

State of Florida



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

DATE: June 2, 2008

TO: Matthew M. Carter II, Chairman
Lisa Polak Edgar, Commissioner
Katrina J. McMurrin, Commissioner
Nancy Argenziano, Commissioner
Nathan A. Skop, Commissioner

FROM: Rosanne Gervasi, Senior Attorney, Office of the General Counsel *res smc.*
David Dowds, Division of Competitive Markets & Enforcement *[Signature]*

RE: Docket No. 080065-TX – In Re: Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida. *[Signature]*

MEMORANDUM OF LAW

Case Background

By Order No. PSC-08-0090-PAA-TX, issued February 13, 2008, in this docket (PAA Order), the Commission proposed to rescind Vilaire Communications, Inc.'s (VCI or company) eligible telecommunications carrier (ETC) status and to cancel its Competitive Local Exchange Company (CLEC) certificate. On March 5, 2008, VCI timely filed a protest of the PAA Order and a petition for formal hearing. Therefore, this matter is scheduled for a formal hearing on June 4, 2008. An Order Establishing Procedure, Order No. PSC-08-0194-PCO-TX, was issued on March 26, 2008.

On March 31, 2008, the prosecutorial staff served its First Set of Interrogatories and First Request for Production of Documents on VCI (Discovery). VCI timely filed general and specific objections thereto on April 7, 2008, and a partial response to the Discovery on April 15, 2008. On April 22, 2008, prosecutorial staff filed a Motion to Compel Discovery (Motion to Compel), seeking full and complete responses to the Discovery by 12 p.m. on April 30, 2008.

By Order No. PSC-08-0258-PCO-TX, issued April 25, 2008, the Prehearing Officer granted the Motion to Compel and required VCI to respond to the Discovery within seven days of the issuance date of the Order, by May 2, 2008. On May 2, 2008, VCI instead filed a Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. By Order No. PSC-08-0304-PCO-TX, issued May 8, 2008 (Discovery Order), the Commission denied VCI's Motion for Reconsideration and ordered VCI to fully answer the Discovery by the close of business on

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Friday, May 9, 2008. Rather than complying with the Discovery Order, on May 9, 2008, VCI instead filed a letter stating that it declined to provide the information sought by the Discovery.

On May 13, 2008, the prosecutorial staff filed a Motion to Impose Sanctions Due to VCI's Failure to Comply with the Discovery Order (Motion to Impose Sanctions). VCI filed no response to the Motion. Also on May 13, 2008, VCI filed a Motion to Dismiss Proceedings for Lack of Subject Matter Jurisdiction or in the Alternative, to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction (Motion to Dismiss) and Request for Oral Argument, to which prosecutorial staff responded on May 12, 2008.¹

On May 27, 2008, VCI filed a letter stating that it will no longer participate in any aspect of this docket, including the Prehearing Conference scheduled for May 28, 2008. The Prehearing Officer convened the Prehearing Conference and took appearances. VCI did not appear. Therefore, the Prehearing Officer found it unnecessary to address the draft prehearing order and no prehearing order has been issued in the case. The Prehearing Officer directed advisory staff to file a recommendation for the Commission's consideration as a preliminary matter at the start of the June 4, 2008, hearing, to address VCI's May 27, 2008, letter, as well as the pending Motion to Impose Sanctions and Motion to Dismiss. This Memorandum is filed in compliance with that directive.

The Commission has jurisdiction pursuant to Sections 120.80(13), 364.10(2), 364.27, 364.285, 364.335, 364.337, and 364.345, Florida Statutes (F.S.).

¹ VCI served its Motion to Dismiss on the prosecutorial staff on May 5, 2008, but did not perfect the filing of the Motion until May 13, 2008.

Discussion of Issues

ISSUE 1: Should Prosecutorial Staff's Motion to Impose Sanctions Due to VCI's Failure to Comply with Order No. PSC-08-0304-PCO-TX be granted?

RECOMMENDATION: Yes. VCI's protest of the PAA Order and request for hearing should be dismissed with prejudice and the PAA Order should be made final and effective by way of a Consummating Order. (Gervasi)

STAFF ANALYSIS:

I. VCI's Letter Declining to Provide Discovery

In its May 9, 2008, letter in which it declined to provide the Discovery as ordered by the Discovery Order, VCI stated that the information sought by the Discovery is integrally related to the jurisdictional question presented in its Motion to Dismiss, that VCI is intent on preserving the issue of the Commission's jurisdiction for judicial review, and that VCI is unwilling to waive its objections by providing further discovery. In the letter, VCI states that "[it] believes that the Commission is without jurisdiction in this matter and, therefore, was without authority to compel discovery. Consequently, the Commission's discovery ruling was an invalid exercise of authority. Under these circumstances, [VCI] must respectfully decline to provide the information sought."

II. Motion to Impose Sanctions

The prosecutorial staff filed its Motion to Impose Sanctions pursuant to Rule 28-106.206, Florida Administrative Code (F.A.C.), and Rule 1.380, Florida Rules of Civil Procedure. Prosecutorial staff requests that the Commission dismiss VCI's Protest of the PAA Order and Request for a Section 120.57(1), F.S., administrative hearing and that the PAA Order be reinstated and consummated as a final order. The prosecutorial staff argues the following:

A. Legal Authority

The prosecutorial staff points out that the Commission may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt. Rule 1.380, Florida Rules of Civil Procedure, sets forth in pertinent part that:

(b) Failure to Comply With Order.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under

subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

(A) An order that the matters regarding which the questions were asked or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

(C) An order striking out pleadings or parts of them or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part of it, or rendering a judgment by default against the disobedient party.

Prosecutorial staff further points out that striking pleadings or entering a default judgment against a party is the most severe of all sanctions, which should be employed only in extreme circumstances.² However, a “deliberate and contumacious disregard of the court’s authority will justify application of this severest of sanctions, . . . as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness.”³

B. VCI’s Refusal to Comply

Prosecutorial staff states that on pages 10-11 of its protest of the PAA Order, VCI specifically requested that the Commission set this matter for hearing “to resolve the disputed issues of fact and law identified herein, and to allow VCI a full opportunity to present evidence and arguments as to why [the PAA Order] should be rescinded.” Subsequently, VCI and the prosecutorial staff mutually agreed upon the issues at an Issue Identification Conference. The prosecutorial staff served its Discovery on VCI on March 31, 2008, seeking to discover matters that are clearly within the scope of the agreed upon issues. The Discovery concerns matters regarding VCI’s operations as an ETC in Florida and its operations as a certificated CLEC in Florida. VCI has failed to respond to Interrogatory Nos. 1-13, 15-36 and 39 and Document Request Nos. 1-10, citing, among other things, the Commission’s lack of subject matter jurisdiction. However, VCI has not requested that the Commission address subject matter jurisdiction as a threshold issue in this proceeding.

The prosecutorial staff argues that although as a matter of law, a party may raise subject matter jurisdiction at any point in a proceeding, VCI’s refusal to respond to the Discovery without having made any formal request that the Commission address subject matter jurisdiction prior to filing its objections to the Discovery was a transparent attempt to delay the Commission’s resolution of the proceeding and impeded the Commission’s ability to conduct an

² Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983); Neal v. Neal, 636 So. 2d 810, 812 (Fla. 1st DCA 1994).

³ Mercer at 946 (citations omitted).

orderly administrative hearing on the matter. By Order No. PSC-08-0258-PCO-TX, the Prehearing Officer granted the prosecutorial staff's Motion to Compel and required VCI to serve its Discovery responses by May 2, 2008. On May 2, 2008, VCI filed its Motion for Reconsideration of Order No. PSC-08-0258-PCO-TX. It was in that filing that VCI first notified the Commission of its intent to file a Motion to Dismiss or in the alternative, hold the proceeding in abeyance pending a determination of the Commission's subject matter jurisdiction.

The prosecutorial staff further argues that VCI's refusal to comply with the Discovery Order denying VCI's Motion for Reconsideration and requiring VCI to submit its full and complete responses to the Discovery by May 9, 2008, appears to be a deliberate and willful action to further its attempts to delay the Commission's ability to conduct an orderly administrative hearing as requested by VCI. The prosecutorial staff notes that VCI has continued to apply for and receive universal service funding during the pendency of this proceeding. VCI received \$51,966 and \$53,461 in universal service funds for March and April for its operations as an ETC in Florida.

C. Commission Should Not Be Misled by VCI's Claim that PSC Lacks Jurisdiction

Prosecutorial staff argues that VCI's claim that the Commission lacks subject matter jurisdiction to revoke its ETC designation is an attempt to justify its refusal to comply with the Discovery Order, and that the Commission should not be misled by that claim. The Discovery to which Order No. PSC-08-0304-PCO-TX compels VCI to respond seeks information relevant to VCI's operations as a CLEC in Florida. VCI has not challenged the Commission's subject matter jurisdiction over its CLEC certificate. Specifically, prosecutorial staff seeks information regarding the scope of VCI's admitted overcharging of the E911 fee and VCI's alleged misapplication of late payment charges. Further, VCI agreed to Issue 11, which asks whether VCI has willfully violated any lawful rule or order of the Commission, or provision of Chapter 364, and if so, whether VCI's CLEC certificate should be revoked. In his prefiled rebuttal testimony at pages 2-3, staff witness Robert J. Casey alleges that VCI has failed to accurately report its gross operating revenues in its 2006 and 2007 regulatory assessment fee (RAF) form, in violation of section 364.336, F.S.

Moreover, prosecutorial staff argues that VCI has acknowledged the Commission's authority pursuant to section 364.27, F.S., to investigate violations of the rulings, orders, or regulations of the FCC. On page 32 of its Motion to Dismiss, VCI states that

[t]he Commission is empowered to investigate interstate rules of practice for or in relation to the transmission of messages or conversations taking place within Florida which in the Commission's opinion violate the Act or the FCC's orders and regulations. But the Commission's power with respect to such interstate matters is limited to referring violations to the FCC by petition.

According to the prosecutorial staff, VCI's acknowledgement that the Commission has explicit authority to investigate such matters is demonstrative of VCI's deliberate and willful disregard of

the Discovery Order. VCI's acknowledgement also further supports prosecutorial staff's argument set forth in its Response to VCI's Motion to Dismiss that VCI has failed to exhaust its administrative remedies in this proceeding. After the opportunity for a section 120.57(1), F.S., hearing, the Commission may find it appropriate to forward its factual findings to the FCC pursuant to section 364.27, F.S. However, VCI's deliberate and willful refusal to comply with the Discovery Order prevents the Commission from conducting an orderly proceeding and considering evidence from both VCI and prosecutorial staff in making its final factual determinations.

Finally, the prosecutorial staff points out that VCI did not include Interrogatory Nos. 1, 3, 6, 34, and 39 and Document Request Nos. 1 and 10 in its objection to the Discovery on the grounds that the Commission lacked subject matter jurisdiction. On pages 3-4 of VCI's Motion for Reconsideration, VCI states that "[t]he Discovery Requests that will be most directly impacted by VCI's motion to dismiss are those touching on, wholly or in part, VCI's operations as an ETC, specifically Interrogatory Nos. 2, 4, 5, 7, 8-32, 35, 36 and 38 and Request Nos. 2, 3, 4, 5, 6, 7, 8 and 9." Prosecutorial staff argues that because VCI did not identify Interrogatory Nos. 1, 3, 6, 34, and 39 and Document Request Nos. 1 and 10, it cannot now claim lack of subject matter jurisdiction in failing to comply with the Discovery Order. This is yet another example of VCI's deliberate and willful disregard of the Discovery Order.

III. VCI's Statement of Non-Participation

In its May 27, 2008, letter, VCI gives five reasons why it will no longer participate in any aspect of this docket.

1) Information forming the basis for this proceeding was obtained through improper channels by way of an unauthorized Commission audit, and pertains to matters that are outside the Commission's jurisdiction;

2) The Commission is without subject matter jurisdiction to initiate, prosecute or adjudicate matters concerning VCI's operations as an ETC, and thus is without authority to issue orders in this proceeding. Any and all current or future orders issued by the Commission in this proceeding are unenforceable. The Commission has refused to decide its jurisdiction over this matter, which suggests the Commission's willingness to prejudice and punish VCI regardless of its authority, and which results in VCI being forced to allocate its limited resources to pursuing relief in other judicial forums;

3) The Commission's prosecution of VCI in this proceeding violates VCI's Constitutional rights. The Commission failed to provide VCI with proper notice in contravention of VCI's rights to due process under the Florida and U.S. Constitutions;

4) VCI can no longer afford to allocate company resources to defend itself in this proceeding. VCI is a small company with limited financial resources, and has been expending upwards of \$40,000 in legal fees per month; and

5) VCI will discontinue participation in this proceeding in order to direct its attention and resources to pursuing its claim against the Commission filed in the Federal District Court for the Northern District of Florida.

IV. Analysis and Recommendation

The Order Establishing Procedure issued in this case states that “[d]iscovery shall be conducted in accordance with the provisions of Chapter 120, F.S., and the relevant provisions of Chapter 364, F.S., Rules 25-22, 25-40, and 28-106, F.A.C., and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.”⁴ The “Tentative List of Issues,” as agreed upon by the prosecutorial staff and VCI, are attached to that Order as Attachment A.⁵ Whether the Commission has jurisdiction to address VCI’s ETC status is specifically identified in those issues, as follows:

7. Does the PSC have the authority to enforce an FCC statute, rule or order pertaining to ETC status, Lifeline, and Link-Up service?
- 8.(a) Has VCI violated any FCC statute, rule or order pertaining to ETC status, or Lifeline and Link-Up service?
 - (b) If so, what is the appropriate remedy or enforcement measure, if any?
- 9.(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?
- 10.(a) Does the Commission have authority to rescind VCI’s ETC status in the state of Florida?
 - (b) If so, is it in the public interest, convenience, and necessity for VCI to maintain ETC status in the state of Florida?

For VCI to request a hearing on the PAA Order and agree to litigate these issues only to object to the Discovery pertaining to them on the basis that the Commission lacks the jurisdiction to even ask for information about them, let alone address and rule on them, is incongruous, at best. VCI also objected to much of the Discovery on the basis that it was overly burdensome and time-consuming, yet at no point in time did VCI request an extension of time to file its responses to any of the Discovery. And as prosecutorial staff points out in its Motion to Impose Sanctions, certain of the Discovery does not even pertain to the issues which VCI argues are beyond the Commission’s jurisdiction to address.

⁴ Order No. PSC-08-0194-PCO-TX at 2.

⁵ Id. at 10.

VCI's objections were overruled by Order No. PSC-08-0258-PCO-TX, granting the prosecutorial staff's Motion to Compel, and VCI's Motion for Reconsideration of that Order was denied by Order No. PSC-08-0304-PCO-TX. Order No. PSC-08-0304-PCO-TX expressly required VCI to fully answer the Discovery by the close of business on Friday, May 9, 2008. Rather than complying with the Discovery Order, VCI elected to file a letter on that date, stating that it is unwilling to waive its objections by providing further discovery, and expressly declining to provide the information that the Commission ordered it to provide because VCI believes the Commission lacks jurisdiction in this matter. VCI has no legal right to disregard the Discovery Order simply because it disagrees that the Commission has jurisdiction over this matter. As noted in the First District Court of Appeal's opinion filed May 16, 2008, *per curiam* denying VCI's Petition for Writ of Prohibition filed May 15, 2008, requesting that the Court prohibit the Commission from ruling on this matter, the lower tribunal has jurisdiction to determine its own jurisdiction.⁶

In requesting that the Commission dismiss VCI's Protest and reinstate and consummate the PAA Order as a final order, the prosecutorial staff acknowledges that striking pleadings or entering a default judgment against a party is the most severe of all sanctions, which should be employed only in extreme circumstances.⁷ Advisory staff agrees with the prosecutorial staff that the circumstances of this case are extreme. As evidenced by its letter dated May 9, 2008, VCI has deliberately and willfully defied the Discovery Order after requesting a hearing on the matter and agreeing upon the issues to be litigated. As prosecutorial staff points out, a "deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, . . . as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness."⁸

Advisory staff is mindful that the severity of the sanction for noncompliance with an order compelling discovery should be commensurate with the violation, and that dismissal is inappropriate when the moving party is unable to demonstrate meaningful prejudice.⁹ The prosecutorial staff, and ultimately the Commission, are clearly prejudiced by VCI's willful defiance of the Discovery Order. VCI has prevented the prosecutorial staff from preparing for the hearing through the use of the discovery process. Moreover, as prosecutorial staff points out, VCI has prevented the Commission from conducting an orderly proceeding and considering evidence on the issues from both parties in making its final factual determinations.

⁶ VCI Co. d/b/a Vilaire Communications v. FPSC, Case No. 1D08-2383. The Court cited to Mandico v. Taos Const., Inc., 605 So. 2d 850 (Fla. 1992) (holding that the lower tribunal has jurisdiction to determine its own jurisdiction and prohibition will not lie to divest a lower tribunal of jurisdiction to hear and determine that question); and Board of County Comm'rs of Metro-Dade County v. Wood, 662 So. 2d 417 (Fla. 3d DCA 1995) (reversing circuit court's granting of prohibition relief where board had not ruled on issue of its jurisdiction).

⁷ Mercer v. Raine, 443 So. 2d at 946; Neal v. Neal, 636 So. 2d at 812 (*supra*, at note 1).

⁸ Mercer v. Raine, 443 So. 2d at 946 (*supra*, at note 2).

⁹ Neal v. Neal, 636 So. 2d at 812 (*supra*, at note 1) (citations omitted).

VCI's May 27, 2008 statement of non-participation in this proceeding further shows that the ultimate sanction of dismissal is warranted in this case.¹⁰ VCI failed to participate in the prehearing and has stated its intent not to participate in the hearing that it requested. Pursuant to the Order Establishing Procedure, the failure of a party to appear at the prehearing and hearing constitutes a waiver of that party's issues and positions and the party may be dismissed from the proceedings.¹¹

Rule 1.380(b)(2)(C), Florida Rules of Civil Procedure, expressly provides the Commission with the authority to grant the prosecutorial staff's Motion to Impose Sanctions under these circumstances. Despite its willful disregard of the Discovery Order and its pronouncement that it will no longer participate in this proceeding, throughout the pendency of the proceeding VCI has continued its operations as a CLEC in Florida and has continued to receive universal service funding for its operations as an ETC in Florida. By its willful disregard of the Discovery Order and failure to participate in the prehearing and hearing, VCI has forfeited its right to a hearing in this matter.

Based upon the foregoing, advisory staff recommends that the prosecutorial staff's Motion to Impose Sanctions should be granted. VCI's protest of the PAA Order and request for hearing should be dismissed with prejudice and the PAA Order should be made final and effective by way of a Consummating Order.

¹⁰ Advisory staff notes that on May 23, 2008, the prosecutorial staff filed a letter stating that VCI had also indicated that it would only make its witness, Mr. Stanley Johnson, available for deposition on 3 of the 11 issues identified in the case.

¹¹ Order No. PSC-08-0194-PCO-TX at 5 and 7.

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Issue 2: Should VCI's Motion to Dismiss Proceedings for Lack of Subject Matter Jurisdiction or in the Alternative, to Abate Proceedings Pending Federal District Court Decision on Subject Matter Jurisdiction be granted?

Recommendation: No, the Motion to Dismiss or Abate Proceedings, as well as VCI's Request for Oral Argument on the Motion, should be denied as moot. (Gervasi)

Staff Analysis: If the Commission agrees with the advisory staff's recommendation in Issue 1 of this memorandum, VCI's Motion to Dismiss or Abate and Request for Oral Argument on the Motion should be denied as moot. Advisory staff notes that the Commission determined its jurisdiction to rule on this matter in the PAA Order and, as stated in the case background, the Commission has jurisdiction pursuant to Sections 120.80(13), 364.10(2), 364.27, 364.285, 364.335, 364.337, and 364.345, F.S.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Order No. PSC-08-0090-PAA-TX should become final and effective upon the issuance of a Consummating Order. However, the docket should remain open in order for VCI to complete the required refund of excess E911 overcharges and verify the transition of VCI customers to AT&T, after which time this docket should be closed administratively. (Gervasi, Dowds)

STAFF ANALYSIS: Order No. PSC-08-0090-PAA-TX should become final and effective upon the issuance of a Consummating Order. However, the docket should remain open in order for VCI to complete the required refund of excess E911 overcharges and verify the transition of VCI customers to AT&T, after which time this docket should be closed administratively.

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