

State of Florida



Public Service Commission
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DATE: November 17, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (M. Watts) *MW*
Office of the General Counsel (Tan) *Tan*

RE: Docket No. 090480-TX – Compliance investigation of Clective Telecom Florida, LLC for apparent failure to accurately disclose information on application.

AGENDA: 12/01/09 – 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\RAD\WP\090480.RCM.DOC

Case Background

On August 13, 2008, Clective Telecom Florida, LLC (Clective FL) applied for a Competitive Local Exchange Telecommunications Company (CLEC) certificate to provide local exchange telecommunications services in Florida. The Florida Public Service Commission (Commission) issued CLEC Certificate No. 8736 to Clective FL on October 31, 2008. By Proposed Agency Action (PAA) Order No. PSC-09-0298-PAA-TX, issued on May 6, 2009, in Docket No. 090221-TX, In re: Compliance investigation of CLEC Certificate No. 8736, issued to Clective Telecom Florida, LLC, for apparent first-time violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies, the Commission penalized Clective FL \$500 for failing to pay its 2008 regulatory assessment fee (RAF). The company retained its CLEC certificate by paying the RAF and penalty.

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On April 29, 2009, Clective FL filed a notice of adoption of an Interconnection Agreement (ICA) in Docket No. 090246-TP, In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Cbeyond Communications, LLC by Clective Telecom Florida, LLC. On May 8, 2009, BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) filed an Objection to Notice of Adoption and Petition to Cancel Clective FL's CLEC Certificate No.8736 (Objection) in Docket No. 090246-TP, with additional supporting documentation filed on later dates.

In its Objection and additional filings, AT&T alleged that Clective FL did not have the managerial and financial capability to provide CLEC services. AT&T used the actions of Clective GA, Incorporated (Clective GA), which has the same managerial team as Clective FL, to support this claim. AT&T provided documentation showing that Clective GA is in the midst of bankruptcy proceedings, as well as that it is apparently unable to satisfy its financial obligation to AT&T. AT&T also alleged that Clective FL had misrepresented the identity of one of the individuals named in its CLEC application.

In answer to a question concerning Docket No. 090246-TP during the August 18, 2009 Agenda Conference, Clective FL confirmed that it used an alias for a Mr. Jeffrey Noack on its CLEC application. Clective FL offered Mr. Noack's experience under the name "Joseph Nichols" to show technical capability on the application. Counsel for Clective FL stated that it did so because of AT&T's apparent prejudice against Mr. Noack for his association with Global NAPS, Inc.¹ Based primarily on that information, the Commission, on its own motion, directed staff to open an investigation of Clective FL's CLEC application.

On September 22, 2009, staff sent a data request to Clective FL. In the data request, staff asked Clective FL to provide detailed information and documentation concerning its managerial, technical and financial capability, with specific questions concerning Mr. Noack. Clective FL responded via facsimile on October 6, 2009. This recommendation addresses staff's findings in its investigation.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.285, 364.335, 364.337, 364.345, Florida Statutes (F.S.).

¹ AT&T has been in litigation with Global NAPS, Inc. (CLEC Certificate No. 5691) in several states, including Florida, regarding a dispute over payment of access charges, and has disconnected Global NAPS, Inc. in Florida for nonpayment of those charges.

Discussion of Issues

Issue 1: Should the Commission cancel Clective Telecom Florida, LLC's CLEC Certificate No. 8736 for the company's apparent failure to accurately disclose information in Docket No. 080545-TX, application for a certificate of public convenience and necessity to provide telecommunications services within the State of Florida as a competitive local exchange company?

Recommendation: Yes, the Commission should cancel Clective Telecom Florida, LLC's CLEC Certificate No. 8736 for the company's apparent failure to accurately disclose information in Docket No. 080545-TX, application for a certificate of public convenience and necessity to provide telecommunications services within the State of Florida as a competitive local exchange company **(M. Watts/Tan)**

Staff Analysis: Pursuant to Rule 25-24.820, Florida Administrative Code (F.A.C.), the Commission may cancel a certificate for violation of a term or condition under which the authority was originally granted. Section 364.335(1)(a)&(d), F.S., Application for a Certificate, states:

- (1) Each applicant for a certificate shall:
 - (a) Provide all information required by rule or order of the commission, which may include a detailed inquiry into the ability of the applicant to provide service.
* * *
 - (d) Submit an affidavit that the applicant has caused notice of its application to be given to such persons and in such manner as may be prescribed by commission rule.

Further, Section 364.337(1), F.S., provides in part that the Commission shall grant a certificate of authority to provide competitive local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service. Rule 25-24.810, F.A.C., Application for a Certificate, requires that an applicant for a certificate shall submit a completed Form PSC/RCP 8 (5/08) entitled "Application Form for Authority to Provide Competitive Local Exchange Service Within the State of Florida," and is incorporated into this rule by reference.

Form PSC/RCP 8 (5/08) contains a section whereby the applicant is required to submit resumes of employees and officers of the company that would indicate sufficient managerial and technical experience to manage, operate, and maintain a telecommunications company. Clective FL submitted resumes with its application for a CLEC certificate in Docket No. 080545-TX. The Commission granted Clective FL a CLEC certificate based upon the resumes and other information provided by Clective FL with its application.

Via information provided by AT&T in Docket No. 090246-TP, the Commission and staff learned that a resume in Clective FL's application may have been flawed. As noted in the Case Background, Clective FL acknowledged during the August 18, 2009 Agenda Conference that the

resume submitted for Mr. Joseph Nichols with its CLEC application was flawed in that “Joseph Nichols” was used as an alias for “Jeffrey Noack.” The Commission then, on its own motion, directed staff to perform an in-depth investigation of Clective FL’s CLEC application.

In a September 22, 2009 data request, staff asked Clective FL to provide documents and other information to verify the managerial, technical and financial capability information contained in its 2008 CLEC application. The following paragraphs summarize staff’s analysis of Clective FL’s 2008 application and other information provided in response to staff’s data request.

Management

- Ms. Patricia Morris is identified as the company owner or officer on page 7 of the CLEC application. The name of the signature appearing on the page is Patricia Morris. When questioned, Mr. Evan Katz admitted that he signed Patricia Morris’ name on page 7 of the CLEC application. By signing Page 7, the signatory acknowledges the consequences of making false statements on the application. While not unusual for an authorized person to sign a document for another person, it is usually done transparently. That is, the person signs his or her own name, followed by the word “for” and the name of the person for whom he or she is signing.
- Clective FL included Mr. Jeffrey Noack’s resume, using an alias for Mr. Noack, in its Florida CLEC application. Mr. Noack did not authorize nor have knowledge of the use of his resume by Clective FL².

Technical

- Clective FL characterized persons who appear to be technical contractors as “directors” of Clective GA. In the resumes for technical personnel submitted with its Florida application, Clective FL stated that each was currently a “director” of a technical function for Clective GA. This led staff to believe that each was actively employed in a leadership position by Clective GA. When staff requested evidence, such as tax records, that these people were employed by Clective GA, Clective FL stated that each of them only gave verbal authorization to use their names in the application for Clective GA, and, with the exception of Mr. Jeffrey Noack, the same for Clective FL. It appears that the people who possess the technical capability to conduct technical maintenance and operations for a CLEC do not work for Clective GA.

² In AT&T’s Third Notice of Filing Additional Documentation In Support of Its Objection and Petition to Cancel Clective Telecom Florida, LLC’s CLEC Certificate No. 8736 filed on August 31, 2009, in Docket No. 090246-TP, Mr. Noack denies authorizing Clective to file documents with the Florida Public Service Commission under his alias “Joseph Nichols or otherwise” and that he was not aware that Clective had done so prior to the documents being presented to him under cross-examination by an AT&T Ohio attorney. Mr. Noack did say that he had used the alias “Joseph Nichols” in the past while representing “Clective” in another state, but he did not authorize the use of his name or his alias in Florida and Georgia.

- In a September 22, 2009 data request, staff asked Clective FL to provide detailed resumes for all persons that are currently on the payroll of Clective FL that would fulfill the technical requirements for retaining CLEC authority in Florida. Despite stating that each of the technical contractors was “currently” the director of a technical function in Clective GA at the time of Clective FL’s 2008 Florida CLEC application, it appears that that statement is not true for two of the individuals. The detailed resumes provided for Alex Balashov and Hal Finkel in response to staff’s data request do not list Clective GA among the companies with which either person was associated during 2008 or any other time period.

Financial

- Patricia Morris is listed with the Florida Secretary of State as the Manager and only officer of Clective FL. For Clective GA, Ms. Morris is listed with the Georgia Secretary of State as the CEO/CFO, and Mr. Brad Mondschein is listed as the Secretary. Thus, Clective GA and Clective FL have essentially the same management team. Because the companies are separate entities, the financial capability of Clective FL may not be negatively impacted by Clective GA’s bankruptcy. Nevertheless, the two entities fall under the leadership of Patricia Morris.
- In response to staff’s data request, Clective FL submitted a confidential affidavit which provides evidence of an investor that appears to bolster the company’s current financial capability.

Conclusion

In the aggregate, Clective FL appears to have a systemic management problem based upon misrepresentations in its 2008 CLEC application. Of particular concern to staff is that Clective FL admitted that it used Mr. Noack’s resume, under an alias, without his knowledge and approval. The reason given by Clective FL was to hide Mr. Noack’s identity from AT&T. By so doing, Clective FL purposely failed to provide the Commission with appropriate and accurate information regarding Mr. Noack on Form PSC/RCP 8 (5/08), Application Form for Authority to Provide Competitive Local Exchange Service Within the State of Florida.

The CLEC application requires Clective FL to submit resumes of employees or officers of the company that would indicate sufficient technical experience or identify what company has been contracted to conduct technical maintenance. Clective FL presented resumes of persons it identified as directors for Clective GA. Upon further questioning of Clective FL, staff learned that the directors were not employees of Clective GA. They can only be described as contractors. While it is acceptable to hire contractors to provide technical support, staff finds it troubling that Clective FL’s CLEC application would lead the reviewer to believe that these directors were on Clective GA’s payroll when they were not.

Page 7 of the Commission’s CLEC application requires that a company owner or officer acknowledge that regulatory assessment fees must be paid, that rules and orders have been received and understood, and that the information submitted in the application and any attached

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documents is accurate. In this case, the signature appearing on page 7 of the CLEC application is shown as Patricia Morris. When asked if the signature on page 7 was that of Patricia Morris, Clective FL responded that Mr. Evan Katz signed Patricia Morris' name. This is troubling in that Mr. Katz should have signed his name, signifying on behalf of Patricia Morris, assuming he had that authority. Mr. Katz is not listed as an officer for Clective FL in the records of the Florida Secretary of State.

The Commission granted Clective FL's CLEC certificate on October 6, 2008, by Order No. PSC-08-0651-PAA-TX issued in Docket No. 080545-TX after finding that Clective FL met the Commission's financial, managerial and technical terms and conditions. However, based on staff's findings during this investigation, staff no longer believes that Clective FL meets the established managerial and technical terms and conditions. In fact, as detailed above, staff believes that absent Clective FL's apparently misleading and deceitful statements in its application, Clective never possessed the managerial and technical capabilities to hold a CLEC certificate in Florida.

Accordingly, in light of the additional information discovered since its August 8, 2009 recommendation in Docket No. 090248-TP, staff recommends that the Commission should cancel Clective Telecom Florida, LLC's CLEC Certificate No. 8736 pursuant to Rule 25-24.820, F.A.C., for the company's apparent failure to accurately disclose information in Docket No. 080545-TX, application for a certificate of public convenience and necessity to provide telecommunications services within the State of Florida as a competitive local exchange company.

Issue 2: If the Commission approves Issue 1, should the Commission refer Clective FL to the appropriate authority for a determination whether criminal charges are appropriate regarding the apparent violation of Section 837.06, F.S.?

Recommendation: Yes. If staff's recommendation in Issue 1 is approved, the Commission should refer Clective FL to the appropriate authority for a determination whether criminal charges are appropriate regarding the apparent violation of Section 837.06, F.S. **(Tan)**

Staff Analysis: Staff's analysis in Issue 1 indicates apparent intentional misrepresentation by Clective FL, which is a criminal matter under the jurisdiction of the State Attorney. Section 837.06, F.S., provides that "whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor of the second degree, punishable as provided in Sections 775.082 or 775.083, F.S." At the August 18, 2009 Agenda Conference, the company admitted to the Commission that an alias was used when completing the CLEC application.

A company's owner or an officer is required to sign an Applicant Acknowledgement that it is illegal to make a false statement to a public employee. Staff believes that the apparently misrepresented resume provided to staff attached to Form PSC/RCP 8 (5/08), Application Form for Authority to Provide Competitive Local Exchange Service Within the State of Florida, by Clective FL, in combination with the fact that Mr. Noack did not authorize the use of his name on the Florida CLEC application, may rise to the level contemplated by Section 837.06, F.S.

Further, staff's recommendation is consistent with the Commission's decision in Docket No. 000218-TX, In re: Initiation of show cause proceedings against Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone for apparent violation of Section 364.183(1), F.S., Access to Company Records, in which the Commission voted to refer the company to the appropriate authority for its apparent falsification of a document submitted to the Commission in the course of those proceedings. Therefore, if the Commission approves Issue 1, staff recommends the Commission refer Clective FL to the State Attorney for a determination whether criminal charges are appropriate regarding the apparent violation of Section 837.06, F.S.

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Order issued from this recommendation 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 any material facts in dispute, in the form provided by Rule 28-106.201, F.A.C., within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13)(b), F.S., any issues not in dispute should be deemed stipulated. The company should also be required to immediately cease and desist providing all intrastate telecommunications services in Florida, and the CLEC certificate should become inactive on December 31, 2009. If there is no protest, this docket should be closed upon issuance of the Consummating Order. **(Tan)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the foregoing staff recommendation statement.