

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of Show Cause) DOCKET NO. 960124-TC
Proceedings against Wlberth) ORDER NO. PSC-97-0351-FOF-TC
Gaviria for Violation of Service) ISSUED: March 27, 1997
Standards Rules 25-24.515 and)
25-24.512, F.A.C.)
_____)

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER ADOPTING HEARING OFFICER'S RECOMMENDED
ORDER AND REVOKING CERTIFICATE

By the Commission:

I. Case Background

On March 20, 1996, PAA Order No. PSC-96-0388-FOF-TP was issued requiring Wlberth Gaviria (Gaviria) to show cause why he should not be fined or his Certificate Number 3320 should not be canceled for violations of Rules 25-24.512, Improper Use of a Certificate, and 25-24.515, Pay Telephone Service, Florida Administrative Code. On April 9, 1996, Gaviria filed a Petition to Initiate Formal Proceeding and an Answer and Response to Order to Show Cause, in which he denied that he had violated Rules 25-24.512 and 25-24.515, F.A.C. The case was forwarded to the Division of Administrative Hearings on August 21, 1996, and the final hearing was held on December 6, 1996. Gaviria failed to show at the final hearing.

On January 17, 1997, the Administrative Law Judge (ALJ) issued the Recommended Order. The Recommended Order includes specific findings of fact and conclusions of law that support the ALJ's decision that the Commission established by clear and convincing evidence that Gaviria violated Rule 25-24.515, F.A.C. The ALJ found that the Commission failed to establish by clear

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and convincing evidence that Gaviria violated Rule 25-24.512, F.A.C., because he allowed another company named South Telecommunications, Inc. (STI), which is jointly owned by Wlberth and Heiner Gaviria, to place its name on the nameplates of some of Gaviria's telephones. Finally, the ALJ concluded that by his conduct of his pay telephone services, Gaviria has shown that it is not in the public interest that he be permitted to continue to hold a certificate. The ALJ recommended that the severity of the violations of the Commission's rules is sufficient to justify that Certificate No. 3320 be revoked. No party filed exceptions to the Recommended Order. On March 18, 1997, the Commission adopted the ALJ's Recommended Order as its own.

II. Adoption of the Administrative Law Judge's Findings of Fact and Conclusions of Law

The Commission concurs with the ALJ's recommendation that the severity of the violations of the Commission's rules is sufficient to justify that Certificate No. 3320 be revoked. The Recommended Order adopted by the Commission is attached as "Attachment A."

Therefore, based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that all findings contained in the Recommended Order for Division of Administrative Hearings Case No. 96-3925 are affirmed in every respect. It is further

ORDERED that Wlberth Gaviria has wilfully violated Rule 25-24.515, Florida Administrative Code. It is further

ORDERED that it is not in the public interest for Wlberth Gaviria to operate in Florida. It is further

ORDERED that Wlberth Gaviria's certificate of public convenience and necessity (No. 3320) is revoked. It is further

ORDERED that this docket is closed.

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By ORDER of the Florida Public Service Commission, this 27th
day of March, 1997.

BLANCA BAYO, Director
Division of Records and Reporting



By: Kay Flynn, Chief of Records

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater 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.

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CHARLES J PELLEGRINI ESQ
FLORIDA PUBLIC SERVICE COMMISSION
2540 SHUMARD OAK BLVD
TALLAHASSEE FL 32399-0850

Florida Public Service Commission
RECEIVED
JAN 20 1997
LEGAL DIVISION

State of Florida
Division of Administrative Hearings

Sharyn L. Smith
Director and Chief Judge
Ann Cole
Clerk of the Division



The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
32399-3060

January 17, 1997

Blanca Bayo
Director of Records and Recording
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Gaviria v. Florida Public Service Commission
Case No. 96-3925

Dear Ms. Bayo:

Enclosed is my Recommended Order. Also enclosed are the exhibits admitted in evidence and the transcript of the final hearing. Copies of this letter will serve to notify the parties that my Order and the record have been transmitted this date.

As required by Section 120.57(1)(k), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order within 15 days of its rendition.

Sincerely,

A handwritten signature in cursive script that reads "Sus-B Kirkland".

SUSAN B. KIRKLAND
Administrative Law Judge

SBK/drk

Enclosures

cc: Charles J. Pellegrini, Esquire
Ulberth Gaviria
William D. Tallbott, Executive
Rob Vandiver, General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILBERTH GAVIRIA,)
)
 Petitioner,)
)
 vs.) CASE NO. 96-3925
)
 FLORIDA PUBLIC SERVICE COMMISSION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Susan B. Kirkland, held a formal hearing in this case on December 16, 1996, in Miami, Florida.

APPEARANCES

For Petitioner: No appearance.

For Respondent: Charles J. Pellegrini, Esquire
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 31399-0850

STATEMENT OF THE ISSUES

Whether Petitioner violated Rules 25-24.512 and 25-24.515, Florida Administrative Code, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On March 20, 1996, Respondent, Florida Public Service Commission (Commission), issued Proposed Agency Action Order No. PSC-96-0388-FOF-TC, requiring Petitioner, Wilberth Gaviria (Gaviria), to show cause why he should not be fined or his certificate Number 3320 should not be cancelled for violations of

Rules 25-24.512, Improper Use of a Certificate, and 25-24.515, Pay Telephone Service, Florida Administrative Code. On April 9, 1996, Gaviria filed a Petition to Initiate Formal Proceeding and an Answer and Response to Order to Show Cause, in which he denied that he had violated Rules 25-24.512 and 25-24.515, Florida Administrative Code.

The case was forwarded to the Division of Administrative Hearings on August 21, 1996, for assignment to an Administrative Law Judge. The case was set for final hearing on November 18, 1996. On November 7, 1996, Petitioner filed a Motion for Continuance, which was granted, and the final hearing was rescheduled for December 16, 1996.

On November 27, 1996, Respondent filed a Request for Official Recognition, requesting that official recognition be taken of the following: Chapter 364, Florida Statutes, Rule Chapters 25-22 and 25-24, Florida Administrative Code, Order No. PSC-96-0388-FOF-TC, and Order No. PSC-96-0548-FOF-TC. The request was granted at the final hearing.

On December 13, 1996, counsel for Petitioner filed Notice of Counsel's Withdrawal from Further Representation of Petitioner, Wilberth Gaviria.

Petitioner failed to appear at the final hearing. Respondent called the following witnesses at the final hearing: Richard Moses, Ralph King, Chester Wade, and Victor Cordiano. Respondent's Exhibits 1-140 were admitted in evidence.

The transcript was filed on January 7, 1997. On January 13, 1997, Respondent filed a Motion to Late File Proposed Recommended

Order. Good cause having been shown, the motion is GRANTED. Respondent submitted its proposed recommended order on January 14, 1997.

FINDINGS OF FACT

1. Petitioner, Wilberth Gaviria, owns Gaviria, which is a pay telephone service provider in Miami, Florida, and which holds Certificate No. 3320 from the Florida Public Service Commission (Commission) issued on April 12, 1993.
2. Wilberth and Heiner Gaviria jointly owned a company named South Telecommunications, Inc. (STI).
3. Rule 25-24.511(4), Florida Administrative Code, restricts a pay telephone provider to a single certificate. In March 1996, the Commission denied STI's application for a certificate to provide public pay telephone service because Wilberth Gaviria held major ownership interests in both Gaviria and STI and a certificate had been issued to Gaviria.
4. The Commission also denied STI's application because the Commission determined that STI had willfully misrepresented that it was not providing pay telephone service without a certificate.
5. In May, 1995, the Florida Pay Telephone Association forwarded to the Commission a complaint from Liberty Tel. Inc. (Liberty), a pay telephone service provider in Miami.
6. Liberty alleged that STI, although not issued a certificate by the Commission, was soliciting location owners under contract with Liberty.
7. Liberty alleged that it had received seven letters from an agent of STI, advising that STI had entered into contracts

with seven location owners alleged to be under contract with Liberty and requesting that Liberty remove its pay telephones from those locations. In response to the letters, Liberty advised the seven location owners of their contractual obligations to Liberty.

8. Liberty also alleged in its complaint that it had checked three Gaviria pay telephones and found the following violations:

- a. local calls were limited to ten minutes for twenty-five cents;
- b. charges in excess of tariff for the Miami-Fort Lauderdale extended calling plan;
- c. 0+ calls were not routed to the local exchange company;
- d. incoming calls were blocked;
- e. the 211 repair message was incomplete; and
- f. STI nameplates were on the telephones.

9. On October 23, 1995, the Commission received a complaint from Alberto Menendez of Alberto and Sons Meat Market in Miami, alleging that STI failed to return telephone calls concerning two pay telephones which were damaged and out of operation, failed to respond to messages requesting repair, failed to remove the telephones from Mr. Menendez's property until five weeks after a request to do so, and failed to restore the premises to a reasonable condition after removing the telephones.

10. As a result of the complaints from Liberty and Mr. Menendez, the Commission staff conducted four field evaluations, beginning in June, 1995.

11. The Commission staff conducts field service evaluations of pay telephones in Florida using a checklist consisting of the following 29 criteria/violations:

1. Telephone was not in service.
2. Telephone was not accessible to the physically handicapped.
3. Telephone number plate was not displayed.
4. Address of responsible party for refunds/repairs was not displayed.
5. Coin-free number for repairs/refunds did not work properly.
6. Current directory was not available.
7. Extended Area Service and Local calls were not \$.25 or less.
8. Wiring not properly terminated or in poor condition.
9. Address of pay telephone location was not displayed.
10. Instrument was not reasonably clean.
11. Enclosure was not adequate or free of trash.
12. Glass was chipped or broken.
13. Insufficient light to read instructions at night.
14. Name of provider (as it appears on the certificate) was not displayed.
15. Local Telephone Company responsibility disclaimer was not displayed.
16. Clear and accurate dialing instructions were not displayed.
17. Statement of services not available was not displayed.
18. Automatic coin return function did not operate properly.
19. Incoming calls could not be received/or bell did not ring loud enough.
20. Direct coin free service to the local operator did not work.
21. Direct coin free service to local Directory Assistance did not work.
22. Access to all available interexchange carriers was not available.
23. Coin free service to 911 did not work.
24. 911 could not verify the street address of the pay phone.
25. Transmission was not adequate or contained noise.
26. Did not comply with 0+ interLATA Toll rate cap - AT and T + opr. chg + \$.25.
27. Combinations of nickels and dimes did not operate correctly.
28. Dial pad did not function after call was answered.
29. 0 + area code + local number did not go to LEC operator as required.

Hereinafter, these violations will be referenced by the number preceding each violation. For example, telephone not in service will be referenced as "1."

12. On June 7, 1995, Ralph King, an evaluator for the Commission evaluated Gaviria pay telephone number 305 751 8327 and found the following violations: 1, 3, 4, 6, 9, 13, and 14.

13. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 8523 and found the following violations: 3, 4, 6, 8, 9, 14, 15, and 16.

14. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 633 9237 and found the following violations: 3, 4, 5, 6, 7, 9, 10, 15, 16, 19, 22, and 29.

15. On June 9, 1995, Mr. King evaluated Gaviria pay telephone number 305 920 9902 and found the following violations: 2, 3, 4, 5, 6, 7, 9, 15, 16, 19, 21, and 22.

16. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 854 9684 and found the following violations: 3, 4, 5, 6, 7, 9, 14, 15, 16, 22, 27, and 29.

17. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 854 9087 and found the following violations: 4, 5, 6, 7, 9, 14, 15, 16, 27, and 29.

18. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 324 9023 and found the following violations: 6, 9, 14, 15, 16, 22, and 29.

19. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 350 9020 and found the following violations: 1, 4, 5, 6, 9, 13, 14, 20, 22, 23, 27, and 29.

20. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 350 9096 and found the following violations: 3, 4, 5, 6, 7, 9, 13, 14, 15, 16, 19, 22, 27, and 29.

21. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 573 8079 and found the following violations: 3, 4, 5, 6, 7, 9, 19, 22, 27, and 29.

22. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 8248 and found the following violations: 3, 4, 5, 6, 7, 9, 13, 14, 19, 22, and 29.

23. On June 7, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 8378 and found the following violations: 1, 3, 4, 5, 6, 7, 9, 13, 14, 16, 19, and 29.

24. On June 6, 1995, Mr. King evaluated Gaviria pay telephone number 305 883 8281 and found the following violations: 4, 5, 6, 9, 13, 14, and 15.

25. On June 6, 1995, Mr. King evaluated Gaviria pay telephone number 305 261 9899 and found the following violations: 3, 4, 5, 6, 7, 9, 13, 14, 15, 16, and 19.

26. On June 8, 1995, Mr. King evaluated Gaviria pay telephone number 305 673 9337 and found the following violations: 4, 5, 6, 7, 9, 13, 22, and 29.

27. On June 8, 1995, Mr. King evaluated Gaviria pay telephone number 305 673 9125 and found the following violations: 4, 5, 6, 7, 9, and 29.

28. On June 8, 1995, Mr. King evaluated Gaviria pay telephone number 305 221 9671 and found the following violations: 4, 5, 6, 11, and 17.

29. On June 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9731 and found the following violations: 4, 6, 14, 15, 16, 22, and 29.

30. On June 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9467 and found the following violations: 4, 5, 6, 7, 14, 19, 21, 22, and 29.

31. On June 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9433 and found the following violations: 4, 5, 6, 14, 22, and 29.

32. On June 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9087 and found the following violations: 3, 4, 5, 6, 7, 9, 13, 14, 15, 16, 17, 19, 22, and 29.

33. On June 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 861 9041 and found the following violations: 4, 5, 6, 7, 14, 15, 16, 19, 22, 27, and 29.

34. On June 14, 1995, Mr. King evaluated Gaviria pay telephone number 305 685 9345 and found the following violations: 4, 5, 6, 7, 14, 15, 16, 19, 22, 27, and 29.

35. On June 14, 1995, Mr. King evaluated Gaviria pay telephone number 305 685 9342 and found the following violations: 4, 5, 6, 7, 9, 14, 15, and 16.

36. The Commission staff advised Gaviria of the June, 1995 service evaluation results on June 14, 1995 by regular mail (File Nos. TE793.9501, TE793.9502), on July 11, 1995, by certified mail (File Nos. TE793.501, TE793.9502), on July 12, 1995 by regular mail (File No. TE793.9503), on August 4, 1995, by certified mail (File No. TE793.9503), each time requiring a response within 15 days and corrective measures.

37. Gaviria did not respond to the June 14, 1995 and July 12, 1995, letters or to the July 11, 1995 and August 4, 1995 follow-up letters.

38. On August 9, 1995, Commission staff transmitted the June 14, 1995, July 11, 1995, July 12, 1995, and August 4, 1995 letters to Gaviria by facsimile and advised Gaviria that it appeared to be in violation of the Commission's rule to report changes in circumstances.

39. On August 10, 1995, Commission staff advised counsel for Gaviria that the letters had been transmitted to Gaviria by facsimile and that Gaviria had stated that it would respond by August 21, 1995. Additionally, Commission staff advised counsel for Gaviria that they would consider recommending that the Commission initiate a show cause proceeding if Gaviria's response was not satisfactory and timely.

40. On August 14, 1995, Gaviria responded to File No. TE793.9501. The response consisted of 56 admissions, 45 claims of vandalism without substantiation, 14 denials without substantiation, and 4 claims that the line was going to be transferred. Commission staff considered the response unsatisfactory.

41. On August 21, 1995, Gaviria responded to File No. TE793.9503. The response consisted of 3 admissions, 42 denials without substantiation, and 1 claim that the line was going to be transferred. Commission staff considered the response unsatisfactory.

42. On September 6, 1995, Commission staff advised counsel for Gaviria that, according to Southern Bell, the four lines Gaviria claimed were going to be transferred in response to File No. TE793.9501 were still assigned to Gaviria's certificate.

Commission staff also advised counsel for Gaviria that Gaviria had misinterpreted the Commission's directory availability rule, that it had erroneously responded to the Commission's directory access rule, and that telephone number 305 751 9087 did not have required signage. Counsel was also advised of the procedure required to obtain certification for STI.

43. In September 1995, Commission evaluator King returned to Miami and evaluated 39 Gaviria pay telephones, 19 of which had been evaluated in June, 1995.

44. On September 14, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 751 8523 and found the following violations: 4, 6, and 13.

45. On September 11, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 920 9902 and found the following violations: 2, 6, 7, 9, 11, and 19.

46. On September 14, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 350 9020 and found the following violations: 4, 6, 8, 9, and 24.

47. On September 14, Mr. King re-evaluated Gaviria pay telephones numbered 305 751 8327, 305 350 9096 and 305 751 8378 and found violations 4 and 6 at each of the telephones.

48. On September 13, Mr. King re-evaluated Gaviria pay telephones numbered 305 751 8248, 305 673 9125, and 305 673 9337 and found violations 4 and 6 at each of the telephones.

49. On September 15, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 883 8281 and found the following violations: 4, 6, 7, 9, and 13.

50. On September 15, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 261 9899 and found the following violations: 6, 7, 9, 13, and 19.

51. On September 15, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 221 9671 and found violations 6 and 7.

52. On September 13, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 751 9732 and found the following violations: 4, 6, and 9.

53. On September 14, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 751 9467 and found the following violations: 4, 6, 9, and 20.

54. On September 14, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 751 9433 and found the following violations: 4, 6, and 9.

55. On September 13, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 751 9087 and found the following violations: 4, 6, and 13.

56. On September 12, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 861 9041 and found the following violations: 4, 6, and 27.

57. On September 15, 1995, Mr. King re-evaluated Gaviria pay telephone number 305 685 9341 and found the following violations: 6, 7, and 9.

58. On September 13, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9848 and found the following violations: 4, 6, and 19.

59. On September 13, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 8994 and found violations 4 and 6.

60. On September 13, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9763 and found the following violations: 2, 4, 6, and 14.

61. On September 13, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9860 and found the following violations: 4, 6, 19, and 24.

62. On September 13, 1995, Mr. King evaluated Gaviria pay telephone number 305 751 9992 and found the following violations: 4, 6, and 19.

63. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 573 9320 and found the following violations: 2, 6, 13, 14, 15, 16, 17, and 19.

64. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 867 9725 and found the following violations: 3, 4, 6, 9, 13, 14 and 19.

65. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 868 9167 and found the following violations: 3, 4, 6, 9, 13, 14, 15, and 19.

66. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 868 9727 and found the following violations: 4, 6, 9, 13, 19, and 24.

67. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 868 9823 and found the following violations: 4, 6, 13, 19, and 24.

68. On September 12, 1995, Mr. King evaluated Gaviria pay telephone number 305 868 9357 and found the following violations: 4, 6, 9, 19, and 24.

69. On September 14, 1995, Mr. King evaluated Gaviria pay telephones numbered 305 751 9906 and 305 751 9778 and found the following violations for each telephone: 2, 4, and 6.

70. On September 14, 1995, Mr. King evaluated Gaviria pay telephones numbered 305 751 8906 and 305 573 9876 and found violations 4 and 6 at each telephone.

71. On September 15, 1995, Mr. King evaluated Gaviria pay telephones numbered 305 691 9068 and 305 694 9415 and found violations 4 and 6 at each telephone.

72. On September 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 693 9451 and found violation 4.

73. On September 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 694 9415 and found the following violations: 4, 6, 9, 13, and 24.

74. On September 15, 1995, Mr. King evaluated Gaviria pay telephone number 305 883 9851 and found the following violations: 2, 6, 7, and 9.

75. Commission staff advised Gaviria of the September 1995 service results on September 20, 1995 by regular mail (File Nos. TE793.9504, TE793.9505, TE793.9506, TE793.9507), requiring a response within 15 days and corrective measures.

76. On October 2, 1995, counsel for Gaviria wrote to Commission staff stating that Gaviria had been unable to discover the majority of violations upon inspection and that Gaviria believed that the evaluator was intentionally misstating the condition of the telephones.

77. In his letter to Commission staff, counsel for Gaviria suggested a meeting with the evaluator and his supervisor. It

was left for counsel to arrange for the meeting, but he did not do so.

78. In November, 1995 two other Commission evaluators conducted an evaluation of two Gaviria pay telephones, one of which had been evaluated previously. For each of the telephones, the evaluators found violations 4 and 6.

79. Commission staff advised Gaviria of the November, 1995 evaluation results on November 14, 1995, by regular mail (File No. TE793.95080), requiring a response within 15 days and corrective measures.

80. On November 26, 1995, Gaviria timely responded to the November 14, 1995 letter; however his response consisted of denials without substantiation. Commission staff considered the response unsatisfactory.

81. On February 8, 1996, Commission staff filed a recommendation that the Commission order Gaviria to show cause why it should not have its certificate revoked or be fined for violations of Commission rules.

82. On March 20, 1996, the Commission issued Order No. PSC-96-0388-FOF-TC, in which it ordered Gaviria to show cause why it should not be fined or why the Commission should not revoke its certificate for violations of Rules 25-24.512 and 25-24.515, Florida Administrative Code.

83. On April 9, 1996, Gaviria timely filed an answer and petition to initiate formal proceedings before the Commission.

84. In March, 1996, Mr. King returned to Miami to re-evaluate Gaviria pay telephone number 305 861 9041 and found the

following violations on March 15, 1996: 4, 6, 14, 15, 26, and 29.

85. Commission staff advised Gaviria of the March, 1996 service evaluation results on March 20, 1996, by regular mail (File No. TE793.9601), requiring a response within 15 days and corrective measures.

86. On March 31, 1996, Gaviria timely responded to the March 20, 1996 letter by making denials without substantiation. Commission staff considered the response unsatisfactory.

87. In October 1996, Commission evaluator Chester Wade went to Miami to re-evaluate 23 of Gaviria's pay telephones.

88. On October 21, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 633 9237 and found the following violations: 1, 3, 6, 9, 14, and 19.

89. On October 22, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 751 9433 and found the following violations: 6, 9, 11, and 14.

90. On October 22, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 691 8180 and found the following violations: 2, 6, and 14.

91. On October 22, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 868 9357 and found the following violations: 6, 9, 14, and 24.

92. On October 22, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 751 9467 and found the following violations: 6, 14, and 20.

93. On October 21, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 854 9087 and found violations 6 and 14.

94. On October 22, 1996, Mr. Wade evaluated Gaviria pay telephones numbered 305 751 9732; 305 751 8327; 305 751 8900; 305 751 9906; 305 751 9778; 305 751 8378; 305 573 9876; 305 673 9125; 305 673 9337; 305 861 9041; 305 868 9823; and 305 868 9727 and found violations 6 and 14 for each of the telephones.

95. On October 21, 1996, Mr. Wade evaluated Gaviria pay telephones numbered 305 854 9684; 305 693 9451; 305 694 9415; and 305 691 9068 and found violations 6 and 14 at each telephone.

96. On October 21, 1996, Mr. Wade evaluated Gaviria pay telephone number 305 751 9087 and found the following violations: 6, 14, and 20.

97. Commission staff advised Gaviria of the October 1996 service evaluation results on November 6, 1996, by regular mail (File Nos. TE793.9603 and TE793.9604), requiring a response within 15 days and corrective measures.

98. On November 20, 1996, Gaviria timely responded to the letter. The response consisted of 31 denials without substantiation; 23 claims of vandalism without substantiation, 2 admissions, and 1 inaccurate claim of ownership. Commission staff considered the response to be unsatisfactory.

99. Commission Staff performed five separate field service evaluations on 38 Gaviria pay telephones, finding a total of 439 violations. Of that total, twenty percent were repeated violations.

100. Contrary to its assertions, Gaviria placed no orders for telephone directories to Bell South Telecommunications in the period June 6, 1995 to September 15, 1996.

101. Gaviria transferred telephones 305 920 9902; 305 883 8281; 305 262 9899; 305 221 9671; and 305 685 9342 only on September 18, 1995, following the Commission's September 1995 evaluation and even then without correcting the violations as it had claimed.

102. The Commission revokes approximately 90 certificates for public convenience and necessity each year for violations as comparatively minor as a failure to pay regulatory assessment fees or to notify the Commission of a change of location. Therefore, to revoke Gaviria's certificate for its more than 425 violations on 38 telephones over a period of 16 months would be proportionate to the offense.

CONCLUSIONS OF LAW

103. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

104. The Commission has the burden to establish the violations by clear and convincing evidence. Ferris v. Turlington, 510 So.2d 292 (Fla. 1987).

105. Chapter 364, Florida Statutes, sets forth the Commission's authority to regulate telecommunications companies, including pay telephone providers.

106. Section 364.01(4), Florida Statutes, provides that the Commission shall exercise its exclusive jurisdiction in order to :

Protect the public health, safety and welfare by ensuring that basic telecommunications services are available to all consumers in the state at reasonable and affordable prices.

107. Section 364.3375, Florida Statutes, provides that no person shall provide telephone service without first obtaining from the Commission a certificate of public convenience and necessity to provide such service.

108. Section 364.285(1), Florida Statutes, provides:

The 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 to have willfully violated any law rule or order of the commission or any provision of this chapter a penalty for each offense of not more than \$25,000, which penalty shall be fixed, imposed and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it.

109. Chapter 25-24, Part XI, Florida Administrative Code, sets forth rules governing the regulation of pay telephone service providers.

110. Rule 25-24.511(4), Florida Administrative Code, provides that the Commission will grant a certificate if the grant is in the public interest and that one certificate per applicant will be granted unless granting additional certificates is shown to be in the public interest.

111. Rule 25-24.514(1)(b), Florida Administrative Code provides that the Commission may cancel a company's certificate for violation of Commission rules or orders or violation of Florida Statutes.

112. Rule 25-24.515(1), Florida Administrative Code, provides that pay stations shall be lighted during hours of darkness when light from other sources is not adequate to read instructions and use the instrument.

113. Rule 25-24.515(3), Florida Administrative Code, provides that each telephone station shall permit access to 911 without requiring the use of a coin, paper money or a credit card.

114. Rule 25-24.515(4), Florida Administrative Code, provides that each station shall, without charge, permit access to local directory assistance and the telephone number of any person responsible for repairs or refunds.

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

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

117 Rule 25-24.515(7), Florida Administrative Code, provides that all intraLATA calls, including operator service calls, shall be routed to the local exchange company.

118 Rule 25-24.515(8), Florida Administrative Code, provides that each telephone station shall allow incoming calls

to be received, with the exception of confinement facilities, hospitals and schools, and at locations specifically exempted by the Commission.

119. Rule 25-24.515(10), Florida Administrative Code, provides that the charge for calls may not exceed the rates shown in the local exchange company Pay Telephone Access Tariff.

120. Rule 25-24.515(11)(a), Florida Administrative Code, provides that each pay telephone service company shall make all reasonable efforts to minimize the extent and duration of interruptions of service.

121. Rule 25-24.515(12), Florida Administrative Code, provides that where there are fewer than three telephones located in a group, a directory for the entire local calling area shall be maintained at each station. Where there are three or more telephones located in a group, a directory for the entire local calling area shall be maintained at every other station. However, where telephone stations are fully enclosed, a directory shall be maintained at each station.

122. Rule 25-24.515(13), Florida Administrative Code, provides that normal maintenance and coin collection activity shall include a review of the cleanliness of each station and reasonable efforts shall be made to ensure that 95 percent of all stations are clean and free of obstructions.

123. Rule 25-24.515(14), Florida Administrative Code, provides that each telephone station shall conform to the American National Standards Specifications for Making Buildings and Facilities Accessible and Usable by Physically Handicapped People.

124. The Commission has alleged that Gaviria violated Rule 25-24.512, Florida Administrative Code which provides:

No certificate of public convenience and necessity authorizing pay telephone service shall be sold, assigned, or transferred.

125. It is the Commission's position that Gaviria violated Rule 25-24.512 because it allowed STI nameplates to be placed on some of its telephones. Although the evidence does show that STI nameplates were on some of Gaviria's telephones, that in and of itself does not establish that Gaviria sold, assigned or transferred its certificate. The Commission has failed to establish by clear and convincing evidence that Gaviria violated Rule 25-24.512, Florida Administrative Code.

125. The Commission has established by clear and convincing evidence that Gaviria has willfully conducted pay telephone services, in the period beginning June 1995 through October 1996, in violation of Rules 25-24.515(1), (3), (4), (5), (6), (7), (8), (10), (11)(a), (12), (13), and (14), Florida Administrative Code.


126. By its conduct of its pay telephone services, Gaviria has shown that it is not in the public interest that it be permitted to continue to hold Certificate No. 3320. The severity of the violations of the Commission's rules is sufficient to justify that Certificate No. 3320 be revoked.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered finding that Wiberth Gaviria has willfully violated Rule 25-24.515, Florida Administrative Code and that his certificate of public convenience and necessity Certificate No. 3320 be revoked.

DONE AND ENTERED this 17th day of January, 1997 in Tallahassee, Leon County, Florida.



SUSAN B. KIRKLAND
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.