

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION
CLERK

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

DATE: March 1, 2007

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

FROM: Division of Competitive Markets & Enforcement (Beard, Casey)
Office of the General Counsel (Tan)

RE: Docket No. 060826-TX – Compliance investigation of USA Telephone Inc. d/b/a Choice One Telecom for apparent violation of Rules 25-22.032(6)(b), F.A.C., Customer Complaints, and 25-24.805, F.A.C., Certificate of Public Convenience and Necessity Required.

AGENDA: 03/13/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\060826.RCM.DOC

Case Background

USA Telephone Inc., d/b/a Choice One Telecom (Choice One) was a certificated competitive local exchange telecommunications company (certificate nos. 8587 and 5647) and interexchange company (certificate no. 7982) based in Miami and providing services in Florida. USA Telephone, Inc. had three operating companies in Florida (company codes TJ508, TX203, and TX843) – each using the name Choice One. Staff further notes that the Commission canceled each of the three operating companies' certificates for the following reasons:

DOCUMENT NUMBER-DATE

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Company Code	Date Canceled	Reason Canceled
TJ508	Jan. 20, 2005	Failure to Respond to Orders (non-payment of RAF)
TX203	November 30, 2004	Failure to Respond to Orders (non-payment of RAF)
TX843	September 1, 2006	Failure to Respond to Orders (non-payment of RAF)

On September 12, 2006, staff received a customer complaint against Choice One from one of its customers, Ms. Bertram. Staff attempted to contact the liaison for Choice One a number of times by phone with no results. In addition, staff attempted to contact Choice One by mail, sending two certified letters (return receipt requested) on October 2, 2006 and November 9, 2006. Staff received signed return receipts for each letter, indicating Choice One received both letters. The letter on November 9 informed Choice One that failure to respond to staff's request for information may lead to penalties in accordance with Section 364.285 Florida Statutes. Staff has not received a reply from Choice One to either of the two letters. A response to the final letter was due December 5, 2006.

As part of its investigation into the customer complaint, staff learned that the Commission has canceled Choice One's three operating certificates. The Commission took this action because Choice One failed to respond to Orders PSC-06-0611-PAA-TX, and PSC-06-0705-CO-TX (failure to pay its Regulatory Assessment Fee timely, statutory late payment charges and penalty amount). Staff placed a call to Choice One's "Call Us" phone number (provided on the company's web site) which staff believes is used by prospective customers to establish a new account. Speaking to the company's customer service representatives, staff discussed both the prospect of establishing of new service with the company in Florida and of the calling plans offered by Choice One in Florida. Based on these discussions, staff concluded that the company is actively doing business in the state as a competitive local exchange provider, and is doing so without a certificate of public convenience and necessity as required in Rule 25-24.805, Florida Statutes. Further indicating that Choice One has been operating without a current certificate came when staff became aware that another customer of the company filed a complaint against Choice One with the Commission on October 26, 2006.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.285 and 364.337, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty upon USA Telecom, Inc. d/b/a Choice One Telecom in the amount of \$10,000 for apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints?

Recommendation: Yes, the Commission should impose a \$10,000 penalty upon USA Telephone, Inc. d/b/a Choice One Telecom for the apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. The fine should be paid to the Florida Public Service Commission and forwarded to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the Commission does not receive the fine within five business days after the issuance of the Consummating Order, the collection of the fine should be referred to the Office of the Comptroller for collection. (Beard)

Staff Analysis: On September 12, 2006, staff received a customer complaint against Choice One from one of its customers, Ms. Bertram. The complainant states that she believed the company was billing her incorrectly. The complainant stated that she canceled her account with Choice One at the beginning of the month, but her final bill on August 18, 2006, was for a full month's service (\$44.33). Staff attempted to contact Mr. Jean A. Cherubin, Vice President and liaison for Choice One by phone a number of times. Staff either reached a voice recording with no option to leave a message, or would reach a member of support staff who consistently stated Mr. Cherubin was out of the office for the day. On each occasion, Commission staff left a detailed message regarding the nature of the call. Staff also provided its phone number and requested that Mr. Cherubin call to discuss the case.

Neither Mr. Cherubin nor any other representative of Choice One ever returned staff's calls. In addition, staff attempted to contact Choice One by mail, sending two certified letters (return receipt requested) on October 2, 2006 and November 9, 2006. Staff received signed return receipts for each letter, indicating Choice One received both letters. The letter on November 9 informed Choice One that failure to respond to staff's request for information may lead to penalties in accordance with Section 364.285 Florida Statutes. Staff has not received a reply from Choice One to either of the two letters. A response to the final letter was due December 5, 2006.

Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with the Commission's rules. According to Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, a company shall provide staff with a written response to a customer complaint within 15 working days after staff sends the complaint to the company. As of the date of filing this recommendation, Choice One has yet to respond to the customer complaint, which is an apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code.

Pursuant to Section 364.285(1), 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 day a violation continues, 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.

Section 364.285(1), Florida Statutes, however, does not define what it is to “willfully violate” a rule or order. Nevertheless, it appears plain that 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. 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.

However, “willful violation” need not be limited to acts of commission. The phrase “willful violation” can mean *either* an intentional act of commission or one of omission, that is *failing* to act. See, Nuger v. State Insurance Commissioner, 238 Md. 55, 67, 207 A.2d 619, 625 (1965)[emphasis added]. As the First District Court of Appeal stated, “willfully” can be defined as:

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 disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1st DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

Thus, Choice One’s failure to respond to the customer complaint meets the standard for a “refusal to comply” and “willful violations” as contemplated by the Legislature when enacting Section 364.285, Florida Statutes.

“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) (ignorance of the law is never a defense). Moreover, in the context of this docket, all competitive local exchange telecommunications companies, like Choice One are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other telecommunications companies that have failed to respond to consumer complaints. Therefore, staff recommends that the Commission find that Choice One has, by its actions and inactions, willfully violated Rule 25-22.032(6)(b), Florida Administrative Code, and should impose a penalty in the amount of \$10,000 against the

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company for the apparent violation. The fine should be paid to the Florida Public Service Commission and forwarded to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the Commission does not receive the fine within five business days after the issuance of the Consummating Order, the collection of the fine should be referred to the Office of the Comptroller for collection.

Issue 2: Should the Commission fine USA Telecom, Inc. d/b/a Choice One Telecom \$25,000 for apparent violation of Rule 25-24.805, Florida Administrative Code, Certificate of Public Convenience and Necessity Required?

Recommendation: Yes. The Commission should fine Choice One Telecom \$25,000 for apparent violation of Rule 25-24.805, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. (Beard)

Staff Analysis: While investigating a customer complaint against Choice One Telecom, staff became aware that the Commission canceled the company's certificate no. 8587 about the time the customer filed the complaint. Staff investigated further and learned that the company was ordered (PSC-06-0611PAA-TX and PSC-06-0705-CO-TX) by the Commission to pay penalties and cost of collection totaling \$500. The Commission also ordered Choice One to pay past due Regulatory Assessment Fees, including statutory late payment charges. Together, Choice One was to pay these charges to the Florida Public Service Commission for failure to comply with Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, by the end of the protest period. Along with canceling the company's certificate, the orders also required Choice One to cease and desist operating as a telecommunications provider.

Staff attached United States Postal Service Return Receipt cards bearing the company's address to both the Proposed Agency Action Order and the Consummating Order mailed to Choice One. These Cards were returned to the Commission, signed, providing proof of delivery of the two orders.

On August 25, 2006, Choice One filed a Competitive Local Exchange Company Regulatory Assessment Fee Return with the Commission, and remitted the indicated amount due of \$1,330.23. However, the fee was paid after the protest period ended and the Consummating Order was issued (August 15, 2006), and the company failed to pay the full amount due, omitting the \$500 charge for penalty and cost of collection, and statutory late payment charges.

Pursuant to Rule 25-4.0161(10), Florida Administrative Code, If an entity fails to pay the Regulatory Assessment Fee in full, including statutory late payment charges, along with the penalty amount, that entity's certificate shall be cancelled. In a memorandum dated August 29, 2006, staff noted that the Commission received no protests in response to Order No. PSC-06-0611-PAA-TX and the Commission canceled the certificates of Choice One and 26 other companies.

On December 22, 2006, staff placed a call to Choice One using one of the indicated numbers for establishing new service. A Choice One customer service representative answered and staff asked if the company offered new service in Miami, FL. The Choice One customer service representative stated "yes." Staff asked what charges and service plans were available and Choice One explained that the told charges would be an up-front amount of \$79 along with the first month's payment based on the plan selected. Staff asked what plans were available and Choice One explained that it had a basic plan for \$29 per month, and a Complete Choice Plan for \$49 per month that "covered West Palm Beach to Key West and all calling features." Staff repeated the test on December 27, 2006 and received the same result.

Staff believes its investigations indicate Choice Once is currently enrolling new customers and did not cease providing competitive local exchange services when its certificate of public convenience and necessity was canceled effective August 15, 2006. Staff believes Choice One is aware of the requirement of having a certificate of public convenience and necessity as the company has had to obtain such certificates in the past and has had such certificates canceled in the past.

Staff notes that USA Telephone Inc., d/b/a/ Choice One Telecom, has a history of operating without a certificate of public necessity. In Docket Number 050238-TX, staff explained that although the Commission canceled both Choice One's CLEC certification and IXC registration for non-payment of its regulatory assessment fee, the company was continuing to provide competitive local exchange service to over 3,000 customers. In that case, staff asked Mr. Cherubin to explain why Choice One did not resolve its issues that resulted in the cancellation of the company's certificate. Mr. Cherubin stated he had left the matter to an associate to handle and the associate failed to perform properly. Mr. Cherubin stated he only learned of the cancellation of the company's certificate and registration when he discovered a letter from the Commission regarding relevant Dockets (040845-TX and 040920-TI).

Staff believes that Choice One's practice of providing telecommunications services without a certificate constitutes a willful violation of a lawful rule of the Florida Public Service Commission.

Section 364.285(1), Florida Statutes, states:

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 lawful 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. Each day that such refusal or violation continues constitutes a separate offense. Each penalty shall be a lien upon the real and personal property of the entity, enforceable by the commission as a statutory lien under chapter 85. Collected penalties shall be deposited in the General Revenue Fund unallocated.

Therefore, staff recommends that the Commission should fine Choice One \$25,000 for apparent violation of Rule 25-24.805, Florida Administrative Code, Certificate of Public Convenience and Necessity Required.

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Issue 3: Should all network service providers be ordered to cease providing service to Choice One?

Recommendation: Yes. All network service providers should be ordered to cease providing service to Choice One. (Beard)

Staff Analysis: Network service providers cannot provide service without an interconnection agreement and competitive local exchange providers must be certificated to have an interconnection agreement.

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Issue 4: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13) (b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Choice One fails to timely file a protest and requests a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. The fines should be paid to the Florida Public Service Commission and forwarded to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the fine is not received within five business days after the issuance of the Consummating Order, the collection of the fine should be referred to the Office of the Comptroller for collection. This docket should remain open until the fines are paid or permission to write-off the fines is given by the Office of the Comptroller. (Tan)

Staff Analysis: Staff recommends that the Commission take action as set forth in the above staff recommendation.