

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Astrocom Corporation for apparent violation of Rule 25-24.470, F.A.C., Registration Required.

DOCKET NO. 080579-TI
ORDER NO. PSC-09-0059-PAA-TI
ISSUED: January 27, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING A PENALTY FOR APPARENT VIOLATION OF
RULE 25-24.470, FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Case Background

On May 15, 2008, we received a customer complaint regarding a prepaid calling card. After receiving the complaint, our 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 this Commission rules governing those type services. Additionally, our staff determined that Astrocom was not registered as an intrastate interexchange telecommunications company (IXC) and had not filed a tariff with this Commission. By Order No. PSC-06-0615-PAA-TI, Astrocom's IXC registration and tariff were cancelled by this 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

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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 again failed to pay the penalties and late fees.

After receiving the complaint, our staff contacted the company. On June 2, 2008 and June 12, 2008, our 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 this 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, our staff called Astrocom to obtain the company's correct mailing address. Our 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, our staff explained to the company's representative that several attempts had been made to contact the company. The company representative requested that our staff fax another copy of the letter to the company. A copy of our 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 our staff's call or responded to the letter.

On July 22, 2008, our 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, our 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, our staff received a letter from Astrocom, via facsimile, regarding the dockets opened against the company's CLEC and IXC operations. After reviewing the fax, our staff immediately contacted the company. The company requested additional time to review the information related to the IXC docket and assured that our staff would be contacted the next day to resolve the matter. In regards to the CLEC docket, another member of our staff 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. Our 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 our staff again regarding either docket.

We are vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes.

II. 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, several attempts were made to contact Astrocom. Each time the company was contacted, our staff requested that Astrocom resolve the customer complaint, register as an IXC, and file a tariff with this Commission. To date, Astrocom has failed to comply with these requests. We believe that the company has been adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

We hereby find that Astrocom's failure to register and file a tariff with this 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, we are 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 this 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 this 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 we have previously imposed upon intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to register and to file a tariff with this Commission.

III. Decision

Therefore, we find it appropriate to 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.

The Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by our 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 this 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 shall be deemed admitted, the right to a hearing waived, and the penalty shall 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 shall 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 shall 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that we hereby impose a penalty upon Astrocom Corporation, in the amount of \$25,000, for the apparent violation of Rule 25-24.470, F.A.C. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, F.A.C., is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if the company fails to timely file a protest and request a Section 120.57, F.S., hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that if payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty shall be referred to the Department of Financial Services for collection and the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that this docket shall be closed 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.

By ORDER of the Florida Public Service Commission this 27th day of January, 2009.



ANN COLE
Commission Clerk

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TJB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 17, 2009.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.