where the Commission found that a customer’s protest did not meet the substantial interests test on the basis that “[n]one of ... the alleged injuries have or are occurring and these alleged injuries may never occur. Therefore, we find that these alleged injuries are speculative ...”

² Staff notes that although this Docket was established initially on the basis of Radiant’s request for voluntary cancellation of its IXC registration, after further investigation, staff is recommending that the Commission deny Radiant’s request and instead involuntarily cancel Radiant’s IXC registration.

Code, whether APCC Services' suffers economic injury has no correlation to the Commission's assessment of Radiant's ability to provide the citizens of Florida with sufficient and adequate telecommunications service, nor is APCC Services' economic injury the type of injury to which protection is afforded by the Rule. Therefore, staff believes that APCC Services also fails to meet the second prong of the Agrico test on the basis that Rule 25-24.474, Florida Administrative Code, is not designed to protect the economic interests of an intervenor.

Conclusion

Based on the foregoing analysis, staff recommends that the Commission deny APCC Services' Motion to Intervene and Request to Stay Proceeding on the basis that APCC Services lacks standing to intervene in an involuntary cancellation of an IXC registration. Staff believes that APCC Services has not demonstrated a substantial injury sufficient to satisfy the Agrico two-prong test. First, staff believes that APCC Services' potential economic injury is too remote, and second, Rule 25-24.474, Florida Administrative Code, authorizing the Commission to involuntarily cancel an IXC registration of a company that violates Commission rules or orders or the Florida Statutes, is not designed to protect the economic interests of an intervenor.

Issue 2: Should the Commission deny Radiant Telecom, Inc.'s request for a voluntary cancellation and instead cancel IXC Registration No. TJ230 on the Commission's own motion with an effective date of December 31, 2005?

Recommendation: Yes, the Commission should deny the company a voluntary cancellation and instead cancel IXC Registration No. TJ230 on its own motion, with an effective date of December 31, 2005. **(M. Watts/Isler/Scott)**

Staff Analysis: Rule 25-24.474(2), Florida Administrative Code, states that if a registered company desires to cancel its registration, it shall request cancellation from the Commission in writing and shall provide the current and any past due RAFs, and the associated penalty and interest with its request, as well as a statement on treatment of customer deposits and final bills, if applicable. As stated in the Case Background, Radiant paid its current and past due RAFs, with associated penalty and interest, and requested cancellation in writing as required by this rule. It did not provide a statement on treatment of customer deposits and final bills.

However, Rule 25-24.474(1)(b), Florida Administrative Code, states that violation of a Commission rule or order shall be grounds for cancellation of a company's registration. After receiving the company's request for cancellation, staff performed a routine assessment of the status of the company's compliance with Commission rules and resolution of consumer complaints. When staff found that Radiant had an outstanding complaint for which no response had been provided, and compared the company's reported revenues for 2004 and 2005 (\$0 per year) with those reported in previous years (e.g., \$294,757.00 in 2002), staff sent an inquiry to the company via certified mail. As stated in the Case Background, to date Radiant has responded to neither.

Rule 25-22.032(6)(b), Florida Administrative Code, requires that the company provide the Commission with a written response to complaints within 15 working days after the complaint is sent to the company. As noted in the Case Background, Radiant has not provided a response to Complaint No. 653277T to date. The response was due on June 14, 2005. Since it appears that Radiant is no longer in business, there would be no purpose in requiring the company to pay a penalty. By canceling the company's registration on its own motion, however, the Commission would be able to track the company should it apply for another certificate or IXC registration in the future. The cancellation of this registration in no way diminishes the entity's obligation to settle the issue of its apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code.

Staff believes that the Commission should use Radiant's apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, and its failure to respond to staff's inquiries concerning its 2004 and 2005 RAF returns as grounds for an involuntary cancellation of intrastate interexchange telecommunications company Registration No. TJ230 issued to Radiant Telecom, Inc.

Based on the above, staff recommends that the Commission deny Radiant Telecom, Inc.'s request for a voluntary cancellation and on its own motion, the Commission should cancel IXC Registration No. TJ230, with an effective date of December 31, 2005.

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Order issued from this recommendation 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 Radiant Telecom, Inc. fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted and the right to a hearing waived. If the company is removed from the register and its tariff canceled effective December 31, 2005, in accordance with the Commission's Order from this recommendation, the company should be required to cease and desist providing intrastate interexchange telecommunications services in Florida on that date. If the company should subsequently reapply for IXC registration or any other telecommunications certificate, such application should not be approved until the company has settled the issue of its apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code. This docket should be closed administratively upon the issuance of the Consummating Order. **(Scott)**

Staff Analysis: Staff recommends that the Order issued from this recommendation 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 Radiant Telecom, Inc. fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted and the right to a hearing waived. If the company is removed from the register and its tariff canceled effective December 31, 2005, in accordance with the Commission's Order from this recommendation, the company should be required to cease and desist providing intrastate interexchange telecommunications services in Florida on that date. If the company should subsequently reapply for IXC registration or any other telecommunications certificate, such application should not be approved until the company has settled the issue of its apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code. This docket should be closed administratively upon the issuance of the Consummating Order.