

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: April 21, 2005

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

FROM: Division of Competitive Markets & Enforcement (M. Watts)
Office of the General Counsel (Teitzman; Rojas)

RE: Docket No. 050180-TI – Compliance investigation of Tiburon Telecom, Inc. for
apparent violation of Section 364.336, F.S., Regulatory Assessment Fees.

Docket No. 050181-TX – Compliance investigation of Tiburon Telecom, Inc. for
apparent violations of Rules 25-22.032, F.A.C., Customer Complaints, and 25-
4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

AGENDA: 05/03/05 – Regular Agenda – Proposed Agency Action – Interested Persons May
Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050181.RCM.DOC

Case Background

This recommendation addresses two dockets. Docket No. 050180-TI is a compliance investigation of Tiburon Telecom, Inc. for its apparent failure to pay its 2004 intrastate interexchange telecommunications company Regulatory Assessment Fees, with statutory late charges. Docket No. 050181-TX is a compliance investigation of Tiburon Telecom, Inc. for its apparent failure to pay its 2004 competitive local exchange telecommunications company Regulatory Assessment Fees, with statutory late charges, and its apparent failure to respond to a consumer complaint.

Tiburon Telecom, Inc. is a certificated competitive local exchange telecommunications company (CLEC) and a registered intrastate interexchange telecommunications company (IXC)

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located in Tallahassee, Florida. On January 10, 2003, the Commission granted Tiburon Telecom, Inc. IXC Registration No. TJ714, and on January 17, 2003, it granted the company CLEC Certificate No. 8234. Issue 1 of this recommendation pertains to the company's IXC registration (Docket No. 050180-TI), and Issues 2 and 3 pertain to the company's CLEC certificate (Docket No. 050181-TX).

Discussion of Issues

Issue 1: Should the Commission impose a penalty and a cost of collection, together totaling \$500, on Tiburon Telecom, Inc. for its apparent first violation of Section 364.336, F.S., Regulatory Assessment Fees in Docket No. 050180-TI?

Recommendation: Yes. (M. Watts/Rojas)

Staff Analysis: Pursuant to Section 364.336, Florida Statutes, IXC's must pay a minimum annual Regulatory Assessment Fee (RAF) of \$50 if the registration was active during any portion of the calendar year. Pursuant to Rule 25-4.0161(2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a registration if a company refuses to comply with Commission statutes.

On December 15, 2004, the Division of the Commission Clerk & Administrative Services mailed the 2004 RAF return notice to Tiburon Telecom, Inc. On February 18, 2005, the Office of General Counsel mailed a delinquent notice via certified mail to the company for nonpayment of its 2004 RAF. Tiburon Telecom, Inc. has not paid the RAF required by Section 364.336, Florida Statutes, for 2004. Also, accrued statutory late payment charges required by Section 350.113(4), Florida Statutes, have not been paid.

The Commission is vested with jurisdiction over this matter pursuant to Sections 350.113, 364.02, 364.336, and 364.285, Florida Statutes. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other interexchange telecommunications companies for similar violations. Therefore, staff recommends that the Commission impose a penalty and a cost of collection, together totaling \$500, on Tiburon Telecom, Inc. for apparent violation of Section 364.336, Florida Statutes, in Docket No. 050180-TI.

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Issue 2: Should the Commission impose a \$10,000 penalty on Tiburon Telecom, Inc. for its apparent violation of Rule 25-22.032, Florida Administrative Code, Customer Complaints, in Docket No. 050181-TX?

Recommendation: Yes. (M. Watts/Teitzman)

Staff Analysis: On November 22, 2004, the Commission received a consumer complaint concerning local telephone service against Tiburon Telecom, Inc. Staff forwarded the complaint to the company with a response due by December 15, 2004. The company did not respond to the consumer complaint, so staff sent an overdue notice to the company on January 11, 2005. Staff was subsequently notified by Sprint-Florida, Incorporated (Sprint) that it had disconnected all of the company's lines in Sprint's territory for nonpayment on January 12, 2005. The company has not responded to date.

Rule 25-22.032(6)(b), Florida Administrative Code, states in pertinent part that the company shall respond to Commission staff in writing within 15 days after the Commission staff sends the complaint to the company.

Staff believes that Tiburon Telecom, Inc.'s failure to respond to the consumer complaint is a "willful violation" of Section 364.336, 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 Smith 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 failure of Tiburon Telecom, Inc. to respond to a consumer complaint within 15 days 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 competitive local exchange telecommunications companies, like Tiburon Telecom, Inc., are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.0252, 364.183, 364.337(5), and 364.285, Florida Statutes. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange telecommunications companies for similar violations. Therefore, staff recommends that the Commission impose a penalty of \$10,000, on Tiburon Telecom, Inc. for its apparent violation of Rule 25-22.032, Florida Administrative Code, in Docket No. 050181-TX.

Issue 3: Should the Commission impose a penalty and cost of collection, together totaling \$500, on Tiburon Telecom, Inc. for its apparent first violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, incorporated by Rule 25-24.835, Florida Administrative Code, in Docket No. 050181-TX?

Recommendation: Yes. (M. Watts/Teitzman)

Staff Analysis: Rule 25-24.835, Florida Administrative Code, Rules Incorporated, incorporates by reference, Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees, which applies to CLECs such as Tiburon Telecom, Inc.

Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee (RAF) of \$50 if the certificate was active during any portion of the calendar year. Pursuant to Rule 25-4.0161(2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with Commission rules.

On December 15, 2004, the Division of the Commission Clerk & Administrative Services mailed the 2004 RAF return notice to Tiburon Telecom, Inc. On February 18, 2005, the Office of General Counsel mailed a delinquent notice via certified mail to the company for nonpayment of its 2004 RAF. Tiburon Telecom, Inc. has not paid the RAF required by Rule 25-4.0161, Florida Administrative Code, for 2004. Also, accrued statutory late payment charges required by Section 350.113(4), Florida Statutes, have not been paid.

The Commission is vested with jurisdiction over this matter pursuant to Sections 350.113, 364.336, 364.337 and 364.285, Florida Statutes. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange telecommunications companies for similar violations. Therefore, staff recommends that the Commission impose a penalty and a cost of collection, together totaling \$500, on Tiburon Telecom, Inc. for apparent violation of Section 364.336, Florida Statutes, in Docket No. 050181-TX.

Issue 4: Should this docket be closed?

Recommendation:

Docket No. 050180-TI, Issue 1: Staff recommends that the Order issued from Issue 1 of this recommendation 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 for this docket. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Tiburon Telecom, Inc. fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing in Docket No. 050180-TI, the facts should be deemed admitted and the right to a hearing waived. If the company fails to pay the penalty in Issue 1 within fourteen (14) calendar days after the issuance of the Consummating Order, Tiburon Telecom, Inc.'s IXC tariff should be canceled and IXC Registration No. TJ714 should be removed from the register administratively and the collection of the past due Regulatory Assessment Fees, including statutory late payment charges, should be referred to the Florida Department of Financial Services for further collection efforts. For any payment received applicable to the penalty, including cost of collection, in Issue 1, the cost of collection should be subtracted from the amount received and should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. Any monetary amount exceeding the cost of collection should be remitted 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 company is removed from the register in accordance with the Commission's Order from this recommendation in Docket No. 050180-TI, the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. Docket No. 050180-TI should be closed administratively either upon receipt of the payment of the penalties and cost of collection, and Regulatory Assessment Fees, including statutory late payment charges, or upon removal of the company from the register.

Docket No. 050181-TX, Issues 2 and 3: Staff recommends that the Order issued from Issues 2 and 3 of this recommendation 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 for this docket. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Tiburon Telecom, Inc. fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing in Docket No. 050181-TX, the facts should be deemed admitted and the right to a hearing waived. If the company fails to pay the imposed penalties in Issues 2 and 3 within fourteen (14) calendar days after the issuance of the Consummating Order, CLEC Certificate No. 8234 should be canceled administratively and the collection of the past due Regulatory Assessment Fees, including statutory late payment charges, should be referred to the Florida Department of Financial Services for further collection efforts. For any payment received applicable to the penalty, including cost of collection, in Issue 3, the cost of collection should be subtracted from the

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amount received and should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. Any monetary amount exceeding the cost of collection should be remitted 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 company's CLEC certificate is canceled in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing competitive local exchange services in Florida. Docket No. 050181-TX should be closed administratively either upon receipt of the payment of the penalties and cost of collection, and Regulatory Assessment Fees, including statutory late payment charges, or upon cancellation of the company's certificate.

Action in one docket should not affect action in the other docket. **(Rojas/Teitzman)**

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