

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause)	DOCKET NO. 880240-TC
proceedings against COMMERCIAL)	
VENTURES, INC. for failure to)	ORDER NO. 24197
comply with Commission rules)	ISSUED: 3-5-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
GERALD L. GUNTER

ORDER IMPOSING FINE

BY THE COMMISSION:

I. CASE BACKGROUND

Commercial Ventures, Inc. (Commercial Ventures or the company) is a provider of pay telephone service, and holder of Certificate of Public Convenience and Necessity No. 1006. In late 1987, the Commission received several complaints regarding pay telephone service at the Everglades Hotel, 244 Biscayne Boulevard, Miami, Florida. The complaints included such things as no coin return for incomplete calls, inability to access long distance operators, and inability to use calling cards. The hotel told our staff that the PATS provider of the seven payphones was Continental Pay-Tel, Inc. (Continental). However, Continental informed our staff that it was not the subscriber of record, and, that Commercial Ventures operated the phones under Commercial Ventures' own certificate.

On August 26, 1987, Commercial Ventures was contacted about the complaints and asked to respond within fifteen (15) days. Commercial Ventures responded that all problems had been corrected. Our staff believed the matter was resolved and informed the hotel that the complaint was closed. Upon receiving this news, the hotel informed our staff that the problems with the phones continued. Our staff then initiated this docket recommending Commercial Ventures be ordered to show cause why it should not be fined for its failure to bring its pay telephones into compliance with Commission Rules. The staff's recommendation was predicated upon several service evaluations which had confirmed the complaints of the Everglades Hotel.

At the March 15, 1988, Agenda Conference, we directed that the show cause order be issued and that Commercial Ventures, Inc. be ordered to show cause in writing, within twenty (20) days, why it

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should not be fined \$7,000 for its failure to comply with Rules 25-24.515 (4), (5), (6), (7), and (10)(a), Florida Administrative Code.

Order No. 19085 issued on April 4, 1988, formally initiated show cause proceedings against Commercial Ventures. On April 12, 1988, Commercial Ventures filed its Response to Order Initiating Show Cause Proceedings, as well as its Petition for a Formal Hearing. Subsequent to filing its response, Commercial Ventures filed numerous motions, some of which sought to dismiss the action or to continue scheduled events. We addressed these motions at the October 6, 1988, Agenda Conference and issued Order No. 20288 on November 8, 1988, which disposed of them.

After the Agenda Conference, Commercial Ventures filed several more motions which were considered by the Prehearing Officer at the Prehearing Conference on October 20, 1988. The rulings on these pleadings appear under Section IX of Prehearing Order No. 20294 issued November 9, 1988. Numerous other motions made by Commercial Ventures which were addressed at the hearing.

The hearing was held in Miami Springs on November 14, 1988. Testimony was presented by witnesses for Commercial Ventures, the Everglades Hotel and our staff. Subsequent to the hearing, Commercial Ventures filed various motions which were disposed of in the following orders:

In Order 20462, issued on December 15, 1988, we denied the request to extend the time for filing of the Respondent's brief and held in abeyance two petitions for a Declaratory Statement, which are resolved by the instant Order.

In Order 21891, issued on September 13, 1989, we denied a motion to disqualify the hearing officer.

In Order 22331, issued on December 21, 1989, we denied a request for reconsideration of Order No. 21891.

Commercial Ventures filed a post hearing Motion to be Heard at the Agenda Conference by Telephone on the reconsideration of Order 21891. That Motion is addressed later in this Order.

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II. RULE VIOLATIONS

The circumstances surrounding Commercial Ventures' numerous and prolonged violations of this Commission's rules are discussed in the following subsections.

A. Rule 25-24.515(4)

Rule 25-24.515(4) Florida Administrative Code states that each telephone station should, without charge, permit access to local directory assistance and the telephone number of any person responsible for repairs or refunds but, may provide access by coin return.

Service evaluations conducted by our staff identified repeated violations of Rule 25-24.515(4), Florida Administrative Code, by the pay telephones owned by Commercial Ventures. During these service evaluations the pay telephones failed to provide coin-free or coin return access for calls made to the telephone number of the person responsible for repairs or refunds. These violations were identified by our staff in October 1987, and February 1988. The staff's October observations found that all seven of the telephones required 25¢ to call the posted repair numbers. Six telephones had the same violation in February, with the seventh telephone being out of service. Our staff found no instances where local directory assistance could not be accessed without charge.

Staff members evaluated the Everglades Hotel pay telephones on August 24, 1987; October 9, 1987; February 18, 1988; and May 18, 1988. During the August 24, 1987 evaluation, our staff evaluated the payphone numbers of 374-7244, 374-7245, 374-7262, 379-7265, 577-4395, 577-4396 and 577-4397. The service was unsatisfactory due to inadequate information regarding name or logo, refund, repair numbers and address.

In a follow-up evaluation on October 9, 1987, our staff found that none of the payphones permitted free access to the telephone number of the person responsible for repairs or refunds. The results were sent to Commercial Ventures in a letter dated October 15, 1987.

Mr. Howard Rose, President and Owner of Commercial Ventures, advised staff in his October 29, 1987 letter that the violations had been corrected, therefore, our staff closed the complaint of

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Everglades Hotel. The complaint was subsequently reopened after Ms. Zaby Daniels, Communications Manager of the Everglades Hotel, advised our staff that the problems had not been corrected.

Our staff evaluated the pay telephones again on February 18, 1988 and found all seven were mislabeled as to the repair - refund number. Commercial Ventures was notified of the violations on February 24, 1988.

In his March 14, 1988 letter, Mr. Rose advised our staff that the unsatisfactory items were corrected. Indeed, no repair - refund violations were found during our staff's May 18, 1988 evaluation. While our staff has referred to this as a May 18, 1988 evaluation and Mr. Rose also makes the same reference, the evaluation itself is dated May 27, 1988, which is the date that it was mailed.

We find that there were repeated violations of that part of the Rule which requires that each telephone station shall, without charge, permit access to the telephone number of any person responsible for repairs or refunds. Further, we find that the consecutive and prolonged nature of the violations, after our staff's repeated attempts to obtain corrective action are sufficient reasons to find that Commercial Ventures willfully violated the rule.

B. Rule 25-24.515(5)

Rule 25-24.515(5), Florida Administrative Code, states that each telephone station shall be equipped with a legible sign, card or plate of reasonable permanency, which shall identify the following: telephone number and location address of such station; name or recognizable logo of the owner and the party responsible for repairs and refunds; address of responsible party; clear dialing instructions (including notice of the lack of availability of local or toll services); and, where applicable, a statement that the phone is not maintained by the local exchange company.

Our staff's service evaluations conducted in both October 1987 and February 1988 reflect the following violations of Rule 25-24.515(5), Florida Administrative Code: 1) failure to provide the name or recognizable logo of the owner and party responsible for repairs and refunds, 2) failure to identify the address of the responsible party, 3) failure to provide a free telephone number of

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the responsible party, and 4) no visible statement that the phone is not maintained by the local exchange company.

During our staff's August 24, 1987 evaluation, service was unsatisfactory due to inadequate information regarding the name or logo, refund and repair numbers and address. Additionally, there was no disclaimer that the phone was not maintained by the local exchange company. In a follow-up evaluation made on October 9, 1987, our staff found that on all seven telephones (374-7244, 374-7245, 374-7262, 374-7265, 577-4395, 577-4396 and 577-4397): the name or recognizable logo of the owner and party responsible for repairs and refunds was not displayed, the address of the party responsible for repairs - refunds was not displayed and, a statement disclaiming local telephone company was not displayed.

Our staff also found the phones in violation of Rule 25-24.515(5) on its February 18, 1988, evaluation. In that evaluation the staff found that the telephone number plate was not displayed (374-7245, 577-4397), location address was not displayed (374-7245, 577-4397), name or recognizable logo of the owner and party responsible for repairs and refunds was not displayed (374-7245, 577-4397), address of the party responsible for repairs - refunds was not displayed (374-7244, 374-7245, 374-7262, 374-7265, 577-4395, 577-4396 and 577-4397), clear dialing instructions were not displayed (577-4397), and a statement disclaiming local telephone company responsibility was not displayed (374-7245, 577-4397). Staff's May 18, 1988, evaluation reflects no violation of Rule 25-24.515(5).

Commercial Ventures was notified of the October 9, 1987 evaluation results on October 15, 1987, of the February 18, 1988 evaluation results on February 24, 1988, and of the results of the May 18, 1988 evaluation on May 27, 1988. Commercial Ventures responded in its October 29, 1987 and March 14, 1988 letters, that the violations had been corrected. We find that Commercial Ventures willfully violated Rule 25-24.515(5), Florida Administrative Code.

While Respondent's brief emphasizes that all telephones were in compliance with Rule 25-24.515(5) during the May 18, 1988 evaluation, it admits that the other inspections by the Commission may have occurred at a time when the Respondent was changing from one service company to another, and prior to the time that the new service company replaced the label on the coinphones. Thus,

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Respondent attempts to shift its responsibility to its service companies, despite our staff's efforts to inform Commercial Ventures of its responsibility for providing service in accordance with Commission rules. In view of Mr. Rose's testimony for Commercial Ventures that he wasn't sure if maintenance was done on a timely basis, and his lack of confidence in his service companies, we find that Commercial Ventures acted in an irresponsible manner by failing to be more attentive to its PATS telephone customers.

C. Rule 25-24.515(6)

Rule 25-24.515(6), Florida Administrative Code, states that each telephone station which provides access to any interexchange company, must provide access to all locally available interexchange companies.

During the service evaluation of October, 1987 our staff identified six (6) of the seven (7) Commercial Ventures pay telephones which would not provide access to all locally available interexchange companies. The seventh (7th) telephone was out of service. The staff's February, 1988, evaluation found six (6) repeat violations and one(1) telephone out of service.

In its brief, Respondent refers to the May 18, 1988, evaluation where six of seven telephones were shown to be in compliance. However, the Respondent ignores our staff's previous evaluations.

Our staff's October 9, 1987 evaluation found that telephone numbers 374-7265, 577-4397, 577-4395, 577-4396, 374-7245, and 374-7244 did not permit access to the interexchange access codes of 950-1022 (MCI), 950-0789 (Microtel), 950-1033 (Sprint), 950-0488 (ITI), 950-1011 (Metromedia), 950-1862 (SouthTel), and, 950-0002 (Americall). Telephone 374-7262 could not be evaluated because it was out of service.

Our staff's February 23, 1988, evaluation found that telephones 374-7263, 374-7244, 374-7245, 577-4396, 577-4395, and 577-4397 did not permit access to the Sprint code of 950-1033 (the only access attempt made). Telephone 374-7262 could not be evaluated because it was out of service. The staff's May 18, 1988 evaluation found no violations of Rule 25-24.515(6), although

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telephone 374-7245 could not be tested because the line was disconnected.

Commercial Ventures responded in its October 29, 1987 and March 14, 1988 letters, that the violations had been corrected. However, when questioned by staff counsel about providing access to interexchange carriers, witness Rose replied, "I didn't understand what that was and Ted Odder didn't understand what that was and my service company didn't understand what it was."

There is a disparity between Mr. Rose's letters concerning corrective action and his testimony indicating ignorance of the interexchange carrier access requirement. Our staff provided Mr. Rose with a copy of the Rule 25-24.515(6) requirement on October 15, 1987, and we find that his failure to familiarize himself with the requirements of the rule to be indicative of his company's lack of commitment to monitoring the corrective actions of Commercial Ventures' service companies.

We find that Commercial Ventures willfully violated Rule 25-24.515(6), Florida Administrative Code.

D. Rule 25-24.515(7)

Rule 25-24.515(7), Florida Administrative Code, states that each telephone station must allow incoming calls to be received, with the exception of those located at penal institutions, hospitals and schools, and at locations specifically exempted by the Commission.

The October, 1987 service evaluation identified one (1) of the seven (7) Commercial Ventures pay telephones which failed to receive incoming calls pursuant to the requirements of Rule 25-24.515(7), Florida Administrative Code. One (1) telephone was out of service.

Telephone 374-7265 would not receive incoming calls during our staff's October 9, 1987, evaluation. Telephone 374-7265 was out of service during the staff's May 27, 1988, evaluation. Our staff listed the phone as being unable to receive incoming calls which is one of the conditions that must be satisfied before a telephone is considered in service.

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In its Brief, Commercial Ventures emphasizes the general compliance with this rule found by our staff in its May 18, 1988, evaluation. However, the Respondent fails to address the October 9, 1987 evaluation which found a phone in violation of the Rule.

We find that Commercial Ventures willfully violated Rule 25-24.515(7), Florida Administrative Code.

E. Rule 25-24.515(10)(a)

Rule 25-24.515 (10)(a), Florida Administrative Code, states that each pay telephone service company shall make all reasonable efforts to minimize the extent and duration of interruptions of service. Service repair programs should have as their objective the restoration of service on the same day that the interruption is reported to the company (Sundays and holidays excepted).

Our staff initially began its investigation into this case on July 31, 1987, because of a complaint from the Everglades Hotel that the telephones were frequently out of service or did not work properly. The hotel informed us that service did not improve after reporting the problems to Commercial Ventures. Our staff found a telephone out of service on evaluation visits on October 1987, February 1988, and May 1988.

The staff's investigation was initiated by complaints from the Everglades Hotel. The staff evaluations identified out-of-service phones (374-7265 and 374-7262) on the October 9, 1987, evaluation; (374-7262) on the February 18, 1988, evaluation; and (374-7245, 374-7262) on the May 18, 1988 evaluation. Telephone number 374-7262 was found out of service on three consecutive evaluations. Our staff has no way of determining how long a phone may have been out of service since Commercial Ventures kept no records of complaints, but the record indicates there were complaints from customers of out of order, no dial tone, and Commercial Ventures' witness, Mr. Rose, testified that he didn't know if proper maintenance was timely done.

We find that Mr. Rose's testimony that he didn't know if proper maintenance was timely done is strong evidence of the ineffectiveness of Commercial Ventures' repair efforts. The contention that the hotel failed to notify Commercial Ventures of telephone malfunctions is refuted by a September 15, 1987, letter from the hotel and by Mr. Rose's testimony.

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Thus, we find that Commercial Ventures has willfully failed to maintain the pay telephones at the Everglades Hotel in accordance with Rule 25-24.515(10)(a), Florida Administrative Code.

III. VIOLATIONS NOT CURED WITHIN THIRTY (30) DAYS

In Order No. 19085, we required Commercial Ventures to cure its violations within thirty (30) days. As a defense, Commercial Ventures maintains that our staff's assertion that the purported violations were not cured within thirty (30) days of our issuance of the Order Initiating Show Cause Proceedings is contrary to any evidence. Commercial Ventures asserts that the testimony of the investigators of the Commission, together with the evaluation results of May 18, 1988, disclose no rule violations. Commercial Ventures contends that the burden of proof is upon the staff to produce evidence of a rule violation and that the staff has not done so.

However, our staff's May 18, 1988, evaluation indicates that telephone number 374-7245 could neither receive nor originate calls. Telephone numbers 577-4395, 577-4396, and 577-4397 were not accessible to the physically handicapped. Telephone number 374-7262 was unable to originate or to receive calls. Thus, we find that Commercial Ventures failed to cure violations within thirty (30) days as required by the Order Initiating Show Cause Proceedings.

IV. IMPOSITION OF FINE

Section 364.285, Florida Statutes states that this "commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than \$5,000 . . . [e]ach day that such refusal or violation continues constitutes a separate offense. Based upon the foregoing sections of this Order, we find that the company has not acted in a responsible manner to correct the violations. While there is uncertainty as to Commercial Ventures' contractual agreements with maintenance companies, this does not negate Commercial Ventures' responsibility, as the certified PATS subscriber of record, to comply with Commission Rules. We find that Commercial Ventures shall be fined \$7,000 for failure to

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comply with, and willful violation of, our rules as discussed above.

While Commercial Ventures asserts that this amount is confiscatory compared to Commercial Ventures' net income, it is clear from the hearing transcript that Commercial Ventures is unsure of its own income. We find that imposition of a fine of \$7,000 is reasonable, considering the repeat nature of the violations and the our staff's prolonged efforts to have Commercial Ventures correct the problems.

V. APPLICABILITY OF SECTION 364.15, FLORIDA STATUTES

Commercial Ventures questioned whether Section 364.15, Florida Statutes, which provides that the Commission issue an order directing repairs and improvements, changes, additions or extensions, applies to the Commission's investigations and evaluations of public pay telephones. Commercial Ventures did not address this issue in its Brief. Thus, pursuant to Rule 25-22.056, the company has waived this issue.

Notwithstanding the waiver, when a pay telephone (PATS) provider accepts a certificate of public necessity it does so subject to Commission rules. Compliance with Commission rules is a preexisting obligation for the PATS provider. Requiring the Commission to order that a PATS provider make repairs which are already specifically mandated under Commission rules would be nonsensical. Section 364.285, Florida Statutes, specifically authorizes the Commission to impose penalties for "any entity subject to its jurisdiction under [Chapter 364] which is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission." (emphasis added) Thus, the Legislature considered rules and orders to be of equal force for purposes of enforcement.

VI. APPLICABILITY OF SECTION 364.185, FLORIDA STATUTES

Commercial Ventures asserts that its payphones should be within the ambit of Section 364.185, Florida Statutes, which provides that a telephone company be notified of the making of investigations, inspections, examination, and tests.

While Section 364.185, Florida Statutes, has been applied to the making of investigations, inspections, examinations, and tests

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of the private property of the telephone companies, this provision has never been applied to the evaluation of public pay telephones, whether those pay telephones are owned by a LEC or a non-LEC PATS provider. The statute applies to Commission entry "upon any premises occupied by any telephone company." Pay telephones are, by their nature, available to the general public. For this Commission, which is charged with regulating pay telephone service, to be afforded less access to such telephones than the public at large would be ludicrous. Section 364.185 applies to circumstances where the Commission needs access to telephone facilities which are not open and available to the general public, and where due process might prohibit an unmitigated right to entry.

Moreover, the testing that is done by a PATS examiner is not the same as the technical network tests performed in LEC central offices by service evaluation engineers. A PATS test simply checks the informational content and the general functional condition of the telephone. These are the conditions that any consumer would experience directly when attempting to use the telephone. Accordingly, we find that Commercial Ventures' argument on this point is without merit.

VII. MOTION TO BE HEARD AT RECONSIDERATION

The Agenda addressing the reconsideration of Commercial Ventures' Motion to Disqualify the Hearing Officer has been held and Commercial Ventures' Motion to be Heard in that proceeding denied, de facto. Since pursuant to Rule 25-22.058, oral argument on reconsideration is in the discretion of the Commission and is not a right, failure to allow Mr. Rose to speak at the Agenda was not a denial of an opportunity to be heard.

VIII. CLOSING THE DOCKET

With the collection of the fine imposed or cancellation of Commercial Ventures' Certificate Number 1006, nothing remains to be done in this Docket.

Now, in consideration of the foregoing, it is

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

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ORDERED that the Commercial Ventures pay telephones located at the Everglades Hotel violate Rules 25-24.515 (4) - (7), Florida Administrative Code. It is further,

ORDERED that Commercial Ventures, Inc. failed to maintain the pay telephones at the Everglades Hotel in accordance with Rule 25-24.515 (10) (a). It is further,

ORDERED that Commercial Ventures, Inc. is hereby fined seven-thousand dollars (\$7,000) for having refused to comply with and willfully violating Rules 25-24.515 (4), (5), (6), (7), and (10)(a), Florida Administrative Code. It is further,

ORDERED that Section 364.185, Florida Statutes, does not bar the Commission's investigations and evaluations of public pay telephones. It is further,

ORDERED that this Docket shall remain open for 30 days pending payment of the fine. If the fine is paid within 30 days, this docket shall be closed. If the fine is not paid within this time frame, Commercial Ventures' Certificate, Number 1006, shall be canceled automatically, pursuant to this Order. After cancellation of the Certificate this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 5th
day of March, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CWM

by: Kay Flynn
Chief, Bureau of Records

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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 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.