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Before the  
Federal Communications Commission  
Washington, D. C. 20554

FCC 08M-04

06848

JAN 31 2008

In the Matter of	)	EB Docket No. 07-197	JAN 31 2008
	)		
<b>Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission</b>	)	File No. EB-06-IH-5087	
	)	FRN: 0007179054	
	)		
Resellers of Telecommunications Services	)	NAL/Acct. No. 200732080029	
	)		
	)		

**MEMORANDUM OPINION AND ORDER**

Issued: January 25, 2008

Released: January 28, 2008

**Preliminary Statement**

1. This is a ruling on Motion of the Kintzels, et. al. to Modify the Issues, Or, In the Alternative, Statement of Objections to the Order to Show Cause (the "Motion"), filed on October 26, 2007. With leave granted by *Order* FCC 07M-52 released November 20, 2007, the Enforcement Bureau ("Bureau") filed an Opposition on December 4, 2007.<sup>1</sup> Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission ("Kintzels") filed a Reply on December 11, 2007. *Id.*

**Order to Show Cause**

2. On September 10, 2007, the Commission set this case for formal hearing under *Order to Show Cause and Notice of Opportunity for Hearing ("OSC")*, *In re Kurtis J. Kintzel, Keanan Kintzel, all Entities by which they do Business before the Federal Communication Commission – Resellers of Telecommunications Services*, 22 FCC Rcd 22 (2007). The OSC gives notice (*inter alia*) that:

[E]ntities providing interstate common carrier services owned and controlled by the Kintzel brothers apparently willfully and repeatedly violated multiple terms of a Consent Decree to which they were signatories and apparently willfully and repeatedly violated multiple Commission rules and provisions of the Act relating to the provisions of interstate common carrier services. Such apparent violations, and a lengthy history of noncompliance before the Commission, raise material and substantial questions

<sup>1</sup> Initially, the motion was mistakenly directed to the Commission. To correct its filing error, the Kintzels filed a Consent Motion to withdraw the Motion and thereafter refilled a corrected Motion that was addressed to the Presiding Judge on November 16, 2007.

regarding the basic qualifications of the Kintzel brothers to engage in the provision of interstate common carrier services now and in the future.

3. In light of concern for compliance with a Consent Decree,<sup>2</sup> this proceeding was set by the Commission to determine if the Kintzels should be permitted to continue as a common carrier, and/or whether they should be ordered to refrain from providing interstate carrier services in the future without Commission consent. It appears to the Commission that the Kintzels may have violated terms of a Consent Decree (1) by failing to notify the Commission prior to discontinuing long distance telephone services; (2) by failing to release required USF and TRS contributions; (3) by failing to make voluntary contribution payments to Universal Service in accordance with the Consent Decree; (4) by failing to respond to Commission inquiries; and (5) by making unauthorized changes in subscribers selection of providers of telephone services. The Kintzels were categorically informed by the *OSC* that these allegations raise substantial questions which could determine whether the Kintzels should be permitted to provide common carrier services.

4. The *OSC* serves notice as prescribed under the Administrative Procedure Act. The Kintzels have been fully and timely informed of the time and place of hearing<sup>3</sup>, as well as the legal authority and jurisdiction for hearing that the Commission relies on, and notice of “the matters of fact and law asserted.” There is no contention by the Kintzels of inadequacy of notice. USCA §554(b).

5. The Motion seeks modifications and deletion of Commission designated issues. In challenging the *OSC*, the Kintzels propose excusing the Motion’s admitted untimeliness, bifurcating the hearing, requiring statement of particulars as to violations that warrant \$50 million in penalties; requiring statement of methodology used to calculate the amount of penalty requiring statement of statutory authority for imposition of “excessive penalties;” seeking dismissal of charges for discontinuance of customers’ telephone services by underlying carrier, and seeking deletion of individual liability against Kurtis J. Kintzel and Keanan Kintzel. The basis for seeking such relief is a boiler plate affidavit of Kurtis J. Kintzel that the facts stated in the Motion are based on “knowledge, information and belief.” The Motion is deficient as to reliable proof by omitting an affidavit of specific facts based on Mr. Kintzel’s “personal knowledge.” 47 C.F.R. §1.229 (d).

6. The Bureau asks that the Motion be dismissed as procedurally defective. 47 C.F.R. §1.229. The Bureau contends that the Motion is intended to impede the hearing. The Bureau argues that the Motion is an imperfected motion for summary decision and/or motion for unauthorized reconsideration of the *OSC*. 47 C.F.R. §1.251(a). There is not sufficient evidence to conclude that the Motion is intended to impede the hearing or was filed for any disruptive purpose. The Kintzels have not requested summary decision, and since there are existing issues of fact, the

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<sup>2</sup> See copy of Consent Decree under signature of Kurtis J. Kintzel dated 11 February 2004, executed by Mr. Kintzel in his capacity of Chief Executive Officer, Business Options, Inc., U.S. Bell, Inc., Link Technologies, Buzz Telecom Corporation, Avatar Enterprises, Inc.

<sup>3</sup> See *Order FCC 07M-32*, released September 12, 2007 (setting first Conference for October 11, 2007), and *Order FCC 07M-39*, released October 11, 2007 (resetting Conference to November 15, 2007, in order to consider motion to intervene and allow Kintzels time to obtain counsel). Intervention was denied. *Order FCC 07M-51*, released November 20, 2007. The Kintzels obtained counsel. A hearing date is to be set in consultation with the parties after date for completion of discovery, procedural dates, and proposed hearing date are submitted.

case is not ripe for any summary disposition. 47 C.F.R. §1.251(a)(2) and §1.251(f)(1). The Bureau also points to an existing practicality that it has not yet completed discovery which would produce relevant evidence rebutting allegations made, but not proven, by the Motion. That is precisely the purpose for allowing discovery. *See The Discovery and Preservation of Evidence* 47 C.F.R. §1.311 (General).

### Discussion

7. Any Motion that seeks to enlarge, change or delete issues must be timely filed within fifteen (15) days after text of an OSC has been published in the *Federal Register* ("FR"). 47 C.F.R. §1.229 (a) Here, the Motion was filed on November 16, 2007 which is 48 days after FR publication of the OSC on September 27, 2007. (72 FR No. 187 at 54911 – 54913).

8. However, despite tardiness, there is an exception for modification of issues upon showing good cause. 47 C.F.R. §1.229 (b)(3) Here, there has been no showing of good cause, and no showing of newly discovered facts to support a motion that may be filed within fifteen (15) days of discovery of new facts. *Id.*

9. Yet even without good cause, a motion to modify or enlarge issues:

will be considered fully on its merits if (*and only if*) initial examination of the motion demonstrates that it raises a question of probable decisional significance *and such substantial public interest importance* as to warrant consideration in spite of its untimely filing. (Emphasis added.)

47 C.F.R. §1.229 (c). *See Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 873-74 (1976) (parties should expect this standard to be "strictly construed"). The focus of the allegations concern a Consent Decree with which the Kintzels agreed to comply. Alleged violations of a Consent Decree by private companies, and their principals and agents, though serious, do not evoke the required "substantial public interest importance."<sup>4</sup> And questions of compliance with a local Consent Decree do not raise questions of sufficient public interest importance to warrant consideration of the Kintzels' unexcused tardy Motion. 47 C.F.R. §1.229 (c).

10. Also, invocation of Section 1. 229(c) requires facts of personal knowledge pleaded under oath. The Motion lacks:

Affidavits (or declarations) of individuals having personal knowledge of the facts alleged therein.

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<sup>4</sup> The Kintzels assert in their Motion an "apparent likelihood that the Commission exceeded its statutory and constitutional authority in proposing fines of \$50 million " where the alleged harm in violating terms of the Consent Decree do not involve "irrevocable or costly damage to society and never endangered anyone's life or property." *See* Motion at 2. These policy arguments are not germane to the issues under the OSC, and may possibly be raised by the Kintzels in an attempt to create issues with seemingly "substantive public interest importance" and thereby overcome their untimeliness. 47 C.F.R. §1.229 (c).

This requirement of personal knowledge is to assure the validity of allegations made before the Commission, and failure to observe this requirement has consistently resulted in the denial of requests for issue modification/enlargement. *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 474-75 (Rev. Bd. 1971); *Martin Lake Broadcasting Co.*, 28 FCC 2d 457, 459 (Rev. Bd. 1971). In *Proposal to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 161 (1990), the Commission affirmed its policy of strictly adhering to the standards of Section 1.229. See also *Great Lakes Broadcasting, Inc.*, 6 FCC 4331, 4333 (1991). After examination of the Kintzels' *de minimis* affidavit, assertions in their Motion appear to be based on conclusion, speculation or surmise. It is concluded that the Motion fails to meet the stringent standards of Section 1.229(d). Therefore, the requested issue modification and deletion Motion cannot be granted. *Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); *West Central Ohio Broadcasting, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

11. Finally, the facts recited in the Consent Decree predating the OSC (signed by Kurtis J. Kintzel on 11 February, 2004) and the six page response of Kurtis J. Kintzel to Bureau Letter of Inquiry ("LOI") dated January 17, 2007, reflect a substantial knowledge by Mr. Kintzel of decisional facts on which the Bureau probably will rely. For example, in November 2006, Mr. Kintzel responded to the LOI by admitting that "we did discontinue service to every customer in every state we were providing service," though "not intentionally." Related companies, Business Options and Buzz Telecom (collectively "BOS") that were controlled by Kurtis J. Kintzel discontinued service to "all existing customers" between November 18<sup>th</sup> and 30<sup>th</sup>, 2006. And Universal Service charges payable to the Commission in the amount of \$192,600 are past due. Kurtis J. Kintzel, as CEO of all entities, sent letters to secretaries of state and public utility commissions requesting cancellation of rights to transact business and to resell long distance services. Kurtis J. Kintzel, as CEO, has or should have personal knowledge of facts regarding compliance and/or non-compliance with terms of the Consent Decree which he personally executed, as well as knowledge of the other allegations of the OSC. The Kintzels now have counsel, should fully understand the Commission charges in this proceeding, and should be capable of reciting relevant facts in an affidavit that are more than mere conclusion, speculation, or surmise.<sup>5</sup> The Kintzels have failed to meet the Commission's rule requirements in that they have made an unjustified, untimely and unsupported filing of a Motion request for issue modification/deletion.

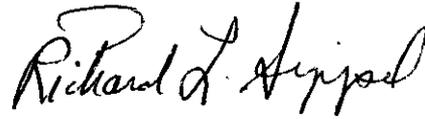
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<sup>5</sup> Novel questions of "piercing a corporate veil" or "double jeopardy" need not be addressed in denying a motion to modify/delete issues which fails on qualifying procedural grounds. Cf. *Fisher v FCC*, 417 F 2<sup>nd</sup> 555 (D.C. Cir. 1969) (where remand order states areas of Commission concern, every conceivable issue proposed by a party need not be considered).

**Order**

Accordingly, for the foregoing reasons, IT IS ORDERED that the “Motion of the Kintzels, *et al.*, To Modify the Issues, Or, In the Alternative, Statement of Objections to the Order to Show Cause “filed on October 26, 2007, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>6</sup> Courtesy copies of this *Memorandum Opinion and Order* are being e:mailed to each counsel of record on the date of issuance.