

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: January 13, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Curry) *LLC*
Office of the General Counsel (Brooks) *SP/HT ALT [Signature]*

RE: Docket No. 090519-TI – Compliance investigation of Communicate Technological Systems, LLC for apparent violation of Rule 25-24.470, F.A.C.

AGENDA: 01/26/10 – 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\RAD\WP\090519.RCM.DOC

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Case Background

In April 2009 the Commission received a customer complaint regarding unauthorized long distance charges. The complaint was initially filed against the bill aggregator. A bill aggregator is not a telecommunications company and does not provide telecommunications services. The bill aggregator aggregates billing records for various telecommunications service providers and bills on behalf of the provider.

After receiving the complaint, staff sent a copy of the complaint to the bill aggregator. Staff was later informed by the bill aggregator that it billed the customer on behalf of Communicate Technological Systems, LLC (CTS) and that a copy of the complaint was forwarded to CTS. CTS resolved the customer's complaint and a copy of CTS's response was

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forwarded to staff. After receiving CTS's response to the complaint, staff determined that CTS was providing intrastate interexchange telecommunications services in Florida and its prior registration as an interexchange telecommunications company (IXC) had been cancelled.

By Order No. PSC-05-1258-PAA-TI, issued December 27, 2005, the Commission ordered the cancellation of CTS' IXC registration and tariff for the company's failure to comply with Section 364.336, Florida Statutes, unless the company paid a \$500 penalty, and all past due Regulatory Assessment Fees (RAF), along with any accrued statutory late payment charges. CTS did not comply with the Commission's order. As a result, the company's IXC registration and tariff were cancelled effective December 31, 2005. Therefore, CTS is not authorized to provide IXC services in Florida.

Staff sent two letters, via first class mail and certified mail, to the company. The letters informed CTS of its requirement to register and file a tariff with the Commission. Staff received the signed certified mail receipt indicating that CTS received staff's letter. However, the company never responded. During the time when the letters were sent to CTS, IXCs were required to file a tariff with the Commission. However, due to statutory changes made by the Legislature, effective July 1, 2009, IXCs are no longer required to file a tariff with the Commission. Companies now are required to publish schedules showing the rates, tolls, rentals, and charges of the company for services to be performed. Companies can either file a published schedule with the Commission or publish its schedule through other reasonably publicly accessible means.¹

This recommendation addresses CTS's failure, as required by Rule 25-24.470, Florida Administrative Code (F.A.C.), to register as an IXC in Florida. The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

¹ Section 364.04, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$25,000 upon Communicate Technological Systems, LLC for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order?

Recommendation: Yes, the Commission should impose a penalty in the amount of \$25,000 upon Communicate Technological Systems, LLC for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order. **(Curry, Brooks)**

Staff Analysis: Rule 25-24.470(1), F.A.C., Registration Required, states in pertinent part:

No person shall provide intrastate interexchange telephone service without first . . . providing the company's current contact information with the Division of the Commission Clerk and Administrative Services.

As stated in the case background, after receiving the customer complaint staff contacted CTS, via first class mail and certified mail, and informed the company of its requirement to register as an IXC with the Commission. However, as of the date of filing this recommendation, CTS has not registered with the Commission. Staff believes that CTS was adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

Staff believes that CTS's failure to register as an IXC with the Commission is a "willful violation" of Rule 25-24.470, Florida Administrative Code, Registration 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, CTS’s failure to register with 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.

Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to register with the Commission. Therefore, staff recommends that the Commission impose a penalty in the amount of \$25,000 upon Communicate Technological Systems, LLC for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order.

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 CTS 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 intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon receipt of the company's current contact information, published schedule, and payment of the penalty, or upon the referral of the penalty to the Department of Financial Services. (Brooks)

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