

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: May 6, 2010

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Pruitt) *AT*
Office of the General Counsel (Brooks) *MTD JB*

RE: Docket No. 100118-TC – Request for cancellation of PATS Certificate No. 8471 by Pinnacle Payphone Corporation, effective March 3, 2010.

AGENDA: 05/18/10 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: ~~Staff~~ *All Commissioners - ac*

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RAD\WP\100118.RCM.DOC

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Case Background

Pinnacle Payphone Corporation (Pinnacle) currently holds Certificate No. 8471, issued by this Commission on June 4, 2004, authorizing the provision of pay telephone service (PATS). Pursuant to Section 364.336, Florida Statutes (F.S.), each telecommunications company holding an active certificate for any portion of the calendar year must pay a minimum annual Regulatory Assessment Fee. Pursuant to Section 350.113(4), F.S., the Regulatory Assessment Fee return forms, for the period of January 1 through December 31, are mailed to entities at least 45 days prior to the date that payment of the fee is due. Pursuant to Rule 25-4.0161(2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. In addition, Rule 25-24.514, Florida

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Administrative Code, provides that a pay telephone company requesting cancellation of its certificate must state its intent and date to pay the current Regulatory Assessment Fee (RAF).

In December 2009, Pinnacle was mailed its annual RAF return form. In February 2010, a certified notice was mailed notifying Pinnacle that they were delinquent in paying the 2009 RAF. On February 25, 2010, Mr. Mark Higgins, President of Pinnacle, signed the return receipt, acknowledging delivery of the delinquency notice. On March 3, 2010, Pinnacle mailed its 2009 RAF, as well as a correspondence requesting cancellation of its PATS certificate effective December 31, 2009. On March 12, 2010, our staff e-mailed Pinnacle and explained that the 2010 RAF was also due as were late payment charges for 2009 and that the effective date for cancellation would be March 3, 2010 and not December 31, 2009. A copy of the 2010 RAF return form was also e-mailed to the company. On March 15, 2010, Mr. Mark Higgins e-mailed staff that he did not believe he owed 2009 late payment charges or the RAF for 2010. On March 18, 2010, staff responded, explaining that Section 364.336, F.S., requires payment if your certificate was active for any portion of the calendar year and that a minimum fee was required pursuant to Sections 350.113 and 364.336, F.S. On March 18, 2010, Mr. Higgins replied that the required fee exceeded the maximum percentage of revenue allowed by statute. On March 31, 2010, staff advised Mr. Higgins that the statutes not only have a maximum percentage of revenue for those companies having revenues that exceed the minimum but also a required minimum fee.

The Commission is vested with jurisdiction over these matters pursuant to Sections 350.113, 364.285, 364.336 and 364.3375, F.S.

Discussion of Issues

Issue 1: Should the Commission deny Pinnacle a voluntary cancellation of pay telephone service (PATS) Certificate No. 8471 and cancel the certificate on the Commission's own motion with an effective date of March 3, 2010?

Recommendation: Yes, Staff recommends Pinnacle's request for voluntary cancellation of the company's PATS certificate should be denied. Pinnacle owes the 2010 RAF (\$100), along with statutory late payment charges for 2005¹ (\$3) and 2009 (\$6) for a total of \$109. Accordingly, staff believes it is appropriate to involuntarily cancel the company's certificate, effective March 3, 2010, on the Commission's own motion for failure to comply with Rule 25-24.514, Florida Administrative Code, and pursuant to Section 364.336, F.S. (Pruitt, Brooks)

Staff Analysis: Section 364.336, F.S., states that:

Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding 6-month period, shall pay to the commission, within 30 days following the end of each 6-month period, **a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business, except, for purposes of this and the fee specified in s. 350.113(3), (emphasis added)** any amount paid to another telecommunications company for the use of any telecommunications network shall be deducted from the gross operating revenue for purposes of computing the fee due. **The commission shall by rule assess a minimum fee in an amount up to \$1,000. (emphasis added)** The minimum amount may vary depending on the type of service provided by the telecommunications company, and shall, to the extent practicable, be related to the cost of regulating such type of company. Differences, if any, between the amount paid in any 6-month period and the amount actually determined by the commission to be due shall, upon motion by the commission, be immediately paid or refunded. **Fees under this may not be less than \$50 annually. (emphasis added)** Such fees shall be deposited in accordance with s. 350.113. The commission may by rule establish criteria for payment of the regulatory assessment fee on an annual basis rather than on a semiannual basis.

Pursuant to Section 364.336, F.S., telecommunications companies may not be assessed a fee that exceeds 0.25 percent annually of its gross operating revenues derived from intrastate business. Section 364.336, F.S., also sets forth a minimum fee that shall be assessed to telecommunications companies in an amount up to \$1,000 and not less than \$50. In his March 12, 2010 email, Mr. Higgins asserted that "although the statute goes on to say a minimum amount can be set by the Commission, there is no indication that the minimum amount can cause a company to have to pay more than .25% of Gross Operating Revenue. The only way to comply with the statutory requirement...and also impose a minimum of \$100 is to require no payment from companies with gross operating revenues less than \$40,000." In an additional e-mail dated

¹ The 2005 RAF was due January 30, 2006. The payment was postmarked February 15, 2006.

March 18, 2010, Mr. Higgins asserted that Section 364.336, F.S., is contradictory and should be interpreted in his favor. Staff disagrees.

All parts of a statute must be read together in order to achieve a consistent whole. See, e.g., *Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 749 (Fla. 4th DCA 1969), writ discharged, 236 So. 2d 114 (Fla.), cert. denied, 400 U.S. 964 (1970). [**11] Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. E.g., *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107, 1111 (Fla. 1980). Accordingly, Section 364.336, F.S. must be considered as a whole in order to effectuate the legislative intent. See, e.g., *Fleischman v. Department of Professional Regulation*, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983) ("Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts."), review denied, 451 So. 2d 847 (Fla. 1984).

Staff believes that read in its entirety, Section 364.336, F.S., is not "contradictory." Section 364.336, F.S., mandates that the Commission shall by rule assess a minimum fee. Staff believes the intent of Section 364.336, F.S., is to ensure that telecommunications companies with minimal revenues, pay a RAF that covers "the cost of regulating such type of company." Staff notes that as the holder of a PATS certificate, Pinnacle is required to remit a fee of \$100.²

In e-mails dated March 18, 2010 and March 31, 2010, staff attempted to assist Mr. Higgins' with the appropriate interpretation of the statute. Staff explained to Mr. Higgins that Section 364.336, F.S., does not exclude pay telephone providers whose RAF (when calculated as a percentage of its gross operating revenues) falls below \$100. Additionally, staff informed Mr. Higgins that Section 350.113, F.S., requires the Commission assess RAFs, Interest and Penalties and that Section 350.113, F.S., does not provide an exception based upon the amount of gross operating revenues generated by a company.

Staff also notified Mr. Higgins that Pinnacle, on at least two occasions, has agreed to payment of this minimum fee. Pinnacle agreed to the minimum fee in an acknowledgment signed and attached to its PATS application, and also in failing to protest Order No. PSC-04-0484-PAA-TC issued May 11, 2004, in Docket No. 040186-TC, which granted Pinnacle's certificate to provide pay telephone services.

Staff recommends Pinnacle's request for voluntary cancellation of the company's PATS certificate should be denied. Pinnacle owes the 2010 RAF (\$100), along with statutory late payment charges for 2005 (\$3) and 2009 (\$6) for a total of \$109. Accordingly, staff believes it is appropriate to involuntarily cancel the company's certificate, effective March 3, 2010, on the Commission's own motion for failure to comply with Rule 25-24.514, Florida Administrative Code, and pursuant to Section 364.336, F.S.

² Rule 25-4.0161(1)(b), Florida Administrative Code.

Issue 2: Should this docket be closed?

Recommendation: Staff recommends that the Order issued from this recommendation should 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), F.S., any issues not in dispute should be deemed stipulated. If the company fails to timely file a protest and to request a Section 120.57, F.S., hearing, the facts should be deemed admitted and the right to a hearing waived.

If the company pays the RAF, including any accrued late payment charges, prior to the expiration of the Proposed Agency Action Order, then the cancellation of the company's PATS certificate will be voluntary. If the company fails to pay the RAF, including any accrued late payment charges, prior to the expiration of the Proposed Agency Action Order, then the company's PATS certificate should be cancelled administratively. The collection of the unpaid RAF, including any accrued statutory late payment charges, should be referred to the Florida Department of Financial Services for further collection efforts.

This docket should be closed administratively either as a voluntary cancellation upon receipt of the payment of the RAFs, including any accrued statutory late payment charges, or cancelled involuntarily on the Commission's own motion. Upon cancellation of the PATS certificate, the company should be required to immediately cease and desist providing telecommunications service in Florida. (Brooks)

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