



Public Service Commission

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RECORDS AND REPORTING

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DATE: AUGUST 19, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (KEATING) *DK CB*
DIVISION OF COMMUNICATIONS (WILLIAMS) *W*

RE: DOCKET NO. 961309-TI: APPLICATION FOR CERTIFICATE TO PROVIDE INTEREXCHANGE TELECOMMUNICATIONS SERVICE BY VENDORMATIC, INC. D/B/A HSS VENDING DISTRIBUTORS, AND INITIATION OF SHOW CAUSE PROCEEDINGS FOR VIOLATION OF RULE 25-24.470, F.A.C., CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY REQUIRED.

AGENDA: 08/31/99 - REGULAR AGENDA - ISSUED 1 AND 2 - FINAL ACTION
- ISSUE 3 - PROPOSED AGENCY ACTION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\961309.RCM

CASE BACKGROUND

In Order No. PSC-97-0937-FOF-TI, issued August 5, 1997, the Commission ordered Vendormatic, Inc., d/b/a HSS Vending Distributors (HSS), to show cause why it should not be fined in the amount of \$25,000 for operating without a certificate, in violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. At the same time, in a proposed agency action, the Commission also granted HSS a certificate to provide interexchange telecommunications service,

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but held the certificate in abeyance pending the resolution of the show cause proceeding.

On August 26, 1997, HSS filed a Response to Order to Show Cause (response). In the response, HSS requested that the proposed fine not be assessed and that a formal hearing be initiated before any such assessment. On the same date, HSS filed a Petition for Formal Proceeding (petition) pursuant to Section 120.57, Florida Statutes, with respect to that portion of the Commission's order holding HSS's certificate in abeyance. Thereafter, this matter was scheduled for hearing.

On February 10, 1998, staff received a letter from Mr. Jurman offering a \$5,000 settlement. The hearing was cancelled to allow staff to review the settlement offer and prepare a recommendation for the Commission's consideration. Staff attempted to contact Mr. Jurman several times concerning HSS's settlement offer. Finally, staff sent a letter to the company on June 15, 1998. Staff received no response to the letter. Then, on October 14, 1998, Mr. Jurman informed staff that he no longer represents HSS. Mr. Jurman indicated that staff should contact the company.

Staff called the company on three separate occasions in an effort to determine the company's representative and to further discuss HSS's settlement offer and request for hearing. Staff received no response from HSS. Therefore, staff sent a certified letter to the company's president, Mr. Richard Hersperger, on October 26, 1998. The receipt for the letter was never received, so staff sent another letter to the company on December 1, 1998, in an abundance of caution. On December 14, 1998, staff received by return mail the certified letter addressed to Mr. Richard G. Hersperger, 601 Fourth Ave., Coraopolis, PA 15108. The U.S. Post Office indicated that the certified letter had been refused.

By Order No. PSC-99-0125-PCO-TI, issued January 21, 1999, the Commission rejected HSS Vending's settlement offer and reset this matter for hearing on HSS Vending's Petition for Formal Proceeding.

By Order No. PSC-99-0443-PCO-TI, issued March 4, 1999, and Order No. PSC-99-0704-PCO-TI, issued April 13, 1999, the procedure for this docket was outlined, and the hearing and prehearing dates

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were established. HSS Vending has failed to comply with these Orders and did not appear at the July 30, 1999, prehearing conference. In view of HSS Vending's failure to pursue its Petition for Formal Hearing with any diligence whatsoever, staff brings the following recommendation.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission, on its own motion, dismiss HSS Vending's August 26, 1997, Petition for Formal Hearing?

RECOMMENDATION: Yes. HSS Vending has failed to diligently pursue its request for formal hearing and has failed to comply with any aspect of the orders setting the procedure for this docket. In accordance with the Order Establishing Procedure for this Docket, Order No. PSC-99-0443-PCO-TI, HSS Vending has waived the right to present any testimony and to raise any additional issues. Staff recommends, therefore, that HSS Vending's Petition be dismissed.

STAFF ANALYSIS: In Order No. PSC-97-0937-FOF-TI, issued August 5, 1997, the Commission ordered HSS Vending, to show cause why it should not be fined in the amount of \$25,000 for violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. At the same time, by proposed agency action, the Commission also held in abeyance HSS Vending's certificate to provide interexchange telecommunications service pending the resolution of the show cause proceeding. On August 26, 1997, HSS filed its response to the Order to Show Cause. HSS also filed a separate Petition for Formal Proceeding.

Thereafter, HSS Vending submitted a settlement offer. After numerous attempts by Commission staff to contact the company regarding the offer, the Commission rejected the settlement and reset this matter for hearing by Order No. PSC-99-0125-PCO-TI, issued January 22, 1999.

By Order No. PSC-99-0443-PCO-TI, issued March 4, 1999, and Order No. PSC-99-0704-PCO-TI, issued April 13, 1999, the procedure for this docket was outlined, and the hearing and prehearing dates were established. HSS Vending has failed to comply with these Orders and did not appear at the July 30, 1999, prehearing

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conference. In view of HSS Vending's failure to pursue its Petition for Formal Hearing with any diligence whatsoever, staff recommends that the Commission, on its own motion, dismiss HSS Vending's Petition for Formal Hearing.

ISSUE 2: Should the Commission require HSS Vending to pay the \$25,000 fine identified in Order No. PSC-97-0937-FOF-TI?

RECOMMENDATION: Yes. HSS Vending has failed to show cause why it should not be fined \$25,000 for operating without a certificate. The Commission should find that the admissions in HSS Vending's response lead to the conclusion of willful violation, and, therefore, the fine should be assessed. If the fine is not received within 10 days of the issuance of the Commission's order, the fine should be forwarded to the Office of the Comptroller for further collection efforts.

STAFF ANALYSIS: As set forth in the Case Background, in Order No. PSC-97-0937-FOF-TI, issued August 5, 1997, the Commission ordered Vendormatic, Inc., d/b/a HSS Vending Distributors (HSS), to show cause why it should not be fined in the amount of \$25,000 for violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. On August 26, 1997, HSS filed a Response to Order to Show Cause (response). In the response, HSS requested that the proposed fine not be assessed and that a formal hearing be initiated before any such assessment. On the same date, HSS filed a Petition for Formal Proceeding (petition) pursuant to Section 120.57, Florida Statutes, with respect to that portion of the Commission's order holding HSS's certificate in abeyance.

In its Response, HSS Vending alleged that it had directed its contractor to stop marketing its calling card application in Florida. HSS Vending indicated that any subsequent solicitation of customers was done without the company's knowledge. HSS Vending added that it believed that further complaints arose from customers

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that received billings a month after the solicitations. Thus, HSS Vending asked that the fine not be assessed.

Staff does not believe that HSS Vending has shown cause why it should not be fined for operating without a certificate. By its response, HSS Vending actually concedes that it was operating and billing in Florida without a certificate. Accordingly, by Section 364.285, 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. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t 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). Furthermore, in Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating to Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that, "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule." Staff believes that HSS Vending's solicitation of customers in Florida clearly demonstrates "willful" violation of Rule 25-24.470, Florida Administrative Code. HSS Vending has submitted nothing to demonstrate otherwise. Therefore, staff recommends that the Commission order HSS Vending to pay the \$25,000 fine identified in Order No. PSC-97-0937-FOF-TI. If the fine is not received within 10 days of the issuance of the Commission's order, the fine should be forwarded to the Office of the Comptroller for further collection efforts.

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PROPOSED AGENCY ACTION

ISSUE 3: Should the Commission deny HSS Vending's application for a certificate to provide interexchange telecommunications service?

RECOMMENDATION: Yes. If the Commission grants staff's recommendation in Issue 1, staff recommends that the Commission deny HSS Vending's November 1, 1996, application for a certificate of public convenience and necessity.

STAFF ANALYSIS: On November 1, 1996, HSS Vending applied for a certificate of public convenience and necessity. By Order No. PSC-97-0937-FOF-TI, issued August 5, 1997, the Commission granted HSS Vending a certificate, but held the issuance of the certificate in abeyance pending the resolution of the show cause proceeding on HSS Vending's providing telecommunications services without a certificate. On August 26, 1997, HSS filed a Petition for Formal Proceeding (Petition) pursuant to Section 120.57, Florida Statutes, protesting that portion of the Commission's order holding HSS's certificate in abeyance, thereby nullifying the PAA portions of Order No. PSC-97-0937-FOF-TI that granted the certificate application and held the certificate in abeyance.

HSS Vending has failed to diligently pursue its Petition for Formal Hearing and has had no contact with the Commission in over a year. In accordance with the Order Establishing Procedure for this Docket, Order No. PSC-99-0443-PCO-TI, HSS Vending has waived the right to present any testimony and to raise any additional issues. Therefore, if the Commission approves staff's recommendation in Issue 1, staff recommends that the Commission also deny HSS Vending's November 1, 1996, application for a certificate of public convenience and necessity. Staff recommends that the Commission take this action as Proposed Agency Action in lieu of reinstating the Proposed Agency Action portions of Order No. PSC-97-0937-FOF-TI as a final order because that Order actually granted HSS Vending a certificate on a conditional basis. In view of HSS Vending's actions in this case and its failure to respond to staff, staff now believes it is more appropriate to deny the company's application.

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ISSUE 4: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendations in Issues 1-2, the show cause portions of this Docket will require no further action. Thus, if no person whose substantial interests are affected files a protest of Issue 3 within 21 days of the issuance of the Commission's Order, this Docket may be closed.

STAFF ANALYSIS: If the Commission approves staff's recommendations in Issues 1-2, the show cause portions of this Docket will require no further action. Thus, if no person whose substantial interests are affected files a protest of Issue 3 within 21 days of the issuance of the Commission's Order, this Docket may be closed.