

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED-FPSC
FEBRUARY 8 AM 11:00
RECORDS AND REPORTING

DATE: FEBRUARY 8, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (VACCARO) *[Signature]*
DIVISION OF COMPETITIVE SERVICES (M. WATTS) *[Signature]*

RE: DOCKET NO. 010124-TX - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST TOTALTEL USA COMMUNICATIONS, INC. FOR APPARENT VIOLATION OF SECTION 364.183(1), F.S., ACCESS TO COMPANY RECORDS.

AGENDA: 02/20/01 - REGULAR AGENDA - SHOW CAUSE - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\010124.RCM

CASE BACKGROUND

- January 29, 1997 - TotalTel USA Communications, Inc. (TotalTel) obtained Florida Public Service Commission Alternative Local Exchange Company (ALEC) Certificate Number 4771.
- January 18, 2000 - TotalTel reported no revenue for 1999.
- February 22, 2000 - Staff opened Docket No. 000235-TX against TotalTel to initiate show cause proceedings for apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records for failure to provide staff with information contained in company records necessary for inclusion in the 1999 local competition report to the Legislature.

DOCUMENT NUMBER-DATE

01820 FEB-85

FPSC-REC.FBI/REPORTING

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- March 16, 2000, staff filed a recommendation to order TotalTel to show cause in writing why it should not be fined \$10,000 or have its certificate canceled for apparent violation of Section 364.183(1), Florida Statutes, for presentation at the March 28, 2000, Agenda Conference.
- May 23, 2000 - The Commission issued Order No. PSC-00-1023-AS-TX approving a \$3,500 settlement offer submitted by TotalTel in Docket No. 00235-TX.
- June 5, 2000 - The Commission received TotalTel's check for \$3,500 to settle Docket No. 000235-TX.
- July 6, 2000 - TotalTel was mailed a certified letter requesting information contained in company records for inclusion in the 2000 local competition report to the Legislature.
- July 11, 2000 - TotalTel signed the return receipt (Attachment A, page 8) from the July 6, 2000, certified letter.
- January 22, 2001 - As of this date, TotalTel has not responded to Commission staff.

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 order TotalTel USA Communications, Inc. to show cause why it should not be fined \$25,000 or certificate number 4771 should not be canceled for apparent failure to provide the Commission access to information in accordance with Section 364.183(1), Florida Statutes, Access to Company Records?

RECOMMENDATION: Yes. The Commission should order TotalTel USA Communications, Inc. to show cause in writing within 21 days of the issuance of the Commission's Order why it should not be fined \$25,000 or have certificate number 4771 canceled for apparent failure to provide the Commission access to information in accordance with Section 364.183(1), Florida Statutes, Access to Company Records. TotalTel USA Communications, Inc.'s response should contain specific allegations of fact and law. If TotalTel USA Communications, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period and the fine is not paid within ten business days after the 21-day response period, the facts should be deemed admitted, the right to a hearing should be deemed waived and certificate number 4771 should be canceled. If the fine is paid, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. (M. Watts)

STAFF ANALYSIS: Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

364.183, Access to Company Records. -

(1) 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.

Based on the return receipt (Attachment A, page 8) staff received from the United States Postal Service, it appears that TotalTel received the data request and could have responded. It is imperative that the Commission receive 100% participation to accurately reflect the status of local telecommunication competition to the Legislature and the Governor. Staff requested the information in order to comply with Section 364.386, Florida Statutes, Reports to the Legislature. Section 364.386, Florida Statutes, Reports to the Legislature, states in part:

364.386 Reports to the Legislature.-

(1) The Commission shall submit 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 December 1, 1996, and on an annual basis thereafter, a report on the status of competition in the telecommunications industry and a detailed exposition of the following:

(a) The overall impact of local exchange telecommunications competition on the continued availability of universal service.

(b) The ability of competitive providers to make functionally equivalent local exchange services available to both residential and business customers at competitive rates, terms, and conditions.

(c) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.

(d) The overall impact of price regulation on the maintenance of reasonably affordable and reliable high-quality telecommunications services.

(e) What additional services, if any, should be included in the definition of basic local telecommunications services, taking into account advances in technology and market demand.

(f) Any other information and recommendations which may be in the public interest.

By Section 364.285, 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 offense, 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. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t 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).

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Staff believes that the conduct of TotalTel, by refusing to allow staff access to company records, in apparent violation of Section 364.183(1), Florida Statutes, has been "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating to Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule." Thus, any intentional act, such as the conduct of TotalTel at issue here, would meet the standard for a "willful violation."

In February 2000, staff opened Docket No. 000235-TX against TotalTel to initiate show cause proceedings for apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records, for apparent failure to provide the information contained in company records for inclusion in the 1999 local competition report for the Legislature. The Commission approved TotalTel's settlement offer which included a contribution of \$3,500 to the General Revenue Fund and TotalTel's assurance that in the future it would timely respond to requests for information by the Commission. However, TotalTel has not responded to the Commission's request for information for the 2000 local competition report for the Legislature.

Staff opened this docket to initiate show cause proceedings against TotalTel for failure to provide information requested via certified letter for inclusion in the 2000 local competition report, in apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. Since this is TotalTel's second offense, staff believes that the proposed fine should be higher than the \$10,000 that the Commission has ordered for similar violations in comparable proceedings.

Therefore, staff recommends that the Commission should order TotalTel USA Communications, Inc. to show cause in writing within 21 days of the issuance of the Commission's Order why it should not be fined \$25,000 or have certificate number 4771 canceled for apparent failure to provide the Commission access to information in accordance with Section 364.183(1), Florida Statutes, Access to Company Records. TotalTel USA Communications, Inc.'s response should contain specific allegations of fact and law. If TotalTel USA Communications, Inc. fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period and the fine is not paid within

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ten business days after the 21-day response period, the facts should be deemed admitted, the right to a hearing should be deemed waived and certificate number 4771 should be canceled. If the fine is paid, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. If staff's recommendation in Issue 1 is approved and TotalTel USA Communications, Inc. timely responds to the Order to Show Cause, this docket should remain open pending the outcome of the show cause proceedings.

Staff recommends that if TotalTel USA Communications, Inc. fails to respond to the Order to Show Cause within the 21-day show cause response period and the fine is not received within ten business days after the expiration of the show cause response period, then certificate number 4771 should be canceled and this docket may be closed administratively. If TotalTel USA Communications, Inc. pays the fine recommended in Issue 1, this docket should be closed administratively. **(Vaccaro)**

STAFF ANALYSIS: If staff's recommendation in Issue 1 is approved and TotalTel USA Communications, Inc. timely responds to the Order to Show Cause, this docket should remain open pending the outcome of the show cause proceedings.

Staff recommends that if TotalTel USA Communications, Inc. fails to respond to the Order to Show Cause within the 21-day show cause response period and the fine is not received within ten business days after the expiration of the show cause response period, then certificate number 4771 should be canceled and this docket may be closed administratively. If TotalTel USA Communications, Inc. pays the fine recommended in Issue 1, this docket should be closed administratively.

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits.	A. Received by (Please Print Clearly) <i>KARLIS</i>	B. Date of Delivery <i>7-11-01</i>
1. Article Addressed to: Legal Department TotalTel USA Communications, Inc. Overlook at Great Notch 150 Clove Road, 8th Floor Little Falls, NJ 07424-2159	C. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee	
2. Article Number (Copy from service label) <i>7099 3400 0004 3108 94??</i>	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, July 1999	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. 4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	