

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 25, 2006

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

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

RE: Docket No. 060373-TI – Compliance investigation of Mercury Telco Group, Inc. for apparent violation of Rule 25-24.475, F.A.C., Company Operations and Customer Relations.

AGENDA: 06/06/06 – 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\060373.RCM.DOC

Case Background

Mercury Telco Group, Inc. (Mercury) is an interexchange telephone company (IXC) located in Deerfield Beach, Florida. Mercury provides intrastate interexchange prepaid calling services sold in Florida through various prepaid calling cards. On August 10, 2005, staff notified Mercury via Certified Mail that the Florida Public Service Commission (Commission) received four customer complaints regarding the company's service during the period of October 13, 2004, through July 26, 2005, and that Mercury is not registered with the Commission as an IXC. The Certified Mail receipt indicates that the company received the letter on August 15, 2005.

On September 26, 2005, Mercury submitted its IXC Registration Form and Tariff, however, Mercury failed to provide staff with any response to the four customer complaints. Subsequently, the Commission received two additional complaints regarding prepaid calling cards serviced by Mercury – one on August 25, 2005, and another on November 4, 2005. Mercury now had accumulated a total of six customer complaints.

On December 30, 2005, staff again notified Mercury via Certified Mail that it has not provided staff with a response to the customer complaints, and as a result, the company is at risk of potential monetary penalties that could be imposed by the Commission. The Certified Mail receipt indicates that Mercury received the letter on January 6, 2006. The company still did not provide a response.

On March 27, 2006, the Commission received two more customer complaints regarding prepaid phone cards serviced by Mercury. In both complaints, the customers claim that the prepaid phone cards do not work and the telephone numbers associated with the services provided through the phone cards are disconnected. Staff confirmed that the service telephone numbers for the phone cards are no longer working.

On March 30, 2006, staff sent Mercury a final notice via Certified Mail informing the company that if staff does not receive Mercury's response to the eight customer complaints by April 20, 2006, staff will recommend that the Commission impose a monetary penalty on Mercury. The final notice was returned marked "Attempted Not Known." In addition, Mercury's business office telephone numbers listed for the company's contact information filed with the Commission are disconnected.

On May 3, 2006, staff opened this docket to address Mercury's failure to reply to customer complaints in apparent violation of Rule 25-24.475, Florida Administrative Code (F.A.C.), Company Operations and Customer Relations.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.285, 364.602 and 364.603, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty upon Mercury Telco Group, Inc. in the amount of \$10,000 per apparent violation, for a total of \$80,000, for eight apparent violations of Rule 25-24.475(5), Florida Administrative Code, Company Operations and Customer Relations?

Recommendation: Yes. The Commission should impose a penalty upon Mercury Telco Group, Inc. in the amount of \$80,000 for its apparent failure to respond to Commission inquiries regarding eight customer complaints in apparent violation of Rule 25-24.475(5), Florida Administrative Code, Company Operations and Customer Relations. **(Buys, Tan)**

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or remove an IXC from the register and cancel an IXC's tariff if an IXC refuses to comply with the Commission's rules. According to Rule 25-24.475(5), F.A.C., Company Operations and Customer Relations, each IXC shall respond to Commission inquiries within 15 days.

As stated in the case background, staff received a total of eight customer complaints regarding Mercury's prepaid calling services sold through prepaid phone cards in Florida. As of the date of filing this recommendation, Mercury has yet to respond to the customer complaints in apparent violation of Rule 25-24.475(5), F.A.C. The customer complaints and related prepaid phone cards are listed in Table 1.

TABLE 1

Customer Complaint Request No.	Date Received	Phone Card Name	Access Number	PIN
624838T	October 13, 2004	SUGAR!	888-376-9164	859 129 9085
638970T	January 21, 2005	La Esmeralda	786-924-6871	857 1641 413
646319T	March 22, 2005	Paradise 1800	866-840-9245	940 179 9448
660508T	July 26, 2005	X Phonecard Florida	786-419-4001	906 169 0699
664571T	August 25, 2005	Destination Caribbean	786-924-6097	933 182 6343
674279T	November 4, 2005	Buenas Nuevas	786-924-0964	519 7653 294
693382C	March 27, 2006	SUGAR!	888-376-9164	516 536 3268
		La Esmeralda	786-924-6871	935 828 7159
				902 905 5663
				778 002 0702
693399C	March 27, 2006	SUGAR!	888-376-9164	318 999 6609
				686 997 2449
				892 410 0758
		La Esmeralda	786-924-6871	275 585 7051
				212 205 5739
				340 104 3426

As explained in the case background, staff attempted on several occasions to solicit a response from Mercury regarding the customer complaints. However, it appears that Mercury is no longer doing business at the location listed in the Commission's Master Directory and the company has not updated its contact information. Nonetheless, it appears that Mercury is continuing to provide service for prepaid phone cards sold in Florida. In the event that Mercury (a) fails to respond to the Commission's Order resulting from this recommendation, and (b) continues to provide service following the effective date of the cease and desist provision of the order, then staff will file a complaint in Circuit Court seeking enforcement of the Commission's Order against the company as authorized by the Commission's Administrative Procedures Manual (APM). Specifically, APM Chapter 2.15(K)(4) states:

Some telecommunications companies may fail to respond to a Commission compliance order and fail to pay the penalty, and the Commission may cancel the company's certificate or registration. The Commission will order any such company to cease and desist providing telecommunications service in Florida. For any such company that continues to provide telephone service in Florida in violation of Chapter 364, staff is authorized to file complaints in Circuit Court seeking enforcement of the Commission's orders against those companies. A complaint may be filed once an offending company is identified by staff, and the director of the Division of Competitive Markets and the General Counsel approve the filing. The complaint may include:

- a) A request, pursuant to Section 120.69, Florida Statutes, for enforcement of the applicable cease and desist order;*
- b) A request, pursuant to Section 364.285(2), Florida Statutes, for an injunction against providing telecommunications services without a certificate or registration required by Chapter 364; and*
- c) A request, pursuant to Section 364.285(2), Florida Statutes, for an accounting and refund of amounts collected for the provision of telecommunications services after the effective date of the certificate or registration cancellation.*

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, Mercury’s failure to respond to Commission inquiries regarding 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 intrastate interexchange telephone companies, like Mercury 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 IXCs that have failed to respond to customer complaints. Therefore, staff recommends that the Commission find that Mercury has, by its actions and inactions, willfully violated Rule 25-24.475(5), F.A.C. and impose a penalty in the amount of \$10,000 per apparent violation, for a total of \$80,000, against Mercury Telco Group, Inc. for its apparent failure to respond to Commission inquiries regarding eight customer complaints.

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 Mercury Telco Group, Inc. 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 Mercury fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's tariff should be cancelled administratively and its name removed from the register. If the company's tariff is cancelled and its name 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 telephone service in Florida. This docket should be closed administratively either upon receipt of the payment of the penalty, or upon cancellation of the company's tariff and removal from the register. **(Tan)**

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