

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: December 8, 2005

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

FROM: Division of Competitive Markets & Enforcement (Buys)
Office of the General Counsel (Scott)

RE: Docket No. 050838-TI – Compliance investigation of Primo Communications, Inc. for apparent violation of Rule 25-24.470, F.A.C., Registration Required.

AGENDA: 12/20/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: Administrative

PREHEARING OFFICER: All Commissioners

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050838.RCM.DOC

Case Background

Primo Communications, Inc. (Primo) is an interexchange company (IXC) located in Rochester Hills, Michigan. Primo was granted an IXC certificate (Registration No. TJ724) on February 28, 2003. On December 27, 2004, Primo's tariff was cancelled and the company was removed from the register for failing to pay Regulatory Assessment Fees (RAFs), a violation of Section 364.336, Florida Statutes.¹ However, the company apparently continued to provide intrastate interexchange telephone service after the cancellation of its registration.

¹ Docket No. 040938-TI, In re: Compliance Investigation of Primo Communications, Inc. for apparent violation of Section 364.336, F.S.

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On August 16, 2005, the Florida Public Service Commission (Commission) received a consumer complaint (Request No. 663177T) regarding the long distance telephone services provided by Primo. Included with the complaint was a copy of a bill from Primo in which an intrastate interexchange telephone call was charged. Staff contacted the company via certified mail and facsimile. The company responded via telephone call and facsimile on September 13, 2005, in which it indicated the complaint has been resolved. During the phone conversation, also confirmed via facsimile letter, Mr. Benjamin Ardelean, CEO of Primo, indicated that his company would pay the penalty of \$500 imposed by Commission Order No. PSC-04-1198-PAA-TI, plus the past due RAFs. He also indicated the company would submit an IXC registration form and file a tariff. Mr. Ardelean requested that Primo be given until the end of September 2005 to complete the filings.

On October 11, 2005, staff sent a facsimile to Primo reminding the company that it has not taken the actions set forth in its facsimile. On October 25, 2005, staff opened this docket to address the company's apparent failure to register as an IXC.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes.

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Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$25,000 on Primo Communications, Inc. for its apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required?

Recommendation: Yes, the Commission should impose a \$25,000 penalty on Primo Communications, Inc. **(Buys, Scott)**

Staff Analysis: Rule 25-24.470(1), Florida Administrative Code (F.A.C.), Registration Required, states:

No person shall provide intrastate interexchange telephone service without first filing an initial tariff containing the rates, terms, and conditions of service and providing the company's current contact information with the Division of the Commission Clerk and Administrative Services.

Based on the fact that Primo billed a Florida consumer for an intrastate interexchange telephone call placed on May 19, 2005, and by the company's admission, Primo is apparently providing intrastate interexchange telephone service in Florida. Primo failed to pay RAFs for the calendar year 2003, and consequently, its tariff was cancelled and it was removed from the register of interexchange companies effective December 27, 2004. By providing intrastate interexchange telephone service without first submitting a completed registration form and filling a tariff, Primo is apparently in violation of Rule 25-24.470, F.A.C.

Staff believes that Primo's failure to file a tariff and provide the Commission with the company's current contact information is a "willful violation" of Rule 25-24.470, F.A.C., Registration Required.

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.

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However, "willful violation" need not be limited to acts of omission. 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 Primo to submit a completed registration form and file a tariff 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 interexchange companies, like Primo, are subject to certain 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 intrastate interexchange telephone service providers for similar violations. Therefore, staff recommends that the Commission impose a penalty upon Primo Communications, Inc. in the amount of \$25,000 for the company's apparent violation of Rule 25-24.470, F.A.C., Registration Required.

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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, F.A.C., 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 Primo Communications, Inc. 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 Primo fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the collection of the penalty should be referred to the Department of Financial Services and 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 referral of the collection of the penalty to the Department of Financial Services. **(Scott)**

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