

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: October 20, 2005

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

FROM: Division of Competitive Markets & Enforcement (Curry)
Office of the General Counsel (Teitzman)
Division of Regulatory Compliance & Consumer Assistance (Marshall)

RE: Docket No. 050682-TX – Compliance investigation of Saluda Networks Incorporated for apparent violation of Rule 25-22.032(6)(b), F.A.C., Customer Complaints.

AGENDA: 11/01/05 – 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\CMP\WP\050682.RCM.DOC

Case Background

Saluda Networks Incorporated (Saluda) is a certificated competitive local exchange telecommunications company based in Miami, Florida. The company provides competitive local exchange telecommunications services in Florida.

On July 29, 2005, staff received three customer complaints against Saluda. According to the complainants, their local telephone service was disconnected without notice. The customers paid in advance for their telephone service, however, when their services were disconnected the company did not refund their money. Staff made several attempts to obtain a response from the

company, however, the company never responded. On August 17, 2005, staff received a fourth complaint regarding improper billing. According to the fourth complainant, the customer switched local service providers and paid the final bill from Saluda, but the company continued to bill the customer for services. The company was notified of the complaint, via facsimile sent by staff in the Division of Regulatory Compliance & Consumer Assistance (RCA). A response was due by September 8, 2005. To date, the company has not responded.

After receiving the complaints, staff learned that the company may no longer be in business. When staff called the telephone number listed for the company in the Master Commission Directory, a recording stated that due to the administrative decision of one of the company's service providers that some customers were experiencing a temporary disconnection of service and that Saluda was trying to get service restored to its customers. Several messages were left requesting that someone from the company contact staff; however, the company did not return staff's calls.

A certified letter dated September 1, 2005, was sent to the company. The letter again notified the company of the customer complaints and requested that the company provide staff with a response. The letter also advised the company to refund its customers for services which the company received payment but did not provide. According to the United States Postal Service's website, the letter was forwarded to a different address. To date, the letter has not been claimed.

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 Saluda Networks Incorporated in the amount of \$10,000 per apparent violation, for a total of \$40,000 for four apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints?

Recommendation: Yes, the Commission should impose a \$40,000 penalty upon Saluda Network Incorporated for the apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. **(Curry, Marshall, Teitzman)**

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'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 stated in the case background, staff received four customer complaints against Saluda Networks Incorporated. As of the date of filing this recommendation, Saluda Networks Incorporated has yet to respond to the customer complaints, which is in 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, Saluda's failure to respond to the customer complaints 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 Saluda 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 Saluda has, by its actions and inactions, willfully violated Rule 25-22.032(6)(b), Florida Administrative Code, and impose a penalty in the amount of \$10,000 per apparent violation, for a total of \$40,000 against Saluda for four apparent violations.

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 Saluda 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 Saluda fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's Certificate No. 8376 should be cancelled. If Saluda's certificate is cancelled in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalty or upon the cancellation of the company's certificate. **(Teitzman)**

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