

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Investigation of Vilaire<br>Communications, Inc.'s eligible<br>telecommunications carrier status and<br>competitive local exchange company<br>certificate status in the State of Florida. | DOCKET NO. 080065-TX<br>ORDER NO. PSC-08-0387-FOF-TX<br>ISSUED: June 10, 2008 |
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The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

ORDER GRANTING MOTION TO IMPOSE SANCTIONS;  
DENYING MOTION TO DISMISS OR ABATE PROCEEDINGS;  
DISMISSING PROTEST OF ORDER NO. PSC-08-0090-PAA-TX AND  
REQUEST FOR HEARING WITH PREJUDICE; AND  
CONSUMMATING ORDER NO. PSC-08-0090-PAA-TX

BY THE COMMISSION:

I. Background

By Order No. PSC-08-0090-PAA-TX, issued February 13, 2008, in this docket (PAA Order), we 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 was 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, our 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, the 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), we denied VCI's Motion for Reconsideration and

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ordered VCI to fully answer the Discovery by the close of business on 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.

In its May 9, 2008, letter, VCI states that it is unwilling to waive its objections to the Discovery because the Discovery is integrally related to the jurisdictional question presented in its 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 or Abate), filed May 13, 2008. VCI contemporaneously filed a Request for Oral Argument on the Motion. The prosecutorial staff filed a Response to the Motion on May 12, 2008.<sup>1</sup>

On May 27, 2008, VCI filed a letter stating that it will no longer participate in any aspect of this docket, including the prehearing scheduled for May 28, 2008, and the hearing scheduled for June 4, 2008. The Prehearing Officer convened the prehearing and took appearances. VCI did not appear. Therefore, the Prehearing Officer found it unnecessary to address the draft prehearing order and no prehearing order was issued in the case.

On June 2, 2008, at the Prehearing Officer's directive, our advisory staff filed a recommendation for our 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 or Abate. We convened the hearing on June 4, 2008, and VCI failed to appear.<sup>2</sup> No full evidentiary hearing was conducted.

This Order memorializes our decision made at the start of the June 4, 2008 hearing on the two pending motions and consummates the PAA Order. We have 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.).

## 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 we 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.

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<sup>1</sup> 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.

<sup>2</sup> We note that on June 2, 2008, the Federal District Court for the Northern District of Florida denied VCI's Motion for Preliminary Injunctive Relief of an Emergency Nature, which VCI filed in that Court in an effort to restrain us from exercising subject matter jurisdiction in this proceeding. We further note that on May 16, 2008, the First District Court of Appeal per curiam denied VCI's Petition for Writ of Prohibition filed May 15, 2008, in that Court, also in an effort to restrain us from exercising subject matter jurisdiction in this proceeding. VCI Co. d/b/a Vilaire Communications v. FPSC, Case No. 1D08-2383.

A. Legal Authority

The prosecutorial staff points out that we 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.<sup>3</sup> 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.”<sup>4</sup>

B. VCI’s Refusal to Comply

Prosecutorial staff points out that on pages 10-11 of its protest of the PAA Order, VCI specifically requested that this 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

<sup>3</sup> Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983); Neal v. Neal, 636 So. 2d 810, 812 (Fla. 1st DCA 1994).

<sup>4</sup> Id. at 946 (citations omitted).

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, this Commission's lack of subject matter jurisdiction. However, VCI did not request that we 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 we address subject matter jurisdiction prior to filing its objections to the Discovery was a transparent attempt to delay our resolution of the proceeding and impeded our ability to conduct an 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 us of its intent to file a Motion to Dismiss or in the alternative, hold the proceeding in abeyance pending a determination of this 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 attempt to delay this 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 2008 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 we lack subject matter jurisdiction to revoke its ETC designation is an attempt to justify its refusal to comply with the Discovery Order, and that we 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 our 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, F.S., 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 on its 2006 and 2007 regulatory assessment fee (RAF) forms, in violation of section 364.336, F.S.

Moreover, prosecutorial staff argues that VCI has acknowledged our 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 or Abate, 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 we have 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 or Abate that VCI has failed to exhaust its administrative remedies in this proceeding.

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 objections to the Discovery on the grounds that we 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, as follows:

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 our jurisdiction;

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

3) Our prosecution of VCI in this proceeding violates VCI's Constitutional rights. We 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 this Commission filed in the Federal District Court for the Northern District of Florida.

#### IV. Analysis and Rulings

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.”<sup>5</sup> The “Tentative List of Issues,” as agreed upon by the prosecutorial staff and VCI, are attached to that Order as Attachment A.<sup>6</sup> Whether we have 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 we lack the jurisdiction to even ask

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<sup>5</sup> Order No. PSC-08-0194-PCO-TX at 2.

<sup>6</sup> Id. at 10.

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 our jurisdiction to address.

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 its unwillingness to waive its objections by providing further discovery, and expressly declining to provide the information that we ordered it to provide because VCI believes we lack jurisdiction in this matter. VCI has no legal right to disregard our Discovery Order simply because it disagrees that we have jurisdiction over this matter. As noted in the First District Court of Appeal's opinion per curiam denying VCI's Petition for Writ of Prohibition requesting that the Court prohibit us from ruling on this matter, the lower tribunal has jurisdiction to determine its own jurisdiction.<sup>7</sup>

In requesting that we 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.<sup>8</sup> We agree 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."<sup>9</sup>

We are 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.<sup>10</sup> Our prosecutorial staff is 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

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<sup>7</sup> Supra, at note 2. 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).

<sup>8</sup> Mercer, 443 So. 2d at 946; Neal, 636 So. 2d at 812 (supra, at note 3).

<sup>9</sup> Mercer, 443 So. 2d at 946 (supra, at note 3).

<sup>10</sup> Neal, 636 So. 2d at 812 (supra, at note 3) (citations omitted).

discovery process.<sup>11</sup> Moreover, as prosecutorial staff points out, VCI has prevented us from conducting an orderly proceeding and considering evidence on the issues from both parties in making our final factual determinations.

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. VCI failed to participate in the prehearing and 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.<sup>12</sup>

Rule 1.380(b)(2)(C), Florida Rules of Civil Procedure, expressly provides us with the authority to grant our 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, we grant our prosecutorial staff's Motion to Impose Sanctions. VCI's protest of the PAA Order and request for hearing are dismissed with prejudice and the PAA Order is hereby made final and effective upon the issuance of this Consummating Order. Moreover, VCI's Motion to Dismiss or Abate and Request for Oral Argument on the Motion are denied as moot. In so ruling, we note that we determined our jurisdiction to rule on this matter in the PAA Order and, as previously stated herein, we have jurisdiction pursuant to Sections 120.80(13), 364.10(2), 364.27, 364.285, 364.335, 364.337, and 364.345, F.S.

This docket shall 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 shall be closed administratively. Our staff is directed to closely monitor VCI's activities in this regard and to bring the matter back before us if VCI fails to complete them in a timely fashion.

It is, therefore,

ORDERED by the Florida Public Service Commission that our prosecutorial staff's Motion to Impose Sanctions Due to VCI's Failure to Comply with the Discovery Order is granted and Vilaire Communications, Inc.'s protest of Order No. PSC-08-0090-PAA-TX and request for hearing are dismissed with prejudice. It is further

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<sup>11</sup> We note 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.

<sup>12</sup> Order No. PSC-08-0194-PCO-TX at 5 and 7.

ORDERED that Vilaire Communications, Inc.'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 and Request for Oral Argument are denied as moot. It is further

ORDERED that Order No. PSC-08-0090-PAA-TX is hereby made final and effective upon the issuance of this Order. It is further

ORDERED that this docket shall remain open in order for Vilaire Communications, Inc. to complete the required refund of excess E911 overcharges and verify the transition of its customers to AT&T, after which time this docket shall be closed administratively. Our staff is directed to very closely monitor Vilaire Communications, Inc.'s activities in this regard and to bring the matter back before us if Vilaire Communications, Inc. fails to complete them in a timely fashion.

By ORDER of the Florida Public Service Commission this 10th day of June, 2008.



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ANN COLE  
Commission Clerk

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any judicial review of Commission orders that is available pursuant to Section 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.