

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: March 27, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Curry)
Office of the General Counsel (McKay)

RE: Docket No. 080109-TI – Compliance investigation of MP Alliance Technologies, Inc. for apparent violation of Rule 25-24.470, F.A.C.

AGENDA: 04/08/08 – 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\080109.RCM.DOC

Case Background

On August 8, 2007, a customer filed two complaints with the Commission staff regarding three prepaid calling cards. The complaints were filed against MP Alliance Technologies, Inc. (MPAT) and Millennium Telecard (MTC). After reviewing the complaints, staff concluded that MTC may be the network service provider of all three calling cards. The network service provider is the party responsible for ensuring that the prepaid calling services are provided in accordance with Commission rules governing those type services.

Staff contacted MTC regarding the complaints, and was informed by the company that it was not the network service provider. MTC claimed it was the distributor of the cards. MTC identified MPAT as the network service provider. Staff requested that MTC provide contact

information for MPAT, but the company refused. MTC did provide staff call-detail records for one of the calling cards. The call-detail records displayed a company named Trisun Communications. Staff contacted Trisun Communications and obtained contact information for MPAT. On December 7, 2007, staff sent a certified letter to MPAT.

The letter informed MPAT of the customer's complaints and of the company's requirement to register as an intrastate interexchange telecommunications company (IXC) and file a tariff with the Commission. On January 2, 2008, an attorney representing MPAT contacted staff. He informed staff that he was the official point of contact for MPAT and that all future correspondence with the company should go to him.

MPAT claimed that it does not provide IXC services in Florida, only interstate and international services. MPAT claimed its prepaid calling cards cannot be used to place intrastate calls. Staff requested that the company submit these statements in writing.

On January 3, 2008, staff received a letter, via facsimile, from MPAT. The company agreed to resolve the customer's complaints by issuing the customer a refund of \$6.00 plus an additional \$6.00 for the customer's inconvenience. MPAT wrote that it did not provide intrastate IXC services, and therefore would not register or file a tariff with the Commission.

On January 9, 2008, staff contacted the customer to verify she had received a refund. She had not been contacted by the company nor had she received a refund. The customer also advised that her address had changed and provided staff with the new address. Staff contacted MPAT to provide the customer's new address. Staff requested that the company provide a copy of the letter and check that it planned to send to the customer. Staff also requested that the company provide staff an active MPAT calling card for testing and verification.

On January 14, 2008, staff received the requested information along with a \$2.00 calling card titled "*The Latino*." After receiving the requested information from the company, staff contacted the customer. The customer verified that she did receive a refund in the amount of \$12.

On January 29, 2008, staff attempted to test the calling card, but was unable to complete a call. On January 30, 2008, staff made a second attempt to test the card. Staff was able to successfully complete five intrastate long distance calls. After the test calls were completed, staff contacted MPAT and requested that MPAT provide the call-detail records for the card. The company asked that staff provide a copy of the request in writing. Upon termination of the phone call, staff immediately faxed a request for the call-detail records to the company.

On January 31, 2008, MPAT's attorney informed staff that the company was unable to provide call-detail records for the calling card. According to the attorney, the calling card that was provided to staff was a new card and had never been used. Staff explained again that the calling card was used during testing; therefore, a call-detail record of the calls should exist. The attorney stated that he would contact MPAT again to request the information.

On February 1, 2008, MPAT contacted staff. According to MPAT, the phone card that was sent to staff was provided in error. MPAT claimed that it does not use the "*The Latino*"

brand phone cards. The company representative informed staff that it inherited those phone cards when MPAT was purchased. As a result, MPAT was unable to provide call records for the calling card. The company offered staff another phone card for testing. MPAT stated that it would provide a phone card that was the same brand as the phone card in the customer's complaint. The company faxed a letter to staff on February 4, 2008, reiterating what was discussed during the telephone conversation, and on February 6, 2008, staff received the "*Morenita*" phone card.

On February 13, 2008, staff tested the "*Morenita*" phone card. Staff made and completed two intrastate long distance calls. During each test call, staff contacted a member of the Commission's staff in Tallahassee. The calls were made using the West Palm Beach and Tampa access telephone numbers listed on the calling card. The same staff member was called during both test calls.

Despite MPAT's claims that the company does not provide intrastate IXC services in Florida, staff was able to make intrastate long distance calls using both of the cards provided by the company. After determining that MPAT was indeed providing intrastate IXC services in Florida, staff opened this docket on February 22, 2008.

On March 6, 2008, staff attempted to test the "*Morenita*" calling card a third time. Staff called three different local access numbers listed on the card. After dialing each number, staff received a recording asking the customer to press "1" for English or "2" for Spanish. Upon pressing a number, either 1 or 2, the call would disconnect. When staff attempted to place a call using the 800 access number, the recording stated that the call cannot be completed as dialed. Staff also called the access numbers listed on "*The Latino*" calling card that the company originally provided for testing and experienced similar results.

This recommendation addresses MPAT's failure, as required by Rule 25-24.470, Florida Administrative Code (F.A.C.), to register as an IXC and file a tariff prior to providing intrastate interexchange telecommunications services in Florida. The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$25,000 upon MP Alliance Technologies, Inc. for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order?

Recommendation: Yes, the Commission should impose a penalty in the amount of \$25,000 upon MP Alliance Technologies, Inc. for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order. **(Curry, McKay)**

Staff Analysis: Rule 25-24.470, 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.

After receiving the customer complaint, staff contacted MPAT, via certified letter, and notified the company of its requirement to register as an IXC and file a tariff with the Commission. After receiving the letter, the company contacted staff and was again informed of its requirement to register and file a tariff. According to MPAT, the company only provided interstate and international long distances services through its prepaid calling cards and therefore was not required to register or file a tariff with the Commission.

Staff has demonstrated that MPAT's calling cards can be used to make intrastate calls, thus MPAT is providing intrastate IXC services. It appears that MPAT may have misled staff regarding the services that it provides. Because MPAT is providing intrastate long distance services, the company is required to comply with Rule 25-24.470, F.A.C. However, as of the date of filing this recommendation, MPAT has not registered or filed a tariff with the Commission. Staff believes that MPAT was adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

Staff believes that MPAT's failure to register and file a tariff with the Commission is a "willful violation" of Rule 25-24.470, Florida Administrative Code, Registration Required, 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 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 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, MPAT’s failure to register and file a tariff with the Commission 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 telecommunications companies, like MPAT, 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 intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to register and to file a tariff with the Commission. Therefore, staff recommends that the Commission impose a penalty upon MPAT in the amount of \$25,000 for the company’s apparent violation of Rule 25-24.470, F.A.C.

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 MPAT 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 payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty should be referred to the Department of Financial Services for collection and the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon receipt of the company's current contact information, tariff, and payment of the penalty, or upon the referral of the penalty to the Department of Financial Services. **(McKay)**

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