

State of Florida



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Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: August 21, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (M. Watts) *MW*
Office of Strategic Analysis and Governmental Affairs (Shafer/Hunter) *SH*
Office of the General Counsel (Tan) *TAN*

RE: Compliance investigation for apparent violation of Section 364.183(1), F.S.,
Access to Company Records.

- Docket No. 080449-TX – Grande Communications Networks, Inc.
- Docket No. 080450-TX – Tristar Communications Corp.
- Docket No. 080451-TX – Tele Circuit Network Corporation
- Docket No. 080452-TX – DialTone & More, Inc.

AGENDA: 09/04/08 – 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\RCP\WP\080449.RCM.DOC

Case Background

Section 364.386, Florida Statutes, Reports to the Legislature, requires the Commission to submit a report on August 1st of each year to the President of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders of the Senate and the House of Representatives, on the status of competition in the telecommunications industry. Section

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364.386(1)(b), Florida Statutes, specifically requires that the Commission make a request to providers of local exchange telecommunications services on or before March 1 for the data required to complete the report. It also requires the providers of local exchange telecommunications services to file their responses to the Commission's request on or before April 15.

To fulfill these statutory mandates, on February 15, 2008, staff mailed a data request via certified mail to all certificated incumbent and competitive local exchange telecommunications companies (ILECs and CLECs) in Florida. The data request included, but was not limited to, explanations of the statutory requirements, the filing requirements, and the potential of penalties for failure to provide a response to the request.

Each of the four companies listed in Attachment A, had not filed a response as the April 15, 2008 deadline approached. Staff verified that the four companies had signed the certified mail receipt indicating delivery of the data request by the United States Post Office. Because the companies had not responded, staff mailed a second request via first-class post on April 7, 2008, reiterating the response due date of April 15, 2008. In addition, staff made attempts to contact each company via telephone or e-mail. Each company identified in Attachment A failed to provide a response to staff's letters, telephone calls, or e-mails by the established due dates.

This recommendation addresses the companies' failure to provide or timely provide the data required to complete the competition report, which is an apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285 and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records?

Recommendation: Yes, the Commission should impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. (M. Watts/Shafer/Hunter/Tan)

Staff Analysis: Section 364.386, Florida Statutes, provides specific dates for the Commission to request information from local exchange telecommunications providers and to submit a report to the Legislature on the status of competition in the telecommunications industry. It also provides a specific date by which local exchange telecommunications providers must submit information to the Commission.

Commission staff needs information contained in the company records of all Florida ILECs and CLECs to compile the annual competition report for the Legislature. Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports, or other data directly related to matters within the Commission's jurisdiction in the form specified by the Commission and may require such company to retain such information for a designated period of time.

In this instance, four companies failed to provide a response to staff's data request, effectively denying staff access to its records. It is imperative that the Commission receive 100% participation to fully reflect the status of local telecommunications competition in its report to the Legislature. All of the companies listed in Attachment A were made aware of the Commission's authority to impose penalties as prescribed by Section 364.285(1), Florida Statutes, should they fail to provide the information requested by staff.

Pursuant to Section 364.285(1), Florida Statutes, the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have *refused to comply with* or to have *willfully violated* any lawful rule or order of the Commission, or any provision of Chapter 364, Florida Statutes.

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Section 364.285(1), Florida Statutes, however, does not define what it is to "willfully violate" a rule or order or any provision of this chapter. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule or any provision of this chapter. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); *c.f.*, McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of commission or an intentional act.

However, "willful violation" need not be limited to acts of commission. The phrase "willful violation" can mean *either* an intentional act of commission or one of omission, that is *failing* to act. See, Nuger v. State Insurance Commissioner, 238 Md. 55, 67, 207 A.2d 619, 625 (1965)[emphasis added]. As the First District Court of Appeal stated, "willfully" can be defined as:

An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or *with the specific intent to fail to do something the law requires to be done*; that is to say, with bad purpose either to disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1st DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

Thus, the failure of each of the companies listed in Attachment A to allow staff access to its respective company records meets the standard for a "refusal to comply" and "willful violation" as contemplated by the Legislature when enacting Section 364.285, Florida Statutes.

"It is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833); see, Perez v. Marti, 770 So.2d 284, 289 (Fla. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of these dockets, all competitive local exchange telecommunications companies, like the companies listed in Attachment A, are subject to the statutes published in the Florida Statutes. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other telecommunications companies that have failed to provide a response to a data request, thereby denying staff access to their records. Therefore, staff recommends that the Commission impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

Issue 2: Should these dockets be closed?

Recommendation: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision in a given docket files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If any of the companies listed in Attachment A fails to timely file a protest in its respective docket and request a Section 120.57, Florida Statutes, hearing, the facts in that docket should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If any of the companies listed in Attachment A fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC certificate, as listed in Attachment A, should be canceled. If a company's certificate is canceled in accordance with the Commission's Order from this recommendation, that company should be required to immediately cease and desist providing telecommunications services in Florida. A protest in one docket should not prevent the action in a separate docket from becoming final. These dockets should remain open. **(Tan)**

Staff Analysis: Staff recommends that the Commission take actions as set forth in the above staff recommendation.

Docket No.	Company	Regulation Date	Certificate No.	Date Certified Mail Receipt Signed
080449-TX	Grande Communications Networks, Inc.	8/28/2000	7514	2/22/2008
080450-TX	Tristar Communications Corp.	1/12/2007	8656	2/21/2008
080451-TX	Tele Circuit Network Corporation	5/3/2005	8573	2/23/2008
080452-TX	DialTone & More, Inc.	10/17/2007	8697	2/21/2008