

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: December 3, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Pruitt) *[Signature]*
Office of the General Counsel (Morrow, McKay) *[Signature]*

RE: Docket No. 090077-TI – Acknowledgment of cancellation of IXC Registration No. TJ719 by ProNet Communications, Incorporated, effective February 9, 2009.

AGENDA: 12/15/09 – Regular Agenda – 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\090077.RCM.DOC

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Case Background

Section 364.336, Florida Statutes, requires intrastate interexchange telecommunications companies (IXCs) to pay a minimum annual Regulatory Assessment Fee (RAF) if the registration was active during any portion of the calendar year. Rule 25-24.474, Florida Administrative Code, provides that IXCs must pay any current and past due RAFs with a request for cancellation.

On January 29, 2009, Commission staff received a telephone call from Ms. Coral Johnston, president of ProNet Communications, Incorporated (ProNet), requesting the 2008 RAF return be e-mailed to the company. The form was e-mailed that day as requested.

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On February 9, 2009, the Commission received a letter from ProNet dated February 6, 2009 requesting cancellation of its IXC registration. The company advised that it was no longer doing business in Florida and requested a cancellation date of December 31, 2008.

On February 11, 2009, this docket was established to cancel the company's IXC registration, effective February 9, 2009.

On February 18, 2009, Commission staff e-mailed ProNet explaining that the company's request had been postmarked after the due date for payment of the 2008 RAF and that the 2008 RAF had not been received. Staff also explained that in order for the company to receive a voluntary cancellation the 2008 and 2009 RAFs needed to be paid. The 2008 and 2009 RAF return forms were attached to the e-mail.

On March 26, 2009, Commission staff filed its recommendation for the April 7, 2009 Agenda Conference to deny ProNet's request for a voluntary cancellation of its IXC registration.

On April 9, 2009, the company president called legal staff concerning the 2009 RAF payment and questioned why it had to be paid. Legal staff explained that the request for cancellation was not sent until February 2009 and that the cancellation date would be the date the request was received by the Commission. Legal staff asked that another copy of the 2008 and 2009 RAF return forms be e-mailed to the company's president.

On April 10, 2009, technical staff e-mailed ProNet the 2008 and 2009 RAF return forms per legal staff's request.

On April 13, 2009, the Commission received the 2008 RAF return form and minimum payment from ProNet. The return form was dated January 29, 2009 and it came in an envelope with a date of January 30, 2009 from stamps.com which is a software-based service that allows its customers to print postage from their computers directly on envelopes, labels or plain paper.¹

On April 15, 2009, a letter was sent by the Commission's Division of Administrative Services requesting statutory late payment fees of \$126 for the 2008 RAF.

On May 1, 2009, Commission Order PSC-09-0290-PAA-TI was issued denying a voluntary cancellation and cancelling the IXC tariff and removal of ProNet's name from the IXC register on the Commission's own motion.

On May 21, 2009, ProNet timely filed a protest to the proposed agency action order. The company's president requested leniency due to economic reasons.

This recommendation addresses ProNet's protest of the Commission's Order requiring payment of the 2009 RAF and payment of the late payment charges for the 2008 RAF for a

¹ Rule 25-4.0161(3), Florida Administrative Code, states in part, "Regulatory Assessment Fees are considered paid on the date they are postmarked by the United States Postal Service or received and logged in by the Commission's Division of Administrative Services in Tallahassee."

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voluntary cancellation. The Commission is vested with jurisdiction in this matter pursuant to Sections 350.113, 364.285, and 364.336, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant the relief requested by waiving the payment of the 2009 Regulatory Assessment Fee and the statutory late payment charges for the 2008 Regulatory Assessment Fee?

Recommendation: No. The Commission should not grant the relief requested by waiving the payment of the 2009 Regulatory Assessment Fee and statutory late payment charges for the 2008 RAF. The Commission should dismiss this protest on its own motion as ProNet has not provided facts upon which the requested relief can be granted. (Morrow, Pruitt)

Staff Analysis:

Standard of Review

The standard to be applied when determining whether to dismiss a protest is the same as that used in disposing of a Motion to Dismiss. 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. *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action for which relief can be granted. *Id.* at 350. In determining the sufficiency of the petition, the Commission should review the petition and the documents incorporated therein, and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

ProNet's Position

In support of ProNet's position, Ms. Johnston asserts the following in her protest: (1) An involuntary cancellation negatively affects the good name of her company; (2) An involuntary cancellation would also negatively affect the company financially; (3) ProNet had less than \$400 per year in 2008 and 2007 in Florida RAF revenues; (4) The company found the \$700 RAF "unnecessarily high for a small long distance company"; (5) The company paid the 2008 RAF; and (6) The company was in complete compliance with Section 364.336, Florida Statutes, when the company requested cancellation in February.

Analysis

Section 364.336, Florida Statutes, requires IXCs to pay a minimum annual Regulatory Assessment Fee (RAF) if the registration was active during any portion of the calendar year:

Regulatory assessment fees.--Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding 6-month period, shall pay to the commission, within 30 days following the end of each 6-month period, a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business, except, for purposes of this section and the fee specified

in s. 350.113(3), any amount paid to another telecommunications company for the use of any telecommunications network shall be deducted from the gross operating revenue for purposes of computing the fee due. The commission shall by rule assess a minimum fee in an amount up to \$1,000. . . . The commission may by rule establish criteria for payment of the regulatory assessment fee on an annual basis rather than on a semiannual basis.²

Rule 25-4.0161(1), Florida Administrative Code, states in part, “Regardless of the gross operating revenue of a company, a minimum annual regulatory assessment fee shall be imposed as follows: . . . (d) Interexchange Company - \$700; . . .”.

Rule 25-24.474(2) Cancellation of a Registration, Florida Administrative Code, states:

- (2) If a registered company desires to cancel its registration, it shall request cancellation from the Commission in writing and shall provide the following with its request:
- (a) Current and any past due Regulatory Assessment Fees, and the associated penalty and interest; and
 - (b) A statement on treatment of customer deposits and final bills.

ProNet admits in its letter of protest that it did not timely request cancellation of its tariff and removal from the IXC register. ProNet’s letter was dated February 6, 2009, and received at the Commission on February 9, 2009.³ However, the company requests leniency of its “ignorance of regulation” and requests cancellation as of December 31, 2008.

Conclusion

Even assuming all of ProNet’s allegations of fact to be true and accurate, and construing them in the light most favorable to the company, Ms. Johnston has failed to state a cause of action for which the relief prayed for may be granted by this Commission. While Ms. Johnston has asserted that certain mitigating factors may be present, she has not provided evidence that ProNet has complied with Rule 25-24.474, Florida Administrative Code, in order to be granted a voluntary cancellation.

Therefore, staff recommends that the 2009 RAF payment should not be waived, and that the Commission dismiss ProNet’s protest with prejudice. Additionally, staff recommends that PAA Order No. PSC-09-0290-PAA-TI, be reinstated and consummated as a Final Order.

² Since annual Regulatory Assessment Fees are due by January 30th of the subsequent year, the Commission has honored request for cancellation by that date for the preceding calendar year.

³ On February 3, 2009, the Commission received a request from Supra Telecommunications and Information Systems, Inc. (Supra) for cancellation postmarked January 31, 2009. Docket No. 090067-TC was established. Supra paid the 2009 RAF and was granted a voluntary cancellation of its certificate effective February 3, 2009.

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Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation, ProNet Communications, Incorporated should make payment of the 2009 Regulatory Assessment Fee and statutory late payment charges on the 2008 RAF as required by Commission Order No. PSC-09-0290-PAA-TI, within 14 days after the issuance of the Commission's Final Order from this recommendation. This docket should be closed administratively upon either receipt of the payment of the 2009 RAF and 2008 late fees, or upon cancellation of ProNet Communications, Incorporated's IXC tariff and removal of its name from the IXC register on the Commission's own motion. (Morrow, McKay)

Staff Analysis: Payment of the 2009 RAF and late payment charges should be postmarked by the United States Postal Service within 14 days of the issuance of the Final Order from this recommendation. The docket should be closed administratively upon the timely receipt of the payment or upon cancellation of ProNet Communications, Incorporated's IXC tariff and removal of the company's name from the IXC register.