

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida.

DOCKET NO. 080065-TX

DATED: MAY 12, 2008

PROSECUTORIAL STAFF'S RESPONSE IN OPPOSITION TO VILAIRE COMMUNICATIONS, INC.'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO ABATE PROCEEDINGS

Prosecutorial staff of the Florida Public Service Commission (FPSC), pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby files this response in the above-styled docket, to the May 5, 2008, Vilaire Communications, Inc.'s ("VCI") Motion to Dismiss Proceeding for Lack of Subject Matter Jurisdiction or In the Alternative, to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction ("Motion"). VCI has failed to demonstrate as a matter of law why its Motion should be granted, and in support of the denial of VCI's Motion, Prosecutorial staff states as follows:

Oral Argument

Contemporaneously with its Motion to Dismiss, VCI filed a Request for Oral Argument on the grounds that it would be beneficial for the Commissioners. Prosecutorial staff has no objection to oral argument.

Background

On February 13, 2008, the FPSC issued Order No. PSC-08-0090-PAA-TX ("PAA Order"), which proposed the FPSC rescind VCI's Eligible Telecommunications Carrier ("ETC") status and cancel VCI's CLEC Certificate. An eligible telecommunications carrier is a telecommunications company that is designated to offer Lifeline and Link-Up programs¹ to qualified low-income consumers.² In response, VCI filed a Protest of PAA Order PSC-08-0090-

¹ Lifeline service in Florida provides a \$13.50 discount on basic monthly telephone service to qualified low-income individuals. Eligibility can be determined by customer enrollment in any one of the following programs: Temporary Cash Assistance (TCA); Supplemental Security Income; Food Stamps; Medicaid; Federal Public Housing Assistance (Section 8); Low-Income Home Energy Assistance Plan; National School Lunch Program's Free Lunch Program; or Bureau of Indian Affairs Programs. In addition to the program-based criteria, AT&T, Embarq, and Verizon customers with annual incomes up to 135 percent of the Federal Poverty Guidelines may be eligible to participate in the Florida Link-Up and Lifeline programs.

² As defined by Section 364.025(1), Florida Statutes, the term "universal service" means "an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market

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PAA-TX (PAA Order), issued February 13, 2008, and Petition for Formal Hearing (“Protest”). An issue identification conference was held between Prosecutorial staff and VCI, on March 13, 2008, which identified 11 tentative issues. An Order Establishing Procedure (Order No. PSC-08-0194-PCO-TX) was issued on March 26, 2008, setting out the procedure for the Section 120.57, Florida Statutes (F.S.), hearing requested by VCI.

Prosecutorial staff filed a Motion to Compel VCI to respond to Prosecutorial staff’s discovery requests on April 22, 2008. An Order Granting the Motion to Compel on April 25, 2008, was reaffirmed when the FPSC denied VCI’s Motion for Reconsideration at the May 6, 2008 Agenda Conference. On May 5, 2008, VCI filed its Motion.

Standard of Review for a Motion to Dismiss

Generally, a motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

In this case, however, VCI alleges that the FPSC lacks subject matter jurisdiction³ to hear the matter at hand, arguing that ETC status is within the exclusive purview of the FCC. Florida courts regularly review arguments concerning subject matter jurisdiction on Motions to Dismiss. See, Bradshaw v. Ultra-Tech Enters., Inc., 747 So. 2d 1008, 1009 (Fla. 2d DCA 1999) (affirming dismissal of complaint based on ERISA preemption of state law); Doe v. Am. Online, Inc., 718 So. 2d 385, 388 (Fla. 4th DCA 1998) (rejecting the argument that a federal preemption defense constituted an affirmative defense that should have been raised in an answer, not on a motion to dismiss), Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2d DCA 1997, 697 So. 2d 158, 160 (addressing an issue raised in defendant's motion to dismiss regarding federal preemption of plaintiff's claims).

Subject matter jurisdiction is an agency’s power to hear and determine the causes of a general class of cases to which a particular case belongs. *2 Am. Jur 2d Administrative Law* § 281. Furthermore, the question of subject matter jurisdiction can be raised at any time. Stel-Den of Am., Inc. v. Roof Structures, Inc., 438 So. 2d 882, 884 (Fla. 4th DCA 1983), rev. denied, 450 So. 2d 488 (Fla. 1984).

demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers, including those in rural, economically disadvantaged, and high-cost areas.” The Federal Universal Service Fund pays for four programs. They are Link-Up/Lifeline, High Cost, Schools and Libraries, and Rural Health Care.

³ Florida courts, including the Florida Supreme Court, have held that the issue of federal preemption is a question of subject matter jurisdiction. Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561 (Fla. 2005); citing Jacob Wind Elec. Co. v. Dep’t of Transp., 626 So. 2d 1333, 1335 (Fla. 1993); Bankers Risk Mgmt. Servs. Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2nd DCA 1997); Fla. Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1183 (Fla. 1st DCA 1992).

VCI's Motion to Dismiss does not address the FPSC's authority to revoke VCI's CLEC Certificate

On January 10, 2006, VCI was granted Competitive Local Exchange (CLEC) certificate of public convenience and necessity No. 8611 by Order No. PSC-06-0035-PAA-TX. In its Motion, VCI only focuses on whether the FPSC has subject matter jurisdiction to revoke VCI's ETC status. However, the instant docket is not limited to revocation of VCI's ETC status. In its PAA Order, the FPSC proposed to revoke both VCI's ETC status and its CLEC certificate. Furthermore, the parties agreed to the following issue, as set forth in the OEP:

11. (a) Has VCI willfully violated any lawful rule or order of the Commission, or provision of Chapter 364?

(b) If so, should VCI's competitive local exchange company certificate be revoked?⁴

Pursuant to Rule 25-24.820, Florida Administrative Code (F.A.C.), the FPSC may on its own motion, after notice and opportunity for hearing, revoke a company's certificate for the following reasons: (a) Violation of a term or condition under which the authority was originally granted; (b) Violation of Commission rule or order; (c) Violation of Florida Statute; or (d) Violation of a price list standard. The FPSC clearly has authority to revoke VCI's CLEC certificate and VCI has not challenged the FPSC's authority to do so. Consequently, regardless of the FPSC's determination regarding subject matter jurisdiction to revoke VCI's ETC status, this proceeding should not be held in abeyance pending judicial review. Rather, the hearing schedule should be maintained as set forth in the OEP to allow the FPSC to address whether VCI's CLEC certificate should be revoked.⁵

VCI's Motion to Dismiss must fail because VCI has failed to exhaust its administrative remedies.

Florida Courts have set forth the following test for determining whether an administrative forum may be bypassed once an issue has been raised challenging an agency's jurisdiction to take certain action:

When an agency acts without colorable statutory authority that is clearly in excess of its delegated powers, a party is not required to exhaust administrative remedies before seeking judicial relief. A finding of lack of colorable statutory authority provides the necessary limitation on this exception to the requirement of

⁴ Issue 11 is separate and distinct from Issue 9 which requires the Commission to determine:

- (a) Has VCI violated any PSC rule or order applicable to VCI pertaining to ETC status or Lifeline and Link-Up service?
- (b) If so, what is the appropriate remedy, if any?

⁵ Prosecutorial staff notes that if the Commission determines that VCI's CLEC certificate should be cancelled, VCI would no longer be certificated to do business in the state of Florida as a CLEC. Thus, rendering moot the issues regarding the revocation of VCI's ETC status.

exhaustion of administrative remedies. A jurisdictional claim, which has apparent merit, or one which depends upon factual determination, in most instances requires exhaustion of administrative remedies before resort to judicial forum. Florida Power Corp. v. DEP 605 So. 2d 149 (Fla. 1st DCA 1992). See also, e.g., Department of Env'tl. Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 796-97 (Fla. 1st DCA 1982), review denied, 436 So. 2d 98 (Fla. 1983). St. Joe Paper Co. v. Department of Natural Resources, 536 So. 2d 1119 (Fla. 1st DCA 1988); Department of Professional Regulation v. Marrero, 536 So. 2d 1094 (Fla. 1st DCA 1988), [**6] review denied, 545 So. 2d 1360 (Fla. 1989)

As discussed in detail below, Prosecutorial staff firmly believes the FPSC has colorable statutory authority pursuant to both state and federal law to revoke VCI's ETC status. Furthermore, the FPSC has yet to make any findings regarding VCI's operations as an ETC and its provisioning of Lifeline and Link-Up service to Florida consumers.

Furthermore, as pointed out by VCI on page 32 of its Motion, Section 364.27, F.S. sets forth that:

364.27 Powers and duties as to interstate rates, fares, charges, classifications, or rules of practice.--The commission shall investigate all interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transmission of messages or conversations, where any act relating to the transmission of messages or conversations takes place within this state, and when such rates, fares, charges, classifications, or rules of practice are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934," and the acts amendatory thereof and supplementary thereto, or in conflict with the rulings, orders, or regulations of the Federal Communications Commission, the commission shall apply, by petition, to the Federal Communications Commission for relief and may present to the Federal Communications Commission all facts coming to its knowledge as to violation of the rulings, orders, or regulations of that commission or as to violations of the act to regulate commerce or acts amendatory thereof or supplementary thereto.

Pursuant to 364.27, F.S., the FPSC may present to the FCC, in a petition for relief, all facts coming to its knowledge as to violation of the rulings, orders, or regulations of the FCC. The FPSC has yet to issue a Final Order revoking VCI's ETC status. Consequently, after the opportunity for a Section 120.57, F.S. hearing, the FPSC may find it appropriate to forward to the FCC, by way of a petition, any factual findings which implicate a violation by VCI of any FCC rulings, orders, or regulations.

Finally, as mentioned by Prosecutorial staff above, if the FPSC finds it appropriate to cancel VCI's CLEC certificate, thereby prohibiting VCI from operating as a CLEC in the state of Florida, the FPSC need not address VCI's ETC status because the issues addressing VCI's ETC status would be rendered moot.

Accordingly, VCI's Motion must fail because VCI has failed to exhaust its administrative remedies in accordance with Florida law.⁶

FPSC's authority over telecommunications companies is broad, and the FPSC has jurisdiction over the company and the subject matter.

The FPSC is entrusted by the Legislature in Section 364.01(4)(a), F.S. to protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices. In Florida Public Telecommunications Associate, Inc v. City of Miami, 321 F.3d 1046 (11th Cir. Fla., 2003), the Court held that "[a] reading of the enabling statute shows that the Florida Legislature granted to the Florida Public Service Commission broad and exclusive powers to regulate telecommunications companies. Specifically, Section 364.01, F.S. grants to FPSC the exclusive jurisdiction over the regulation of telecommunications companies within Florida. The language of the statute leaves no doubt about the broad and exclusive powers granted to the FPSC to regulate telecommunications companies including their services and facilities." The Court further held that "[w]e find it unpersuasive to argue that the Florida Legislature should have itemized the powers of the FPSC when it gave it such broad and exclusive authority over telecommunications companies." *Id.* at 1050.

Pursuant to Section 214(e) of the Act, state commissions are allowed to designate ETCs. Section 364.10(2), F.S. establishes the FPSC's state authority to designate ETCs.

The Florida Legislature has expressly set forth its intent that the FPSC serve as the guardian of Florida's Lifeline Assistance Program.

Pursuant to Section 364.10(2), F.S. "...an eligible telecommunications carrier shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commission-approved tariff or price list . . . For the purposes of this section, the term "eligible telecommunications carrier" means a telecommunications company, as defined by Section 364.02, which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. 54.201." The Florida legislature has granted the FPSC the express power to designate ETCs.

In addition to Section 364.10(2), which provides for designation of ETCs, the following pertinent subsections of Section 364.10, F.S., discuss the role of an ETC in the State of Florida.

(b) An eligible telecommunications carrier shall offer a consumer who applies for or receives Lifeline service the option of blocking all toll calls or, if technically capable, placing a limit on the number of toll calls a consumer can make. The eligible telecommunications carrier may not charge the consumer an administrative charge or other additional fee for blocking the service.

⁶ Prosecutorial staff believes that VCI's Motion to Dismiss is yet another attempt by VCI in this proceeding to delay the Commission's ultimate resolution of the issues in this proceeding. Prosecutorial staff notes further that VCI has received \$51,966.00 and \$53,461.00 in universal service funds from USAC for March and April for its operations as an ETC in Florida.

(c) An eligible telecommunications carrier may not collect a service deposit in order to initiate Lifeline service if the qualifying low-income consumer voluntarily elects toll blocking or toll limitation. If the qualifying low-income consumer elects not to place toll blocking on the line, an eligible telecommunications carrier may charge a service deposit.

(d) An eligible telecommunications carrier may not charge Lifeline subscribers a monthly number-portability charge.

(e)1. An eligible telecommunications carrier must notify a Lifeline subscriber of impending termination of Lifeline service if the company has a reasonable basis for believing that the subscriber no longer qualifies. Notification of pending termination must be in the form of a letter that is separate from the subscriber's bill.

2. An eligible telecommunications carrier shall allow a subscriber 60 days following the date of the pending termination letter to demonstrate continued eligibility. The subscriber must present proof of continued eligibility. An eligible telecommunications carrier may transfer a subscriber off of Lifeline service, pursuant to its tariff, if the subscriber fails to demonstrate continued eligibility.

3. The commission shall establish procedures for such notification and termination.

(f) An eligible telecommunications carrier shall timely credit a consumer's bill with the Lifeline Assistance credit as soon as practicable, but no later than 60 days following receipt of notice of eligibility from the Office of Public Counsel or proof of eligibility from the consumer.

...

(b) Each eligible telecommunications carrier subject to this subsection shall provide to each state and federal agency providing benefits to persons eligible for Lifeline service applications, brochures, pamphlets, or other materials that inform the persons of their eligibility for Lifeline, and each state agency providing the benefits shall furnish the materials to affected persons at the time they apply for benefits.

...

(d) An eligible telecommunications carrier may not discontinue basic local exchange telephone service to a subscriber who receives Lifeline service because of nonpayment by the subscriber of charges for nonbasic services billed by the telecommunications company, including long-distance service. A subscriber who receives Lifeline service shall be required to pay all applicable basic local exchange service fees, including the subscriber line charge, E-911, telephone relay system charges, and applicable state and federal taxes.

(e) An eligible telecommunications carrier may not refuse to connect, reconnect, or provide Lifeline service because of unpaid toll charges or nonbasic charges other than basic local exchange service.

(f) An eligible telecommunications carrier may require that payment arrangements be made for outstanding debt associated with basic local exchange service, subscriber line charges, E-911, telephone relay system charges, and applicable state and federal taxes.

(g) An eligible telecommunications carrier may block a Lifeline service subscriber's access to all long-distance service, except for toll-free numbers, and may block the ability to accept collect calls when the subscriber owes an outstanding amount for long-distance service or amounts resulting from collect calls. However, the eligible telecommunications carrier may not impose a charge for blocking long-distance service. The eligible telecommunications carrier shall remove the block at the request of the subscriber without additional cost to the subscriber upon payment of the outstanding amount. An eligible telecommunications carrier may charge a service deposit before removing the block.

Each of these requirements contemplates a continuing regulatory relationship between the FPSC and ETCs designated by the FPSC. Consequently, in addition to the FPSC having the primary responsibility for performing ETC designations, the FPSC also possess the concomitant duty to rescind ETC designations for failure of an ETC to comply with the requirements of Section 214(e) of the Telecommunications Act or any other conditions imposed by the state.

VCI argues that once the FPSC grants an ETC designation, the FPSC lacks the explicit authority to revoke such designation. It is inherent that a designation includes the ability to rescind or revoke. State Board of Education v. Nelson, 372 So. 2d 114 (1st DCA 1979), stating that “[t]he power to issue a certificate, in keeping with the broad objectives to be accomplished by these legislative enactments, necessarily and by fair implication includes the authority to specify the conditions under which such certificates shall be held and revoked.” Furthermore, the court found that “[a]lthough the authority to decertify those who have been erroneously granted certification without meeting the basic requirements of *Fla. Stat.Ch. 943.13* is not explicit in the language of the statute, the power to certify necessarily and by fair implication carries with it the authority to decertify.” Cirnigliaro v. Florida Police Standards and Training Comm’n, 409 So. 2d 80 (1st DCA 1982).

The court in Coca-Cola Co. v. State, 406 So. 2d 1079 (Fla. 1981) found that “[t]he powers of this [Florida Dept. of Citrus] and similar agencies include both those expressly given and those given by clear and necessary implication from the provisions of the statute”, citing City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965).

Furthermore, Section 364.10(h)(2), F.S., requires the FPSC to maintain a regulatory relationship with Florida ETCs for the purpose of ensuring that Lifeline eligible consumers are automatically enrolled in the Lifeline program with the appropriate carrier. In requiring the FPSC to act as a “middle man” in the automatic enrollment process, the Legislature once again

recognized the FPSC's role as guardian of the Florida Lifeline program. Therefore, it must follow that the legislature could not have intended for the FPSC to continue forwarding eligible customers to an ETC, the FPSC believes or has knowledge is acting contrary to the public interest.

Consequently, prosecutorial staff believes it is inherent in the FPSC's role as the agency that grants ETC status and the guardian of the Florida Lifeline program that the FPSC has the authority to revoke ETC designation.

Congress and the FCC have recognized the state commission's role in monitoring and addressing the operations of ETCs.

In the Federal Telecommunications Act of 1996 (the Act), Congress has designated specific areas where state commissions are authorized to act. Pursuant to Section 214(e)(2) of the Act, state commissions are authorized to designate common carriers as ETCs if it is in the public interest. Additionally, Section 254(f) of the Act sets forth that states may adopt regulations not inconsistent with the FPSC's rules to preserve and advance universal service. For regulation aimed at promoting universal service, Section 254(f) provides a hierarchy in which states cannot conflict with the federal universal services program, but states are clearly authorized to build upon the federal program to support universal service. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001). Clearly, Congress contemplated that states play an integral role in the advancement of universal service.⁷ Prosecutorial staff believes that a state's role appropriately includes not only the designation of ETCs but also revocation if a state is aware that the operation of an ETC is no longer in the public interest.

The FCC has held that "Individual state commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements." *In the Matter of Federal-State Joint Board on Universal Service*, FCC Order 05-46, 20 FCC Rcd 6371 (March 17, 2005, Released; February 25, 2005, Adopted) The FCC has further recognized that that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria. *In the Matter of Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, FCC Order 00-248, 15 FCC Rcd 15168, (August 10, 2000 Released; Adopted July 11, 2000)⁸

In the instant case, after an audit was conducted to ensure VCI was utilizing USF monies for their intended purposes, the FPSC proposed to take action because VCI appeared to be engaged in double reimbursement amongst other violations and if so, it was no longer in the public interest that VCI be designated as an ETC in the state of Florida.

⁷ States are clearly authorized to build upon the federal program to support universal service. *Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001).

⁸ Likewise, the Joint Board has noted that state commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of section 214(e) of the Act or any other conditions imposed by the state." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, Adopted February 25, 2005, Released March 17, 2005, FCC 05-46, ¶71-72).

Prosecutorial staff notes that the FCC has addressed double recovery of universal service support and found that it is not in the public interest nor pro-competitive to allow double recovery.⁹ The FCC also identified the need for verification of the accuracy of data to ensure that an ETC has not obtained double recovery.¹⁰

Prosecutorial staff respectfully requests the FPSC deny VCI's Motion to Dismiss.

Prosecutorial staff respectfully requests the FPSC deny VCI's Motion to Dismiss because, as set forth above, VCI has failed to exhaust its administrative remedies as required by Florida law. Furthermore, dismissal or abatement of this proceeding is not appropriate because the FPSC has explicit authority to revoke VCI's CLEC certificate if it determines that VCI has willfully violated any lawful rule or order of the FPSC, or provision of Chapter 364.

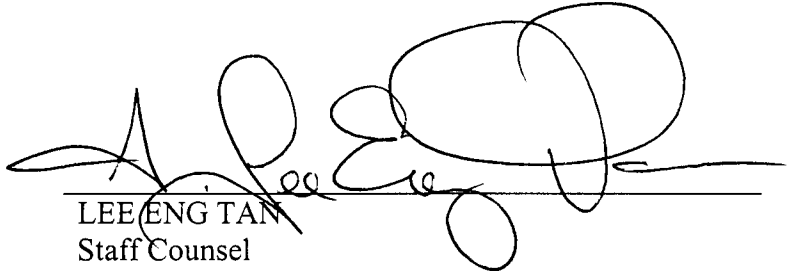
Additionally, as discussed in detail above, the FPSC has colorable authority pursuant to Section 364.10, F.S and Section 214(e) of the Act to revoke VCI's ETC designation on its own Motion. If VCI's Motion to Dismiss is granted, it raises a significant question as to the FPSC's ability to protect consumers in the event that an ETC's operations are contrary to the public interest.

⁹ As previously discussed, if pure resellers could be designated eligible carriers and were entitled to receive support for providing resold services, they, in essence, would receive a double recovery of universal service support because they would recover the support incorporated into the wholesale price of the resold services in addition to receiving universal service support directly from federal universal service support mechanisms . . . we conclude that it is neither in the public interest nor would it promote competitive market conditions to allow resellers to receive a double recovery. Indeed, allowing such a double recovery would appear to favor resellers over other carriers, which would not promote competitive market conditions. Allowing resellers a double recovery also would be inconsistent with the principle of competitive neutrality because it would provide inefficient economic signals to resellers." *In the Matter of Federal-State Joint Board on Universal Service*, released May 8, 1997, CC Docket No. 96-45, FCC 97-157, ¶169

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service, Schools and Libraries Universal Service Support Mechanism, Rural Health Care Support Mechanism, Lifeline and Link-Up*, CC Docket No. 96-45, CC Docket No. 02-6, WC Docket No. 02-60, WC Docket No. 03-109, Order, Adopted: October 14, 2005 Released: October 14, 2005, FCC 05-178, ¶23

Conclusion

For the reasons set forth above, Prosecutorial staff respectfully requests that the FPSC summarily deny VCI's Motion to Dismiss or in the Alternative to Abate proceedings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Prosecutorial Staff's Response In Opposition To Vilaire Communications, Inc.'s Motion To Dismiss or in the Alternative to Abate Proceedings has been served by U.S. Mail to Bruce Culpepper, Akerman Senterfitt Law Firm, 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301, and that a true copy thereof has been furnished to the following by U. S. mail or by (*) hand delivery this 12th day of May, 2008:

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