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: September 13, 2007

TO: Ann Cole, Commission Clerk - PSC, Office of Commission Clerk

FROM: Ray E. Kennedy, Utilities System/Engineering Spec Supr - SES, Division of Competitive Markets & Enforcement REK

RE: Docket No. 070566-TI

The attached recommendation for Docket No. 070566-TI replaces the recommendation filed earlier today (Document No. 08279.)

cc: Beth Salak

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: September 13, 2007

TO: Office of Commission Clerk (Cole)

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

RE: Docket No. 070566-TI – Compliance investigation of UMCC Holdings for apparent violation of Rule 25-24.470, F.A.C., Registration Required.

AGENDA: 09/25/07 – 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\070566.RCM.DOC

Case Background

In March 2007, staff learned that UMCC Holdings (UMCC) may have acquired the customer base of Buzz Telecom Corporation after the Commission cancelled Buzz Telecom Corporation's IXC registration and tariff. Prior to March 2007, the Commission received three customer complaints for slamming against Buzz Telecom Corporation. The customers did change their toll service back to their carrier of choice. On March 26, 2007, staff mailed UMCC a certified letter regarding the complaints. On June 6, 2007, staff received a letter from UMCC, wherein the company stated that it had resolved all of the customer complaints. UMCC also acknowledged that the company had acquired Buzz Telecom Corporation's customers, via an asset acquisition, on December 11, 2006.

On June 20, 2007, the Commission received a customer complaint against UMCC for the unauthorized switch of the customer's long distance service (slamming). UMCC had not registered as an intrastate interexchange company (IXC) or filed a tariff with the Commission. After receiving the complaint, staff contacted the company, via certified letter, and requested that the company resolve the customer complaint and register and file a tariff with the Commission. UMCC signed the certified mail receipt on July 9, 2007. However, the company never responded to staff's request.

It appears that UMCC is providing intrastate interexchange telecommunications services in Florida which is an apparent violation of Rule 25-24.470, Florida Administrative Code (F.A.C.), Registration Required. UMCC has also failed to respond to the customer complaint, which is an apparent violation of Rule 25-22.032, F.A.C., Customer Complaints.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, 364.285, 364.603, 364.604, and 364.183, 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 UMCC Holdings 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 UMCC, Holdings 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, Tan)**

Staff Analysis: Rule 25-24.470, Florida Administrative Code, 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 notified UMCC of its requirement to register as an IXC and file a tariff with the Commission. Staff also requested that the company resolve the customer complaint and provide staff with a copy of the letter of authorization (LOA) or third party verification (TPV) wherein the customer authorized the company to provide service. As of the date of filing this recommendation, UMCC has not resolved the customer complaint, registered as an intrastate interexchange company, or provided staff with a copy of the LOA or TPV. Because UMCC never provided staff with a copy of the LOA or TPV, staff was unable to determine if the company changed the customer's long distance service in apparent violation of Rule 24-4.118, F.A.C. However, staff did determine that UMCC was operating in apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required.

Staff believes that UMCC'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, UMCC'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 telecommunication companies, like UMCC, 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 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 UMCC in the amount of $25,000 for the company's apparent violation of Rule 25-24.470, F.A.C.

Issue 2: Should the Commission impose a penalty in the amount of $10,000 upon UMCC Holdings for its apparent violations of Rule 25-22.032(6)(b), Customer Complaints, Florida Administrative Code, 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 $10,000 upon UMCC Holdings for its apparent violation of Rule 25-22.032(6)(b), Customer Complaints, Florida Administrative Code, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order **(Curry, Tan)**

Staff Analysis: Rule 25-22.032(6)(b), Florida Administrative Code, requires that the company provide staff a written response to the complaint within 15 working days. As stated in the case background, after receiving the customer complaint, staff contacted the company, via certified letter, and requested that the company resolve the customer complaint. The letter also advised UMCC that it may be subject to penalties if the company failed to respond. UMCC signed the certified mail receipt, which indicates that the company did receive staff's letter. However, the company never responded.

Staff believes that UMCC's failure to timely respond to customer complaints is a "willful violation" of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, 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.

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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, UMCC's failure to timely respond to customer complaints 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 telecommunication companies, including IXCs like UMCC, 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 telecommunications companies that failed to timely respond to customer complaints. Therefore, staff recommends that the Commission impose a penalty in the amount of $10,000 upon UMCC Holdings for its apparent violations of Rule 25-22.032(6)(b), Customer Complaints, Florida Administrative Code, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order.

Issue 3: 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 UMCC 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 penalties are not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalties 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 and tariff, the company's response to the customer complaint, and payment of the penalties, or upon the referral of the penalties to the Department of Financial Services. **(Tan)**

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