

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: April 20, 2006

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

FROM: Division of Competitive Markets & Enforcement (M. Watts, Howell, Ollila)
Office of the General Counsel (Tan, Wiggins)

RE: Docket No. 050965-TX – Compliance investigation of Benchmark Communications, LLC d/b/a Com One for apparent violation of Section 364.183(1), F.S., Access to Company Records.

AGENDA: 05/02/06 – 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\CMP\WP\050965.RCM.DOC

Case Background

On December 27, 2005, staff opened Docket No. 050965-TX against Benchmark Communications, LLC d/b/a Com One (Benchmark) for its apparent violation of Section 364.183(1), F.S., Access to Company Records. On June 3 and July 19, 2005, staff sent certified letters via the United States Postal Service (U.S.P.S.) to Benchmark requesting data contained in its company records for inclusion in the Florida Public Service Commission's (Commission's) annual report to the Legislature on the status of local competition in Florida (local competition report). Benchmark signed the return receipt card for each certified letter, but staff did not receive the company's response.

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Staff's recommendation in Docket No. 050965-TX was presented to the Commission at the February 28, 2006, Agenda Conference. On March 20, 2006, Proposed Agency Action (PAA) Order No. PSC-06-0229-PAA-TX was issued by the Commission imposing a \$10,000 penalty on Benchmark for its apparent violation of Section 364.183(1), Florida Statutes. This recommendation addresses Benchmark's proposed settlement.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285 and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission accept Benchmark Communications, LLC d/b/a Com One's proposal that the Commission vacate Proposed Agency Action Order No. PSC-06-0229-PAA-TX as it pertains to Benchmark Communications, LLC only, or in the alternative its settlement offer to voluntarily contribute \$500 to the Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order to resolve its apparent violation of Section 364.183(1), Florida Statutes?

Recommendation: No. The Commission should not accept the company's proposal to vacate PAA Order No. PSC-06-0229-PAA-TX as it pertains to Benchmark only, or its settlement offer of \$500. **(M. Watts/Howell/Ollila/Wiggins/Tan)**

Staff Analysis: On April 4, 2006, Mr. Benjamin Bronston, counsel for Benchmark, submitted an offer to settle the issue in this docket. In the letter, Mr. Bronston stated that Benchmark responded to the data request on July 11, 2006, via regular mail. Upon receiving staff's July 19, 2006, letter, Benchmark assumed its response had not arrived at the Commission before the Commission's reminder letter went out. Benchmark does not have a carrier receipt to support its claim, but can provide a receipt from its postage meter indicating postage paid and inserted into Benchmark's postage meter, along with an affidavit of mailing signed by Benchmark's president if necessary. Thus, Benchmark believes that the Commission should not impose a penalty because it did timely respond.

Benchmark also believes that the Commission should take the following information into account in making its decision. Benchmark, which is based in New Orleans, operates in many areas hardest hit by tropical weather in the 2004 and 2005, particularly Hurricanes Ivan and Katrina. Hence it has sustained significant monetary damages not covered by applicable insurance. Also, Benchmark provided a public service to its customers in the aftermath of the storms by providing free or deeply discounted service to enable them to maintain communications with family, insurance adjusters and disaster relief agencies. For this reason, Benchmark cannot afford to pay any substantial penalty or settlement.

In the event the Commission deems the proof it has offered to be insufficient, Benchmark proposed a monetary offer of \$500.

Staff believes the terms of the settlement agreement as summarized in this recommendation are not acceptable. Benchmark believes that a settlement offer of \$3,500 is too high given the monetary losses it has suffered due to the 2004 and 2005 hurricane seasons. However, the company signed two return receipts for correspondence sent more than one month apart from the Commission that clearly outlined the possible penalty for failure to comply, provided multiple means for submission of the required data, and urged the companies to contact the Commission to confirm receipt of its data to preclude this situation. A settlement offer of \$3,500 is consistent with the Commission's action in accepting similar terms of settlement for the first instance of the same violation in previous dockets (see Attachment A for a list). Thus, Benchmark's proposal of \$500 is not consistent with the Commission's actions with other CLECs.

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Therefore, staff recommends that the Commission not accept Benchmark Communications, LLC d/b/a Com One's proposal that the Commission vacate Proposed Agency Action Order No. PSC-06-0229-PAA-TX as it pertains to Benchmark Communications, LLC only, or in the alternative its settlement offer to voluntarily contribute \$500 to the Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order to resolve its apparent violation of Section 364.183(1), 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. If Benchmark fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If Benchmark fails to pay the \$10,000 penalty imposed in PAA Order No. PSC-06-0229-PAA-TX within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC Certificate No. 8568 should be canceled. If Benchmark's certificate is canceled in accordance with the Commission's Order from this recommendation, Benchmark should be required to immediately cease and desist providing telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalty imposed or upon the cancellation of the company's certificate. **(Wiggins/Tan)**

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