

State of Florida



# Public Service Commission

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

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**DATE:** February 1, 2007

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Division of Competitive Markets & Enforcement (R. Moses, E. Harvey, C. Vinson),  
Office of General Counsel (A. Teitzman) *R* *PAW*

**RE:** Docket No. 070096-TI -. Determination of Compliance by TDS Telecom/Quincy Telephone with Order No. PSC-06-0168-PAA-TL

**AGENDA:** 02/13/07 – Regular Agenda – Proposed Agency Action -- Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\070096.RCM.DOC

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### Case Background

On March 1, 2006, the Commission issued Order No. PSC-06-0168-PAA-TL (PAA order) requiring each Florida incumbent local exchange company to file a wood pole inspection plan and to perform inspections of all wooden poles on an eight-year cycle. TDS Telecom/Quincy Telephone (TDS) filed such a plan on April 4, 2006 stating that its approximately 1,500 poles would be inspected using a traditional sound and bore approach. TDS noted that the inspections had begun on March 27, 2006, but had been suspended to ensure full compliance with the PAA order. TDS inspection efforts resumed during the first week of May 2006, using the Resistograph.

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During the months of April through October 2006, the other Florida ILECs filed pole inspection plans. Those plans fully complying with the Commission's PAA order were accepted by staff. However, the plans of two companies, Verizon and Embarq, varied from the order, and were brought before the Commission for approval of the specific variances. The plans for Verizon and Embarq were approved by the Commission in orders dated August 7, 2006 and November 13, 2006, respectively. In both instances, at the recommendation of staff, the Commission approved these plans which specified using the Resistograph device on an experimental basis, in lieu of the ordered sound and bore with excavation methodology.

In October 2006 staff became aware that Quincy Telephone had completed an inspection of all of its wood poles. However, the company indicated that the inspections had been accomplished using the Resistograph device rather than the traditional sound and bore method it had originally described in its April 4, 2006 plan.

Meetings between TDS and staff were held on October 3, 2006 and December 7, 2006 to discuss the methodology and results of the inspection efforts. At the meetings, the company confirmed that it had completed inspections of all of its wood poles in just one year. However, as a result of Quincy's use of the Resistograph device, staff advised the company that its actions may have constituted a violation of Order No. PSC-06-0168-PAA-TL and that Commission action may be considered.

**Discussion of Issues**

**Issue 1:** Did TDS violate Commission Order No. PSC-06-0168-PAA-TL?

**Recommendation:** Yes. (Moses, Harvey, Vinson)

**Staff Analysis:** The pole inspection activities executed by TDS differed from the plan communicated to the staff on April 4, 2006 and ordered by the Commission. TDS has acknowledged that its pole inspection program deviated from Commission Order No. PSC-06-0168-PAA-TL, which called for traditional sound-and-bore with excavation (see Attachment A, letter from TDS/Quincy Telecom.)

This action by TDS predated any consideration by this Commission of the adequacy of the Resistograph for wood pole inspection. Quincy unilaterally began using the Resistograph device in its inspections in May 2006.

Since the use of the Resistograph device varied substantially from the Commission's PAA order, staff sought Commission approval when this method was later proposed by two other companies. The Commission's actions on those recommendations reiterate that specific approval of such a variation is necessary.

**Issue 2:** Should TDS be fined for violating Commission Order No. PSC-06-0168-PAA-TL?

**Recommendation:** No. (Moses, Harvey, Vinson)

**Staff Analysis:** Staff believes the actions of TDS did violate the Commission's order. However, staff has twice sought and obtained Commission approval for use of the Resistograph device by both Verizon and Embarq as an experimental pole inspection methodology. Therefore, staff believes it would be appropriate now to forebear imposing any fine in this situation.

TDS contends that its actions did not involve willful intent to disregard the Commission order but rather a misunderstanding that it would need to request a waiver of the Commission order prior to using the Resistograph. (Attachment A)

Staff notes Florida Statutes do not define what it is to "willfully violate" a rule or order. Nevertheless, Section 364.285(1) implies the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1<sup>st</sup> DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of commission or an intentional act.

Thus, TDS's failure to follow the Commission's order meets the standard for a "refusal to comply" and "willful violations" as contemplated by the Legislature when enacting section 364.285, Florida Statutes. Staff notes also that ignorance of the law is never a defense. "It 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); see, Perez v. Marti, 770 So.2d 284, 289 (Fla. 3<sup>rd</sup> DCA 2000)

Finally, staff recognizes that, despite employing a then-unapproved methodology, TDS has nonetheless completed 100% of its pole inspections within the first year of the required eight-year cycle, thus advancing the overall aim of wood pole inspection. Additionally, these Resistograph results will provide substantial qualitative evidence and data for staff's use in assessing this new methodology and in comparing the TDS results to those obtained by other companies.

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**Issue 3:** Should this docket be closed?

**Staff Recommendation:** Yes. If no protest is filed by a person whose interests are substantially affected within 21 days of the Commission order, the docket should be closed upon the issuance of a consummating order. If a timely protest is filed by a person whose substantial interests are affected within 21 days of the Commission Order, the docket should remain open pending the resolution of the protest. **(Teitzman)**

**Staff Analysis:** If no protest is filed by a person whose interests are substantially affected within 21 days of the Commission order, the docket should be closed upon the issuance of a consummating order. If a timely protest is filed by a person whose substantial interests are affected within 21 days of the Commission Order, the docket should remain open pending the resolution of the protest.

January 3, 2007

Beth W. Salak, Director  
Division of Competitive Markets &  
Enforcement  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 060077-TL; Local Exchange Companies Telephone Pole Inspection Program

Dear Ms. Salak:

On February 7, 2006, the Florida Public Service Commission's (FPSC or Commission) adopted, with minor modifications, staff's recommendation for companies to implement an eight-year telephone inspection program. On March 1, 2006, the Commission issued Order No. PSC-06-0168-PAA-TL (PAA Order), requiring the companies to file plans for implementing an eight-year telephone pole inspection program. At the February Agenda Conference, commissioners made it clear their position on the importance of this program and strongly encouraged companies not to protest the order. TDS' intent was to comply with the order and did not file a protest.

In an effort to comply with the Commission's wood pole inspection program as quickly as possible, TDS' Network Services Department contracted with an outside vendor to begin sound and bore inspections prior to the issuance of the Commission order. The inspection began the week of March 27. Subsequent to the issuance of the Commission order, it was determined that the contract did not meet all of the requirements set forth in the order. TDS' Network Services Department pulled the contractor off the job in order to renegotiate the contract.

During these negotiations, TDS' contractor informed Network Services that Verizon intended to perform their pole inspections using a resistograph, which would eliminate the need to excavate the poles thus reducing the cost of the pole inspection program. Based on this information and the cost reduction, TDS' Network Services entered into a new pole inspection contract using the resistograph.

Given Network Services understanding that Verizon was using the resistograph to complete its pole inspections, Network Services personnel did not realize that if TDS employed the same process that they would need to file for a waiver of the Commission order. It was not until TDS completed inspection of over half of the poles that I became aware that TDS was using the resistograph at which time I shared this information with Commission staff.

TDS acknowledges that its poles inspection program deviated from Commission Order No. PSC-06-0168-TL. However, TDS uses of the resistograph was not a willful intent to disregard the Commission order but rather a misunderstanding that we would need to request a waiver of the Commission order prior to using the resistograph.

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Attachment A

While the Commission order required that the pole inspection program be completed over an eight-year cycle, TDS has completed the inspection of 100% of the company-owned poles. TDS is currently in the process of reviewing the data which will be filed with the Commission as set forth in Order No. PSC-06-0168-TL.

If you have any questions please contact me at (850) 875-5207.

Sincerely,

Thomas M. McCabe  
Manager – External Affairs  
TDS TELECOM