

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: May 5, 2005

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

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

RE: Docket No. 050260-TI – Compliance investigation of U S P & C Corporation for apparent violations of Sections 364.336, F.S., Regulatory Assessment Fees; Telecommunications Companies, and 364.02(13), F.S., Definitions.

AGENDA: 05/17/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050260.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty and a cost of collection, together totaling \$1,000, on U S P & C Corporation for its apparent second violation of Section 364.336, F.S., Regulatory Assessment Fees?

Recommendation: Yes. (M. Watts/Fordham)

Staff Analysis: U S P & C Corporation (USP&C) is a registered intrastate interexchange telecommunications company (IXC) located in Overland Park, Kansas. On December 5, 1998, the Commission granted USP&C IXC Registration No. TJ147.

Pursuant to Section 364.336, Florida Statutes, IXCs 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 Florida statutes.

On December 15, 2004, the Division of the Commission Clerk & Administrative Services mailed the 2004 RAF return notice to USP&C. 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. USP&C 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. In addition, USP&C had a prior docket for the same statute violation concerning its 1998 RAFs and statutory late payment charges in which the Commission accepted a proposed settlement.

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 \$1,000, on U S P & C Corporation for its apparent second violation of Section 364.336, F.S., Regulatory Assessment Fees.

Issue 2: Should the Commission impose a penalty of \$500 upon U S P & C Corporation for its apparent violation of Section 364.02(13), F.S.?

Recommendation: Yes. (M. Watts/Fordham)

Staff Analysis: 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 rules or any provision of Chapter 364, Florida Statutes. Section 364.02(13), Florida Statutes, states in pertinent part:

Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a) and (d), 364.163, 364.285, 364.501, 364.603, and 364.604, shall provide the commission with such current information as the commission deems necessary to contact and communicate with the company....

On February 25, 2005, staff sent an inquiry to USP&C via United States Postal Service (U.S.P.S.) certified mail. The letter was returned unopened by the U.S.P.S. stamped "Attempted – Not Known." Prior to mailing its inquiry, staff attempted to contact the company via telephone and found that its telephone and facsimile numbers had been disconnected.

Staff believes that USP&C's failure to provide the Commission with the company's current contact information is a "willful violation" of Section 364.02(13), Florida Statutes, 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 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 USP&C to provide staff with the company's current contact information 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 intrastate interexchange telecommunication companies, like USP&C, 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 364.02(13) and 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 for similar violations. Therefore, staff recommends that the Commission impose a penalty in the amount of \$500 U S P & C Corporation for its apparent violation of Section 364.02(13), F.S.

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Order issued from 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. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If U S P & C Corporation fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted and the right to a hearing waived. If the company fails to pay the penalties in Issues 1 and 2 within fourteen (14) calendar days after the issuance of the Consummating Order, U S P & C Corporation's IXC tariff should be canceled and IXC Registration No. TJ147 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, the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket 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. **(Fordham)**

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