

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 25<sup>th</sup> day of  
February, 2009.

In the Matter of the Application of First Choice	)	
Technology, Inc. and NetLojix Telecom, Inc. for	)	<b><u>Case No. XM-2009-0263</u></b>
Approval of an Asset Purchase Agreement	)	

**ORDER APPROVING TRANSFER OF ASSETS AND CANCELING  
CERTIFICATE OF SERVICE AUTHORITY AND TARIFF**

Issue Date: February 25, 2009

Effective Date: March 7, 2009

**Syllabus:** This order approves the transfer of assets of NetLojix Telecom, Inc. to First Choice Technology, and cancels NetLojix Telecom, Inc.'s current authorizations to provide residential and business long distance telecommunications services in Missouri upon completion of the transfer.

**Background and Procedural History**

On January 13,<sup>1</sup> First Choice Technology ("First Choice") and NetLojix Telecom, Inc. ("NetLojix") (collectively "Applicants"), filed a joint application, pursuant to Section 392.300, RSMo 2000, and 4 CSR 240-2.060 and 3.525, requesting that the Commission grant them the authority necessary to consummate transactions involving the transfer of NetLojix's Missouri residential and business long distance customer accounts to First Choice. The Applicants represented that after consummation of the transaction First Choice will provide telecommunications services to all of the former customers of NetLojix, and NetLojix will cease operations in Missouri and surrender its Missouri certificate of service authority and

tariff. Applicants, in conjunction with their application, also submitted a copy of their Asset Purchase Agreement (“Agreement”) and a copy of a sample customer notice to advise the affected customers about the transfer.

The Applicants further state that the proposed transactions will not have any impact on the tax revenues of political subdivisions in Missouri, that the companies have no pending or final judgments against them from any state or federal agency that involve customer service or rates, and that they were current on Missouri assessments and fees and in filing annual reports.

On January 14, the Commission issued notice and set and intervention deadline. The Commission ordered that any person wishing to intervene in this case file an application to do so no later than January 29. No applications to intervene were filed and no party requested a hearing.

On February 4, the Applicants supplemented their application confirming that NetLojix no longer has any customers in Missouri. The Applicants represented that NetLojix will not secure any new customers or provide any services in Missouri prior to the resolution of the instant application. Consequently, First Choice will not file revised tariffs incorporating NetLojix’s rates, terms and conditions because there are no Missouri customers to which such revised tariffs would apply.

### **Staff’s Recommendation**

Staff filed its verified recommendation and memorandum regarding the application on February 19, 2009. Staff’s recommendation and supporting memorandum indicate that Staff has closely examined the proposed transaction. Staff concludes that the proposed

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<sup>1</sup> All dates throughout this order refer to the year 2009 unless otherwise noted.

transfer of assets is not detrimental to the public interest and recommends that it be approved.

### **Findings of Fact**

1. First Choice is a Delaware corporation with principal offices located at 601 North Orlando Avenue, Suite 211, Maitland, Florida (FL) 32751. First Choice is a Missouri certificated long distance telecommunications company providing resold long distance telecommunications services pursuant to authority granted in Case No. TA-2007-0033, issued August 21, 2006, and effective September 8, 2006; Tariff Tracking No. YX-2007-0046.<sup>2</sup>

2. NetLojix is a Delaware corporation, with principal offices located at 7001 Boulevard 26, #323, North Richland Hills, Texas (TX) 76180. NetLojix is a Missouri certificated long distance telecommunications company providing long distance telecommunications pursuant to authority granted in Case No. TA-2000-340, issued January 5, 2000, and effective January 7, 2000; Tariff Tracking No. JX-2003-0740.<sup>3</sup>

3. A copy of a certificate of good standing for First Choice from the Missouri Secretary of State, as required by 4 CSR 240-2.060(1)(C), is a matter of record with the Commission in Case No. TA-2007-0033. A copy of a certificate of good standing for NetLojix from the Missouri Secretary of State, as required by 4 CSR 240-2.060(1)(C), is a matter of record with the Commission in Case No. TA-2000-340.<sup>4</sup>

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<sup>2</sup> *Joint Application*, filed January 13, 2009; *Supplement to Joint Application*, filed February 4, 2009.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; *Staff Recommendation and Memorandum*, filed February 19, 2009.

4. The proposed transaction solely involves competitively classified companies.<sup>5</sup>
5. NetLojix has no Missouri customers at this time that would require advance notice of a change in their telecommunications services.<sup>6</sup>
6. The proposed transaction will have no impact on tax revenues as described in Commission Rule 4 CSR 240-3.520(F) or 4 CSR 240-3.525(F).<sup>7</sup>
7. There are no pending or final judgments or decisions involving the Applicants as described in Commission Rule 4 CSR 240-2,060(1)(K).<sup>8</sup>
8. First Choice and NetLojix are not delinquent in filing any annual reports with the Commission.<sup>9</sup>
9. First Choice and NetLojix are not delinquent with paying any Missouri Public Service Commission assessment.<sup>10</sup>
10. First Choice and NetLojix are not delinquent with paying any Missouri Universal Service Fund fees.<sup>11</sup>
11. First Choice and NetLojix are not delinquent with paying any Relay Missouri fees.<sup>12</sup>
12. No entity filed an application to intervene in this matter.
13. The Office of the Public Counsel filed no pleading and did not participate in any

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<sup>5</sup> *Staff Recommendation and Memorandum*, filed February 19, 2009.

<sup>6</sup> *Id.*; *Joint Application*, filed January 13, 2009; *Supplement to Joint Application*, filed February 4, 2009.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

manner in this case.

14. There is no evidence that the proposed transfer is detrimental to the public interest.

### **Conclusions of Law**

Section 392.300.1, RSMo 2000, provides in pertinent part:

No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void.

\* \* \* \* \*

Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any telecommunications company of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such company shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.<sup>13</sup>

While Section 392.300 requires Commission approval for a transfer of assets that are used or useful in the performance a telecommunication company's duties to the public, it does not articulate a standard by which the Commission should make its determination. Applicable case law provides that the Commission may "not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."<sup>14</sup>

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<sup>13</sup> Section 392.300, RSMo. See also *MCI Metro Access Transmission Services, Inc. v. City of St. Louis*, 941 S.W.2d 634, 643 (Mo. App. 1997).

<sup>14</sup> *In the Matter of Joint Application of Sprint Communications Company, L.P. and STi Prepaid, LLC for*

In addition to the requested transfer of assets, the Applicants have requested the cancellation NetLojix's certificate of service authority. The Commission has the authority to cancel a telecommunications certificate pursuant to Section 392.410.5, RSMo (Supp. 2008), which provides "[a]ny certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected."

## **Decision**

Section 392.300 does not require a hearing for the Commission to make a decision regarding an application to transfer assets, and as such, if this case had solely been restricted to Commission approval of the requested transfer of assets the case would be classified as a non-contested case. Moreover, since NetLojix no longer serves customers, the assets being transferred have not been demonstrated to be necessary or useful in the performance of NetLojix's duties to the public.

Cancellation of Netlojix's tariff pursuant to Section 392.410; however, does require a determination after hearing and as such, this portion of the application presents the Commission with a contested case where the legal rights, duties or privileges of a specific party are required by law to be determined after hearing.<sup>15</sup> The requirement for a hearing is met when the opportunity for a hearing was provided and no proper party requested the opportunity to present evidence.<sup>16</sup> Notice was issued in this case and no hearing has been

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*Authority to Transfer Certain Assets*, Case No. TO-2008-0413, 2008 WL 4286655 (Mo.P.S.C.), Order Approving Transfer of Assets and Approving Tariff, issued September 9, 2008, effective September 11, 2008; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980), citing *State ex rel. City of St. Louis v. Public Serv. Comm'n of Mo.*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>15</sup> Section 536.010(2), RSMo 2000.

<sup>16</sup> *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

requested. Consequently, the Commission may issue its decision based upon the verified pleadings filed in this matter.

Based on the Commission's findings of facts, and its application of those facts to the Commission's conclusions of law, the Commission finds that the proposed transaction will not be detrimental to the public interest and that the application shall be approved.

**THE COMMISSION ORDERS THAT:**

1. To the extent the Missouri Public Service Commission's approval is required, the Joint Application for approval of the transfer of assets of NetLojix Telecom, Inc. to First Choice Technology in accordance with the submitted Asset Purchase Agreement is granted.

2. First Choice Technology and NetLojix Telecom, Inc. are directed to abide by the terms of the Asset Purchase Agreement.

3. First Choice Technology and NetLojix Telecom, Inc. are authorized to do and perform, or cause to be done and performed, such other acts and things, as well as make, execute and deliver any and all documents as may be necessary, advisable and proper to the end that the intent and purposes of the approved transaction may be fully effectuated.

4. The Certificate of Service Authority granted to NetLojix Telecom, Inc. in Case No. TA-2000-340 shall be canceled upon closing of the approved transaction.

5. NetLojix Telecom, Inc.'s Tariff No. JX-2003-0740, effective January 7, 2000, shall be canceled upon closing of the approved transaction.

6. So that the Commission may know when the approved transaction is completed, and when to cancel the certificate of service authority and tariff of NetLojix Telecom, Inc., the Applicants shall file an appropriate notice in this case upon the closing of

the approved transaction.

7. This order shall become effective on March 7, 2009.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Clayton, Chm., Murray, Davis, Jarrett,  
and Gunn, CC., concur.

Stearley, Senior Regulatory Law Judge