

State of Florida



Public Service Commission

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

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

DATE: April 9, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Curry) *KLC*
Office of the General Counsel (Morrow) *AM*

RE: Docket No. 090086-TS – Compliance investigation of Roberta L. Marcus, Inc. *RC*
d/b/a The Marcus Centre, for apparent violation of Rule 25-24.565, F.A.C., *AM*
Certificate of Public Convenience and Necessity Required.

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AGENDA: 04/21/09 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RCP\WP\090086.RCM.DOC

Case Background

On October 24, 2008, staff received a customer complaint against Roberta L. Marcus, Inc. d/b/a The Marcus Centre (The Marcus Centre). After receiving the complaint, staff determined that The Marcus Centre may have been providing shared tenant services (STS) in Florida and had not obtained a STS certificate from the Commission. On November 17, 2008, staff sent a certified letter to the company. The letter requested that the company resolve the customer's complaint. The letter also requested that the company submit an application to obtain a STS certificate from the Commission as required by Rule 25-24.565, Florida Administrative Code (F.A.C.), Certificate of Public Convenience and Necessity Required. Staff received the

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signed certified mail receipt, indicating that the company received the letter, on November 24, 2008.

On November 25, 2008, The Marcus Centre contacted staff. During the telephone conversation, staff explained that the company needed to resolve the customer's complaint and obtain a STS certificate in order to continue operating as a STS in Florida. The company indicated that it did not believe that it needed a STS certificate. Staff requested that the company submit a detailed letter explaining the operations of the company and a copy of the complaint resolution letter that the company sent to the customer. Later that day, the company faxed both letters to staff. After reviewing the information, staff determined that The Marcus Centre was a STS provider and needed to obtain a certificate.

On December 2, 2008, staff received a letter, via facsimile, from the customer. The customer also provided a copy of the letter to The Marcus Centre. The customer was not satisfied with the company's resolution of the complaint. On December 2, 2008, staff called the company to discuss the matter. During the telephone conversation, staff informed the company of its requirement to obtain a STS certificate and requested that the company address the customer's additional concerns.

On December 3, 2008, per the company's request, staff emailed The Marcus Centre the link to the Commission's website to obtain the STS application. The email requested that The Marcus Centre submit the application by December 17, 2008. The email also requested that the company submit a response to the customer's complaint by December 10, 2008. On December 8, 2008, staff received a copy of the response that the company sent to the customer regarding the complaint. However, the company never submitted the application. Staff contacted the company several times, via telephone, and left voicemail messages regarding the company's STS application. To date, the company has not submitted a STS application or responded to staff regarding the matter.

This recommendation addresses The Marcus Centre's failure to obtain a STS Certificate, as required by Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required. The Commission is vested with jurisdiction over these matters pursuant to Sections 364.33, 364.335, and 364.339, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$25,000 upon Roberta L. Marcus d/b/a The Marcus Centre for its apparent violation of Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required?

Recommendation: Yes, the Commission should impose a penalty in the amount of \$25,000 upon Roberta L. Marcus d/b/a The Marcus Centre for its apparent violation of Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required. **(Curry, Morrow)**

Staff Analysis: Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required, states in pertinent part:

No person shall provide shared tenant service without first obtaining a certificate of public convenience and necessity from the Commission. Services may not be provided, nor may deposits or payment for services be collected, until the effective date of a certificate, if granted.

Section 364.339(2), Florida Statutes, states:

No person shall provide shared tenant service without first obtaining from the commission a certificate of public convenience and necessity to provide such service. The commission shall grant certificates to telecommunications companies upon showings that the applicants have sufficient technical, financial, and managerial capabilities to provide shared tenant services. The commission may require such service to be offered and priced differently to residential and commercial tenants if deemed to be in the public interest.

As stated in the case background, staff notified The Marcus Centre on several occasions of its requirement to obtain a STS certificate as required by Rule 25-24.565, F.A.C. However, the company failed to comply with the Commission's rules. Staff believes that the company has been adequately notified of the rule requirements and has been provided with sufficient time to meet those requirements.

Staff believes that The Marcus Centre's failure to obtain a STS certificate from the Commission is a "willful violation" of Rule 25-24.565, F.A.C., Certificate of Public Convenience and Necessity Required, in the sense intended by Section 364.285, Florida Statutes.

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, or revoke any certificate issued by it for any such violation.

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 purposefulness.

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, The Marcus Centre’s failure to obtain a STS certificate from the Commission meets the standard for a “refusal to comply” and a “willful violation” 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 telecommunications companies, like The Marcus Centre, 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 were providing telecommunications services within the state and failed to obtain a Certificate of Public Convenience and Necessity from the Commission. Therefore, staff recommends that the Commission impose a penalty upon The Marcus Centre in the amount of \$25,000 for the company’s apparent violation of Rule 25-24.565, F.A.C.

Issue 2: 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 The Marcus Centre fails to timely file a protest and request 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. If payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order, the penalty should be referred to the Department of Financial Services for collection, and the company should be required to immediately cease and desist providing shared tenant services in Florida. This docket should be closed administratively upon The Marcus Centre obtaining a STS certificate and payment of the penalty, or upon the referral of the penalty to the Department of Financial Services. **(Morrow)**

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