

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: December 23, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Curry)
Office of the General Counsel (Brooks)

RE: Docket No. 080579-TI – Compliance investigation of Astrocom Corporation for apparent violation of Rule 25-24.470, F.A.C., Registration Required.

AGENDA: 01/06/09 – 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\RCP\WP\080579.RCM.DOC

Case Background

On May 15, 2008, staff received a customer complaint regarding a prepaid calling card. After receiving the complaint, staff determined that the network service provider of the calling card was Astrocom Corporation (Astrocom). 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 also determined that Astrocom was not registered as an intrastate interexchange telecommunications company (IXC) and had not filed a tariff with the Commission. By Order No. PSC-06-0615-PAA-TI, Astrocom's IXC registration and tariff were cancelled by the Commission, effective August 15, 2006, for failure to pay its 2005 Regulatory Assessment Fees (RAF). However, the company ultimately paid the 2005 RAF payment but failed to pay the penalties and late fees.

In Docket No. 080454-TX, In Re: Compliance investigation of Astrocom Corporation for apparent violation of Section 364.183(1), F.S., Access to Company Records and apparent first-time violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies, Astrocom's competitive local exchange (CLEC) certificate was also cancelled by Order Nos. PSC-08-0562-PAA-TX and PSC-08-0629-PAA-TX, for failure to pay the 2007 RAF and for failure to respond to a data request. The orders became effective on September 23, 2008, and October 21, 2008, respectively. Astrocom ultimately paid the 2007 RAF payment but failed to pay the penalties and late fees.

After receiving the complaint, staff contacted the company. On June 2, 2008 and June 12, 2008, staff sent letters, via certified mail and facsimile, to the company. The letters were sent to the address listed in the Master Commission Directory (MCD). The letters informed the company of the customer complaint and the company's requirement to register with the Commission as an IXC and file a tariff. The letter also informed the company of its failure to pay a \$500 penalty and statutory late fees as ordered by the Commission in Order No. PSC-06-0615-PAA-TI. Both letters were returned due to an incorrect address. However, according to the facsimile transmittal forms, both letters were successfully faxed to the company.

On July 11, 2008, staff called Astrocom to obtain the company's correct mailing address. Staff obtained the correct mailing address and verified that the fax number listed in MCD was the company's correct fax number. During the telephone conversation, staff explained to the company's representative that several attempts had been made to contact the company. The company representative requested that staff fax another copy of the letter to the company. A copy of staff's letter dated June 12, 2008 was faxed to the company later that same day. The facsimile transmittal form indicated that the fax was submitted successfully. However, no one from the company ever returned staff's call or responded to the letter.

On July 22, 2008, staff sent a third letter to the company, via certified mail and facsimile. The facsimile transmittal form indicated that the facsimile was successfully transmitted and on July 28, 2008, staff received the signed certified mail receipt. However, to date, Astrocom has failed to respond. After not receiving a response, this docket was opened on September 4, 2008.

On October 29, 2008, staff received a letter from Astrocom, via facsimile, regarding the dockets opened against the company's CLEC and IXC operations. After reviewing the fax, staff immediately contacted the company. The company requested additional time to review the information related to the IXC docket and assured that staff would be contacted the next day to resolve the matter. In regards to the CLEC docket, another staff member contacted the company on the same day to discuss settlement options with the company regarding the CLEC issues. Astrocom agreed to immediately resolve the matter. Staff requested that the company submit a proposed settlement offer by November 4, 2008. Astrocom never submitted the proposed settlement offer nor did the company contact staff again regarding either docket.

This recommendation addresses Astrocom'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 Astrocom Corporation 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 Astrocom Corporation 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, Brooks)**

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.

As stated in the case background, staff made several attempts to contact Astrocom. Each time staff contacted the company, staff requested that Astrocom resolve the customer complaint, register as an IXC, and file a tariff with the Commission. As of the date of filing this recommendation, Astrocom has failed to comply with staff's requests. Staff believes that the company has been adequately notified of the requirements and has been provided with sufficient time to meet those requirements.

Staff believes that Astrocom'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, Astrocom’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 Astrocom, 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 Astrocom 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 Astrocom 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. **(Brooks)**

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