

March 24, 2006

Via Fed-Ex No.: 8489-2528-4014

Ms. Blanco S. Bayo, Director  
Division of the Commission Clerk  
& Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: Docket No. 050956-TX

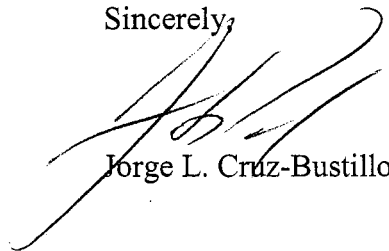
Dear Ms. Bayo:

Enclosed for filing on behalf of Carilink International Inc. ("Carilink") is an original and seven (7) copies of a Protest to the proposed agency action issued under Order No. PSC-06-0229-TX and a Petition for a Formal Proceeding in accordance with Florida Statutes §120.57(2), in Docket No. 050956-TX.

Copies are being served on the parties pursuant to the attached certificate of service.

If you have any questions regarding this filing, please do not hesitate to call me at 305.375.9220.

Sincerely,



Jorge L. Cruz-Bustillo

CMP \_\_\_\_\_  
COM 5  
CTR \_\_\_\_\_  
ECR JCB/eg  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
RCA \_\_\_\_\_  
SCR \_\_\_\_\_  
SGA \_\_\_\_\_  
SEC 1  
OTH Kim P. Lockard

DISTRIBUTION CENTER  
06 MAR 24 AM 9:47

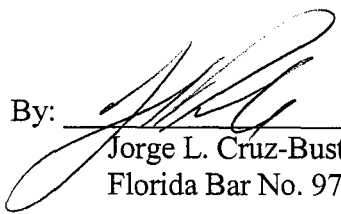
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served by U.S. Regular Mail this 23 day of March 2006, to the following:

Florida Public Service Commission  
Attn: Lee Eng Tan, Esq.  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Florida Public Service Commission  
Attn: Melinda Watts  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

**DIAZ & KAISER, LLP**  
2600 Bank of America Tower  
100 Southeast 2<sup>nd</sup> Street  
Miami, Florida 33131  
Telephone: (305) 375-9220  
Facsimile: (305) 375-8050

By:   
Jorge L. Cruz-Bustillo  
Florida Bar No. 976441

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: In re: Compliance investigation of  
CariLink International Inc. for apparent  
violation of Section 364.183(1), F.S., Access to  
Company Records.

DOCKET NO. 050956-TX

FILED: March 24, 2006

**CARILINK INTERNATIONAL INC.,**  
**PROTEST OF PROPOSED AGENCY ACTION AND**  
**PETITION FOR FORMAL PROCEEDING**  
**IN ACCORDANCE WITH ORDER NO. PSC-06-0229-PAA-TX**

CARILINK INTERNATIONAL INC., (“Carilink”), by and through its undersigned counsel and pursuant to Rules 28-106.201, Florida Administrative Code, files this Protest to the proposed agency action issued under Order No. PSC-06-0229-TX and a Petition for a Formal Proceeding in accordance with Florida Statutes § 120.57(2), in Docket No. 050956-TX.

1. Carilink is a competitive local exchange carrier certified by the Florida Public Service Commission (“Commission”) to provide telecommunications services in Florida.

Carilink’s service of process address is:

Jorge L. Cruz-Bustillo, Esq.  
DIAZ & KAISER, LLP  
100 SE 2<sup>nd</sup> Street  
Suite 2600  
Bank of America Tower  
Miami, Florida 33131  
Telephone: 305.375.9220  
Facsimile: 305.375.8050  
E-mail: [jcruzbustillo@diaz-kaiser.com](mailto:jcruzbustillo@diaz-kaiser.com)  
Web address: [www.diaz-kaiser.com](http://www.diaz-kaiser.com)

2. Carilink’s substantial interests are affected by Order No. PSC-06-0229-PAA-TX, because the proposed agency action specifically seeks to impose a fine and/or penalty on Carilink.

DOCUMENT NUMBER-DATE

02671 MAR 24 06

FPSC-COMMISSION CLERK

3. Carilink will suffer injury in fact by the imposition of the fine and/or penalty and Carilink's substantial interests are of the type and nature which a formal proceeding is designed to protect.

4. Carilink received notice of Order No. PSC-06-0229-PAA-TX **via facsimile** on March 22, 2006. *See* Rule28-106.201(b)(c).

5. Carilink disputes the factual determination made in the proposed agency action that its failure to provide the requested data was "willful." *See* Rule28-106.201(b)(d).

A formal hearing should be granted because no facts, to date, have been introduced into evidence during a public hearing establishing that Carilink's failure - to provide the Commission the requested data - was "willful."

Section 364.285(1), Florida Statutes, authorizes the Commission to impose a fine on a regulated entity for a "willful" violation. The Commission's plenary authority under Chapter 364, Florida Statutes, also allows it to cancel the certification of the regulated entity for failing to pay a fine that the Commission has imposed. By any objective measure, the civil statute being administered by the Commission is penal in nature. Because the statute is penal in nature, "any ambiguity in the substantive statute must be construed in favor of the defending party and against the Commission." *Diaz de la Portilla v. Florida Election Commission*, 857 So. 913, 917 (Fla. 3<sup>rd</sup> DCA 2003). Additionally, "the standard of proof in a case seeking fines . . . is clear and convincing evidence." *Id.* Thus, the Commission is obligated to introduce clear and convincing evidence at a public hearing proving that Carilink's failure was "willful" before any fine or penalty can be imposed.

The case law cited by the Commission in its proposed agency action is the correct starting point for any analysis of what must be shown to establish “willful” conduct. The critical language is:

“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 obey or to disregard the law.*” *Metropolitan Dade County v. State Department of Environmental Protection*, 714 So.2d 512, 517 (Fla. 1<sup>st</sup> DCA 1998). (Italicize added for emphasis).

Notwithstanding the above referenced language cited in the Commission’s proposed agency action, the Commission then imposes a strict liability standard. In other words, Carilink’s actions are automatically deemed to be “willful” simply because the regulated entity did not provide the requested data. The problem with this leap of logic is that it is contrary to the conclusions of law the Court reached in *Metropolitan Dade County*.

In *Metropolitan Dade County*, the court writes:

“When the legislature uses the word “willful” in a statute it demonstrates the legislature’s intention that the actor possess ‘more than mere knowledge or awareness’ for the statute to be applicable.” *Id.* at 516-517.

With this premise in mind, the only evidence asserted in the proposed agency action to support a conclusion that Carilink’s failure was “willful” is the fact that Carilink was the recipient of an initial data request on June 3, 2005, and the recipient of a second data request on July 19, 2005, both sent certified mail return receipt. As the Court stated above, the mere knowledge or awareness, alone, without more evidence is insufficient for a finding that Carilink’s failure and/or omission was “willful.”

In explaining the difference between an act that is willful and one that is mere negligence, the Florida Supreme Court has said the following:

“Every voluntary act of a person is intentional, and therefore in a sense willful, but, generally speaking, and usually when considering statutes of the character mentioned, a voluntary act becomes willful in law *only* when it involves some degree of *conscious wrong* on the part of the actor, or at least culpable on his part, something *more than a mere omission to perform a previously imposed duty.*” *County Canvassing Board of Primary Elections of Hillsborough County v. Lester*, 118 So. 201, 202-203 (Fla. 1928). (Italicize added for emphasis).

Given the explanation set out by the Court, it is reasonable to conclude that in order to prove willfulness there must be evidence that the refusal or omission was a “conscious purpose to disobey, a culpable omission, and not merely innocent neglect.” *Id.* at 202. An example of a culpable omission is where the accused has received the data request and has placed it on his or her desk knowing that the request must be responded to, but the accused refuses to send in the data. Evidence to establish that the person’s actions involved a conscious wrong could be (1) testimony from an employee that the accused was at work every day and that the data request simply sat on the desk, and (2) testimony that the accused stated something to the effect that “he/she has no intention of responding to the Commission’s request.”

Another method to prove willfulness is to allow the accused to proffer an explanation involving unusual circumstances - as to why he or she was preoccupied and unable to respond to the Commission data request making the failure to respond a mere innocent oversight. This proffer would create a rebuttable presumption. To overcome this presumption, the agency seeking to prove “willfulness” would have to establish that the unusual circumstances were only proffered as a pretext (i.e. the unusual circumstances did not occur, or, if they did occur, they are such that a reasonable person would not have been distracted under those circumstances). As noted earlier herein, the burden of proof on the agency is clear and convincing evidence. And any ambiguity, with respect to whether a reasonable man under like circumstances would likewise fail to respond to

the data request, must be construed in favor of the accused and against the Commission. *Diaz de la Portilla v. Florida Election Commission*, 857 So. 913, 917 (Fla. 3<sup>rd</sup> DCA 2003).

6. Rule 28-106.201(2)(e) requires a concise statement of the ultimate facts alleged which petitioner contends warrants reversal. The ultimate fact that warrants reversal is that Carilink's actions were not willful. The following are the facts, to be introduced at a formal hearing, that will demonstrate that Carilink's actions were not "willful."

- a. Carilink is owned and managed by Mr. Hany Ayoub.
- b. In the early part of 2005, Mr. Ayoub was diagnosed with cancer.
- c. Mr. Hany underwent his first chemotherapy on May 28, 2005.
- d. Patients who undergo chemotherapy endure mental and physical fatigue, nausea, vomiting, and other unwanted side affects.
- e. Mr. Ayoub continued to undergo these treatments every four weeks until November 2005.
- f. The first data request was sent out certified mail on June 3, 2005.
- g. The response was due on or before July 15, 2005.
- h. The second data request was sent out certified mail July 19, 2005.
- i. Mr. Ayoub employs three (3) people to assist in the running of his company: Mrs. Mayte Ayoub handles all billing matters; Ms. Pillar Jean-Jacques handles customer service and provisioning, and Mr. Maher Lenus is responsible for service calls.
- j. Commission records reflect that regulatory matters for Carilink have always been handled by Mr. Ayoub personally.

- k. The facts will demonstrate that given Mr. Ayoub's cancer, his chemotherapy, and his deteriorating mental and physical condition during this time period, at best, that Mr. Ayoub's failure to respond to the Commission request for data can only be described as "innocent neglect" or "mere inattentiveness." *See County Canvassing Board of Primary Elections of Hillsborough County v. Lester*, 118 So. 201, 202-203 (Fla. 1928) (where the court writes: "a willful failure to obey is almost universally held to mean something more than a mere inattentive, inert, or passive omission.").
- l. The above stated facts will be introduced at a public hearing in order to establish that Mr. Ayoub and by extension Carilink did not willfully violate a Commission directive.

7. Commission Order PSC-06-0229-PAA-TX requires reversal. *See* Rule 28-106.201(2)(f).

8. The relief sought by Carilink is a reversal of this Commission decision in Order No. PSC-06-0229-TX. *See* Rule 28-106.201(2)(g).

#### **PROPOSED SETTLEMENT OFFER**

9. Mr. Ayoub recognizes his responsibility as a principal of a company regulated by the Commission. He regrets the fact that he was unable to comply with the Commission's previous data requests, but his failure was never a conscious decision to disobey the will of the Commission. In order to resolve this matter, Mr. Ayoub proposes to pay to the Commission the sum of Five Hundred Dollars (\$500.00).

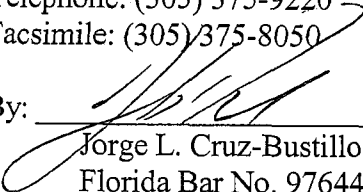


WHEREFORE, Carilink respectfully requests that this Commission accept the proposed settlement offer and/or grant its request for a formal proceeding pursuant to Section 120.57(2), Florida Statutes, and Rule 28-106.201.

Respectfully submitted this 23 day of March 2006.

**DIAZ & KAISER, LLP**  
2600 Bank of America Tower  
100 Southeast 2<sup>nd</sup> Street  
Miami, Florida 33131  
Telephone: (305) 375-9220  
Facsimile: (305) 375-8050

By: \_\_\_\_\_

  
Jorge L. Cruz-Bustillo  
Florida Bar No. 976441