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Public Service Commission

October 5, 2007

Mr. Kenneth A. Hoffman
Rutledge, Ecenia, Purnell & Hoffman
Post Office Box 551
Tallahassee, FL 32302-0551

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Re: Undocketed - Audit Control No. 07-250-1-1

Dear Mr. Hoffman:

This is in response to your letter of September 18, 2007, to the General Counsel. In that letter you respectfully question the Commission's authority to audit the records of GTC, Inc. d/b/a FairPoint Communications ("FairPoint") in connection with its use of Universal Service Funds. A copy of your letter is attached.

As I understand, to date FairPoint has not complied with the data and document requests of Staff auditors based on its reservations about the Commission's authority to audit. This exposes FairPoint to potential sanctions for violation of Section 364.183(1), Florida Statutes, and Rule 25-4.0201, F.A.C., which is a situation we all wish to avoid. Thus I appreciate your letter and the opportunity to explain the Commission's authority to audit FairPoint's records.

Your letter recognizes that under Section 364.183(1), F.S., "(t) he Commission shall have access to all records of a telecommunications company that are necessary for the disposition of matters within the Commission's jurisdiction." Your letter also recognizes that the Rule 25-4.0201, F.A.C., implements that statute. You emphasize, however, that the Commission has no jurisdiction to inquire into FairPoint's financial records because the company is price-cap regulated. You next argue that "the Commission lacks jurisdiction under state law to initiate an audit of FairPoint's costs, revenues and financial statements, particularly with respect to a federal universal fund service program which is clearly outside the jurisdiction of the Commission."

In response, neither the Legislature nor the FCC views this Commission's role in the ETC process as limited as you do. For example, in the 2005 legislative session section 364.10, F.S. was amended to specifically recognize ETCs and impose on them certain obligations in connection with implementing Lifeline service. Section 364.10 (2) (a) includes the following definition of an ETC:

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For the purposes of this section, the term “eligible telecommunications carrier” means a telecommunications company as defined in Section 364.02, *which is designated as an eligible telecommunications carrier by the commission pursuant to 47 C.F.R. s. 54.201.* (emphasis added)

The legislature has thus evinced its agreement to this Commission’s participation in the ETC program established under the Act and the FCC’s rules. Moreover, in Section 364.012, Florida Statutes, the Legislature has specifically encouraged the Commission to maintain “continuous liaisons with federal agencies” such as the FCC. Thus, the Legislature has signaled its intent that the Commission participate effectively in the federal program for distributing and monitoring use of Universal Service Funds.

Next, under FCC rules, if a state wants a rural carrier within its jurisdiction to receive federal high-cost support, that state must file a certification annually with the FCC and with the Universal Service Administrative Company (USAC). The certification must affirm that the federal high-cost funds flowing to rural carriers in the state, or to any competitive eligible telecommunications carriers seeking support for serving customers within a rural carrier’s service area, will be used in a manner that comports with Section 254(e). The applicable rule provisions are as follows:

§54.314. State certification of support for rural carriers.

- (a) *State certification.* States that desire rural incumbent local exchange carriers and/or eligible telecommunications carriers serving lines in the service area of a rural incumbent local exchange carrier within their jurisdiction to receive support pursuant to §§54.30 (local switching support), 54.305 (sale or transfer of exchanges), and/or 54.307 (support to competitive ETC) of this part and/or part 36, subpart F of this chapter must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers within that State will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended...

In my opinion the requirement of state certification of proper use of funds imposes on the state the obligation to ensure that the certification is justified. Your letter seems to suggest that once the certification made for the future year, this Commission has no ability to verify that the ETC kept its word, that this audit function is reserved to USAC. I cannot acquiesce in that view for at least two simple reasons. First, I believe this Commission has an ongoing responsibility to assure that the ETC is honoring its commitments which served as the basis for the state’s certification. Second, with respect to the *next* certification, it makes perfect sense that we would audit selectively past compliance to determine whether the company’s upcoming affirmations of future compliance are trustworthy. In either event, auditing of the company’s records is within this Commission’s jurisdiction.

The above view finds support in orders of the FCC, which promote state public utility commission examination of the records of the ETC. For example, in FCC-05-46, released March 17, 2005, the FCC encouraged state commissions to adopt the reporting requirements for ETCs

established in that order. The FCC then specifically authorized Commissions to require submission of information they believe necessary to ensure compliance with applicable state and federal requirements. The relevant language reads as follows:

. . . To the extent that [state commissions adopt these requirements], we urge Commissions to apply the reporting requirements to all ETCs, not just competitive ETCs. *In addition, state commissions may require the submission of any other information that they believe is necessary to ensure that ETCs are operating in accordance with applicable state and federal requirements.* In doing so, states should conform these requirements with any similar conditions imposed on previously designated ETCs in order to avoid duplicative or inapplicable requirements. 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. [Id., at par. 71][emphasis added]

There can be no reasonable doubt that FCC favors state commission audits of ETC records. For example, six weeks ago, in Docket FCC 07-148, the FCC issued against VCI Company a “Notice of Apparent Liability and Forfeiture and Order”¹ for duplicate billings. In the paragraph 9 of the Notice, the FCC recounts as essential background an audit by the administrator of Oregon’s parallel state low-income program, and the resulting formal investigation by the Oregon Public Service Commission. The audit identified more than 1800 duplicate requests for support submitted by VCI from June 2004 through March 2006. According to the FCC,

“These duplicate billings apparently were also included in VCI’s claims for federal low-income support. Despite the multiple inquiries from state and federal regulatory agencies seeking information about its submissions for low income support, particularly its submission of duplicate requests for support to state and federal agencies, VCI failed to revise any of the Form 497’s filed with USAC to account for its duplicate low-income requests.” [Notice at par. 9.]

It is clear from the language of this recent Notice that the FCC views state audits of compliance with state and federal requirements as an integral part of federal-state working relationship.²

Thus, in sum, I cannot acquiesce in the argument that the role of the Florida Public Service Commission in the ETC certification process is too limited to support an audit of an ETC’s records for

¹ Adopted August 14, 2007, Released August 15, 2007, in FCC-07-148, In the Matter of VCI Company Apparent Liability for Forfeiture,

² I recognize that in Oregon the administrator was apparently auditing the records pertaining to the parallel state low-income program as opposed to the federal program. Nevertheless the records were germane to ensuring compliance with federal requirements and the FCC embraced the audit results as part of its justification for the Notice of Apparent Liability and Forfeiture and Order.

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prior years. A neutral review of Chapter 364, Florida Statutes, and applicable FCC rules and orders supports the proposition that this Commission, having certified FairPoint to the FCC as qualified for designation as an ETC, may audit the records of FairPoint in connection with its use of universal service funds to ensure compliance with federal requirements. For this reason, Section 364.183, Florida Statutes, and Rule 25-4.021, F.A.C., are applicable to FairPoint as an ETC.

I trust that this explanation will be satisfactory to FairPoint. Again, I do appreciate the opportunity to explain the Commission's authority to audit. If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Patrick K. Wiggins". The signature is written in a cursive, flowing style.

Patrick K. Wiggins
Attorney Supervisor

PKW:js