

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Determination of TDS Telecom's
compliance with Commission order regarding
telephone wood poles inspection plan.

DOCKET NO. 070096-TI
ORDER NO. PSC-07-0189-PAA-TI
ISSUED: February 28, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN

NOTICE OF PROPOSED AGENCY ACTION
ORDER ON POLE INSPECTION VIOLATION

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Case Background

On March 1, 2006, we 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.

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

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In October 2006, our 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 our 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, our staff advised the company that its actions may have constituted a violation of Order No. PSC-06-0168-PAA-TL.

II. Analysis and Decision

The pole inspection activities executed by TDS differed from the plan communicated to our staff on April 4, 2006 and ordered by this Commission. TDS has acknowledged that its pole inspection program deviated from Order No. PSC-06-0168-PAA-TL, which called for traditional sound-and-bore with excavation.

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 our PAA Order, our staff sought Commission approval when this method was later proposed by two other companies. Our action on those recommendations reiterate that specific approval of such a variation is necessary.

We find the actions of TDS did violate the PAA Order. However, we have twice approved the use of the Resistograph device by both Verizon and Embarq as an experimental pole inspection methodology. Therefore, we find it appropriate now to forebear imposing any fine in this situation.

TDS contends that its actions did not involve willful intent to disregard the PAA Order but rather a misunderstanding that it would need to request a waiver of the PAA Order prior to using the Resistograph.

We note the 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 this Commission's orders or rules. 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. 1st 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 PAA Order meets the standard for a "refusal to comply" and "willful violations" as contemplated by the Legislature when enacting section 364.285, Florida Statutes. We note 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. 3rd DCA 2000)

Finally, we recognize 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 our use in assessing this new methodology and in comparing the TDS results to those obtained by other companies.

If no protest is filed by a person whose interests are substantially affected within 21 days of this Order, the docket shall be closed upon the issuance of the 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 shall remain open pending the resolution of the protest.

Based on the foregoing, it is

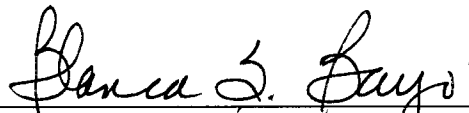
ORDERED by the Florida Public Service Commission that the actions of TDS Telecom/Quincy Telephone constitute a violation of Order No. PSC-06-0168-PAA-TL. It is further

ORDERED that we find it appropriate to forebear from imposing a fine as set forth in the body of this Order. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th day of February, 2007.



BLANCA S. BAYO, Director
Division of the Commission Clerk
and Administrative Services

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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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 21, 2007.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.