

IN RE: Docket No. 22071-U: Encartele, Inc.'s Application for Certificate of Authority to Provide Institutional Telecommunication Services.

Docket No. 22120-U Complaint of Pay Tel Communications, Inc. against Encartele, Inc.

BRIEF OF COMMISSION STAFF

On December 19, 2005, Encartele, Inc. ("Encartele") filed with the Georgia Public Service Commission ("Commission") an Application for a Certificate of Authority to Provide Institutional Telecommunication Services ("ITS"). On January 3, 2006, Pay Tel Communications, Inc. ("Pay Tel") filed a Complaint Seeking an Initiation of an Investigation to Determine Whether Encartele is Unlawfully Providing Institutional Telecommunications Services Without a Certificate. Encartele filed an Answer in Response to this Complaint on January 26, 2006. The matters were assigned to Hearing Officer Jeffrey Stair on April 11, 2006 and then reassigned to Hearing Officer John Tucker on May 18, 2006.

On June 6, 2006, the Commission consolidated the two dockets. A hearing on both these dockets took place before the Hearing Officer on July 21, 2006. Encartele sponsored the testimony of Mr. Scott Moreland. Mr. Vince Townsend testified on behalf of Pay Tel. The Commission Staff and the Consumers Utility Counsel of the Governor's Office of Consumer Affairs participated through cross-examination.

I. Certificate of Authority

The party applying for a certificate of authority has the burden to demonstrate that it possesses the technical and financial capability to provide the services for which the party seeks certification. In the instant case, Encartele has applied to provide ITS.

Commission Rule 515-12-1-.30 sets forth the obligations of an ITS provider. The burden is on Encartele to demonstrate that it is capable of complying with the terms and conditions of this rule.

Encartele has demonstrated that it has the technical and financial capability to provide ITS. However, two issues have arisen in the context of the application process. First, the record reflects that Encartele provided ITS prior to receiving certification from the Commission. The Hearing Officer has asked the parties to brief the issue of whether the provisioning of ITS prior to certification should bear upon Encartele's application. The provisioning of ITS prior to certification is a violation of state law and Commission rules and must be considered in determining whether to certify an applicant.

Encartele's witness testified that under agreements with Consolidated Telecom, Inc. ("CTI"), Encartele owned the ITS equipment, Encartele was responsible for paying the commissions to the institutions and Encartele was entitled to all of the revenues from the provisioning of ITS to the institutions. (Tr. 59-62). Although CTI held itself out as the ITS provider, it was Encartele that was providing the service.

The testimony of Pay Tel witness, Mr. Townsend, further supported the conclusion that Encartele provided ITS prior to certification. Mr. Townsend testified that Captain Faulk of the Twiggs County Sheriff's Department informed Pay Tel that Encartele was providing ITS to the Jeff Davis County Jail and the Crawford County Jail. (Prefiled testimony, p. 6). Mr. Townsend also testified that in response to open records requests Pay Tel learned that it acquired commission statements on Encartele letterhead for June through August, 2005, evidencing commission payments from Encartele to

Cherokee County. (Pay Tel Exhibit 4). The commission payments were based on revenues that Encartele received from providing ITS. (Prefiled Testimony, p. 10).

In addition, Crawford County provided a commission statement on Encartele letterhead for August, 2005. (Pay Tel Exhibit 5). Pay Tel also moved into evidence a commission check from Encartele, dated November 21, 2005. (Pay Tel Exhibit 6). The commission check evidenced payment from Encartele based on ITS revenues. (Prefiled Testimony, p. 10). For Jeff Davis County, Pay Tel moved into evidence the assignment contract from CTI to Encartele as well as commission statements and checks from Encartele to Jeff Davis County Jail/Detention Center. (Pay Tel Exhibits, 7 and 8).

Pay Tel notified the Commission Staff on or about November 13, 2005 that it believed Encartele was providing ITS without certification. (Prefiled Testimony, p. 8). Encartele applied for certification on December 19, 2005.

It is apparent from the evidence discussed above that Encartele was providing ITS prior to seeking certification. Georgia law prohibits telecommunications companies from providing telecommunications services without a certificate of authority. O.C.G.A. § 46-5-163(a). Because Encartele violated state law, a certificate of authority should not be issued to Encartele unless it agrees to pay a penalty of five thousand dollars (\$5,000.00).

It is reasonable to condition certification upon the payment of a penalty to address that Encartele violated a Georgia law administered by the Commission. It would undermine the integrity of the Telecommunications and Competition Development Act (the "Act") to certify companies without any consequence for violating the express terms of the Act.

Under O.C.G.A. § 46-2-91(a), a company subject to the Commission's jurisdiction of the Commission that willfully violates any law administered by the Commission is subject to a penalty not to exceed fifteen thousand dollars (\$15,000.00) for such violation and an additional penalty not to exceed ten thousand dollars (\$10,000.00) for each day during which such violation continues. A payment of \$5,000.00 is considerably less than the penalty the Commission could impose in response to Encartele's violations. As Encartele's witness, Mr. Moreland, testified, Encartele worked with the Staff prior to the hearings in an effort to address its violations. (Tr. 43). Because of this cooperation, it is appropriate to condition the certificate upon a payment that is less than the full penalty amount that the law permits the Commission to impose for violations.

The second issue that arose is whether Encartele should be allowed to offer ITS using a Voice over Internet Protocol ("VoIP") technology. Commission Rule 515-12-1-.30(19) requires each provider to "adhere to each of the certified local exchange service companies' Public Access Line for Institutional Service Providers Tariffs of rates and conditions in whose area service is provided." The provisioning of ITS using VoIP would not comply with the terms of this rule. In response to a rulemaking petition filed by Pay Tel in Docket No. 23330-U, the Commission has issued a Notice of Inquiry to investigate whether a modification to this rule is appropriate. Unless and until the Commission modifies the rule, Encartele should be required to comply with existing Commission Rule 515-12-1-.30(19). It would provide Encartele with an unfair competitive advantage over other ITS providers to allow it to offer service via a technology that other ITS providers are prohibited from using.

II. Free broadband

The provisioning of free broadband service to a customer constitutes a “bonus.” Bonuses are expressly prohibited by Commission Rule. Commission Rule 515-3-1-.02(2). Therefore, providers should not be permitted to offer free broadband service in exchange for being selected as the ITS provider.

III. Jurisdiction over ITS provided using broadband or VoIP

Through the Notice of Inquiry issued in Docket No. 23330-U, the Commission is investigating the issue of providing ITS through different technologies. The Staff will consider all pertinent issues pertaining to such service in the context of that docket. As stated above, it is not appropriate to certify Encartele to provide ITS using VoIP at this time because such service does not comply with the existing Commission rules.

IV. Conclusion

For the foregoing reasons, Staff recommends that the Commission grant Encartele's application subject to the conditions that Encartele agrees to pay a \$5,000.00 penalty related to its violation of Georgia law, and that it complies with all of the Commission's Rules, including Commission Rule 515-12-1-.30(19).

Respectfully submitted, this 19th day of September 2006.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **BRIEF** prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This ____ day of September, 2006

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