

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of T.R.A.C., INC.,)	DOCKET NO. 881027-TI
for authority to provide interexchange)	ORDER NO. 23971
telecommunications service)	ISSUED: 1-8-91
)	

The following Commissioners participated in the disposition of this matter:

BETTY EASLEY
GERALD L. GUNTER

FINAL ORDER IMPOSING FINE, DENYING CERTIFICATE,
AND CLOSING DOCKET NO. 881027-TI

BY THE COMMISSION:

I. CASE BACKGROUND

In May, 1988, upon receiving information indicating that Telecommunications Resellers through Advanced Computerization, Inc. (T.R.A.C.), formerly known as Trade Results through Automated Communications, was operating in Florida as a telephone company without a certificate, Commission Staff contacted T.R.A.C. officials and informed them of the certification requirement in Chapter 364, Florida Statutes. On July 20, 1988, a complaint was received from Pierce Enterprises, Inc., alleging that T.R.A.C. had not performed under its agreement with Pierce.

Following a lack of response by T.R.A.C. to a series of correspondence from Commission Staff, an application for authority to operate as an interexchange company (IXC) was filed on July 29, 1988. The application stated that T.R.A.C. had not transmitted intrastate traffic. The services listed were indicative of retail residential and business services. In reviewing T.R.A.C.'s marketing methods however, it appeared to Commission Staff that T.R.A.C. was involved in a long distance resale operation involving the multi-level distribution of its services. It further appeared that T.R.A.C. could not know whether or not it was facilitating intrastate telecommunications.

Because of T.R.A.C.'s initial lack of cooperation, because the tariff filed appeared to be inconsistent with T.R.A.C.'s offerings, because the tariff neglected the resale aspect of the business, and because of T.R.A.C.'s failure to address the potential for carriage of intrastate traffic, we proposed to deny T.R.A.C.'s request for a certificate of public convenience and necessity in Order No. 20198, issued on October 24, 1988. By Order No. 20205, issued the same day, we required T.R.A.C. to show cause why it should not be

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fined \$10,000 for violation of Rule 25-24.470, Florida Administrative Code, and \$5,000 for filing an application containing false information.

On November 14, 1988, T.R.A.C. filed a protest to the PAA disputing the facts alleged in the above-referenced Order. On December 2, 1988, an official response to the show cause Order was filed. The protest requested a hearing. The hearing was held on April 21, 1988, pursuant to proper notice.

II. DISCUSSION OF ISSUES

A. Penalty for Operation without a Certificate

Section 364.02(4), Florida Statutes, defines "telephone companies." In Order No. 11206, this Commission held that resellers of telecommunications services fall within the definition of "telephone companies" subject to the jurisdiction and of this Commission and the certification requirements of Chapter 364, Florida Statutes. Such resellers must be certificated by this Commission prior to operation within this state. T.R.A.C.'s Contract For Area Director states that T.R.A.C. is a long distance telecommunications services broker. Further, at the hearing, T.R.A.C. admitted that it had operated as a telephone company within the State of Florida. Thus, there can be no question that T.R.A.C. was a "telephone company" as defined in Section 364.02, Florida Statutes. As T.R.A.C. did not possess a certificate, it is evident that T.R.A.C. operated as a telephone company within the State without a certificate.

Pursuant to Section 364.285, Florida Statutes, this Commission can impose a penalty of up to \$5,000 per day for operating without a certificate. T.R.A.C. has asked that any fine for such uncertificated operations be waived because, in its opinion, it tried to comply with the Commission's rules and the laws of the State of Florida.

T.R.A.C.'s president and owner, Mr. Atteberry, stated that he tried to follow these requirements by asking persons connected with certificated IXCs, and others, whether he needed a certificate. This argument is not persuasive because, if Mr. Atteberry had wanted to be sure that he was complying with the law, he could have asked this Commission. Mr. Atteberry cannot claim ignorance of the operation of regulatory commissions because he has had prior

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dealings with such commissions. Further, there was testimony indicating that Mr. Atteberry continued to operate after receiving notice that he might be operating illegally.

Since T.R.A.C. began offering service to the public in April of 1988, and, according to its position statement on this issue, operated until it received a letter from the Commission, and since the letter was sent on June 28, 1988, it is clear that this violation continued for several months. Therefore, a \$10,000 fine is reasonable and appropriate.

B. Penalty for Filing a False Application

Section 364.335, Florida Statutes, provides that "(1) Each applicant for a certificate shall (a) Provide all information required by rule or order of the commission." If an entity provides false or misleading information it has not provided the information requested. Therefore, if a person provides false or misleading information, he has violated this provision.

As previously discussed, T.R.A.C. operated as a telephone company without a certificate and stated differently on its application. Additionally, T.R.A.C.'s application misled the Commission as to the level of telecommunications experience of the applicant. Although Mr. Atteberry admits signing the application and though the signature block of the application states in bold type that the person signing personally attests to the accuracy of the information contained therein, Mr. Atteberry admits that he did not know whether the information he attested to was correct or not.

It is imperative that correct information be provided to this Commission so that the Commission can make reasoned decisions. T.R.A.C.'s false attestation and the provision of other incorrect and misleading information in the application are violations of Section 364.335, and warrant a penalty.

As discussed in the previous issue, Section 364.285, Florida Statutes, authorizes this Commission to impose a penalty for violations of rules and statutes, of up to \$5,000 per violation, per day. Due to the substantial inaccuracies in T.R.A.C.'s application a fine of \$5,000 is reasonable.

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C. Denial of Certificate

T.R.A.C. entered into this venture without proper preparation or adequate facilities, moved its offices without giving proper notice, operated without a certificate, and filed a false application with this Commission. Thus, based upon T.R.A.C.'s actions to date, it is not in the public interest to grant that company a certificate to operate as an interexchange telephone company in Florida.

D. Marketing Issues

One issue in this proceeding was whether T.R.A.C.'s marketing plan was a pyramid sales scheme prohibited by Rule 2-17.001, Florida Administrative Code. This Rule was enacted pursuant to Section 501.205, Florida Statutes. Section 501.203(4), Florida Statutes, defines the "enforcing authority" for Section 501.205 as the State Attorney and the Department of Legal Affairs. Therefore, the determination of whether the aforementioned sales scheme constitutes prohibited multi-level marketing must be made by those entities.

A related issue was whether the transactions between T.R.A.C. and T.R.A.C. representatives constitute "business opportunities" as defined in Section 559.801, Florida Statutes. Section 559.815, Florida Statutes, provides that violations of certain related Sections constitute felonies. Prosecution of those felonies would be within the jurisdiction of the Criminal Courts of this State. Since enforcement of this issue is beyond the jurisdiction of the Commission, it is unnecessary to determine whether T.R.A.C. complied with all applicable provisions of Sections 559.803-811, Florida Statutes, before offering such business opportunities.

Therefore, based on the foregoing it is

ORDERED by the Florida Public Service Commission that each and all of the specific findings herein are approved in every respect. It is further

ORDERED that T.R.A.C. was a "telephone company" as defined in Section 364.02, Florida Statutes. It is further

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ORDERED that T.R.A.C. operated as a telephone company in Florida without a certificate and shall pay a fine of ten thousand dollars (\$10,000). It is further

ORDERED that T.R.A.C.'s application for certification contained false or misleading information and that T.R.A.C. shall pay a five thousand dollar (\$5,000) fine for filing such information. It is further

ORDERED that it is not in the public interest to grant a certificate of public convenience and necessity to T.R.A.C. to operate as an interexchange telephone company in Florida. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission, this
8th day of JANUARY, 1991.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CWM/TH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice

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should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.