

State of Florida



# Public Service Commission

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**DATE:** November 17, 2009

**TO:** Office of Commission Clerk (Cole) <

**FROM:** Division of Regulatory Analysis (Pruitt)  
Office of the General Counsel (Morrow) *JP* *MM* *AV*

**RE:** Docket No. 090241-TC – Compliance investigation of PATS Certificate No. 7989, issued to Protocall Communications, Inc., for apparent first-time violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

**AGENDA:** 12/01/09 – Regular Agenda – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\090241.RCM.DOC

### Case Background

Section 364.336, Florida Statutes, requires pay telephone service providers to pay a minimum annual Regulatory Assessment Fee if the certificate was active during any portion of a calendar year. Rule 25-4.0161(2), Florida Administrative Code, provides that the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. Section 350.113(4), Florida Statutes, requires the Commission to mail the Regulatory Assessment Fee return form to entities at least 45 days prior to the date that payment of the fee is due.

Rule 25-4.0161(9), Florida Administrative Code, requires the Commission to send a delinquent notice to any company that fails to file a Regulatory Assessment Fee return and that

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fails to pay the fee by the specified due date. Rule 25-4.0161(10), Florida Administrative Code, requires Commission staff to establish dockets for companies failing to pay the Regulatory Assessment Fee within 15 days after receiving the delinquent notice and administratively issue a proposed agency action order imposing penalties, requiring payment of the delinquent Regulatory Assessment Fees or cancelling certificates. Rule 25-4.0161(11), Florida Administrative Code, establishes that automatic penalties shall be \$500 for a first offense, \$1,000 for a second offense, and \$2,000 for a third offense.

On December 15, 2008, the 2008 Regulatory Assessment Fee return forms were mailed to telecommunication companies. Payment had to be postmarked by January 30, 2009, to avoid statutory late payment charges.

On February 19, 2009, an e-mail was sent to Protocall Communications, Inc. (Protocall) stating that the 2008 RAF had not been paid, a delinquent notice would be sent the next day, and that the company would be automatically fined if the company did not comply with the notice. The e-mail system was unable to deliver the message.

On February 20, 2009, the Commission sent Protocall a delinquent notice via certified mail for nonpayment of the 2008 RAF.

On February 26, 2009, the delinquent notice was received and signed for by "S. Walker"<sup>1</sup> according to the certified receipt provided by the US Postal Service. This meant that payment of the RAF, including late payment charges, had to be postmarked by March 13, 2009, to avoid an automatic \$500 penalty.

On March 27, 2009, Protocall postmarked its 2008 minimum RAF payment and 2008 RAF return form.

On March 31, 2009, the Commission's Fiscal Services mailed a letter to Protocall which stated that based on the postmark date of the company's RAF payment, an additional amount of \$12 for statutory late payment charges was due.

On April 22, 2009, the Commission's Fiscal Services mailed a Second Notice letter to Protocall for the RAF late payment charges.

On April 27, 2009, Docket No. 090241-TC was established for violation of Rule 25-4.0161, Florida Administrative Code.

On May 6, 2009, Protocall postmarked its \$12 payment for late charges based on its minimum RAF payment.

On May 15, 2009, Order No. PSC-09-0336-PAA-TC was issued, which imposed an automatic \$500 penalty, including collection costs. According to the Order, 12 companies had until close of business June 6, 2009, to pay any past due amount of the RAF, including late payment charges, and the automatic \$500 penalty, or protest the Order.

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<sup>1</sup> The signature on the receipt for the delinquent notice appears to be S. Walker as does the signature for receipt of the PAA Order.

On June 1, 2009, the PAA Order was received and signed for by "S. Walker" according to the certified receipt provided by the US Postal Service.

On June 2, 2009, Mr. Jett, the company president, called and questioned the \$500 penalty. He was informed by legal staff that the RAF was paid, but too late to avoid the automatic penalty. A new e-mail address was given to staff.

On June 4, 2009, Protocall timely filed a protest to the proposed agency action order. Mr. Jett, the company's president, stated personal and economic reasons for waiving the penalty and wrote, "We have been certified [sic] since 1987 and have never been late before."<sup>2</sup>

On August 5, 2009, legal staff called and e-mailed Mr. Jett in an attempt to resolve the docket.

On September 15, 2009, technical staff e-mailed Mr. Jett that attempts by technical staff to call him had been futile and requested that he contact staff. He was also informed that a recommendation would be drafted for the Commission.

On October 15, 2009, legal staff sent a certified letter to Mr. Jett at both his P.O. Box and the physical address he has on file with the Commission. The letters requested that Mr. Jett contact Commission staff within seven days regarding whether he intended to pursue his protest or take any further action in the present docket.

On October 16 and 22, 2009, the US Postal Service left notices of attempted delivery of the certified letters.

On October 23, 2009, technical staff called Protocall and left a message that certified letters had been sent and staff was requesting a return call.

On October 29, 2009, the certified letters were delivered and the return receipts signed by Mr. Jett who did not respond in the requested time frame. As of the date of this filing, there has been no response to staff.

This recommendation addresses Protocall's protest of the automatic \$500 penalty for late payment of the 2008 RAF. The Commission is vested with jurisdiction in this matter pursuant to Sections 350.113, 364.285, and 364.336, Florida Statutes.

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<sup>2</sup> Mr. Jett previously held a payphone certificate under the name Pro Telecom, Inc. (07/14/87-12/31/02). Statutory late payment charges were paid by Pro Telecom, Inc. for 1996, 2000, 2001, and 2002 RAFs. Statutory late payment charges were paid by Protocall for 2001, 2002, and 2005 RAFs.

### Discussion of Issues

**Issue 1:** Should the Commission dismiss Protocall Communications, Inc.'s protest of PAA Order No. PSC-09-0336-PAA-TC?

**Recommendation:** Yes. The Commission should dismiss Protocall Communications, Inc.'s protest of PAA Order No. PSC-09-0336-PAA-TC. Additionally, staff recommends that PAA Order No. PSC-09-0336-PAA-TC be reinstated and consummated as a Final Order. **If the Commission approves staff's recommendation in Issue 1, Issue 2 will be moot and a decision need not be rendered.** (Morrow)

**Staff Analysis:** As detailed in the Case Background, upon issuance of PAA Order No. PSC-09-0336-PAA-TC, Protocall Communications, Inc. filed a response, protesting the penalties imposed. As a result, staff made several attempts to contact Protocall, all of which were unsuccessful. Attempts to contact the company were made via phone, e-mail, and certified letter.

Staff believes the Commission has afforded Protocall ample time and opportunity to pursue its case. Protocall's protest was filed on June 4, 2009, and from this date on, staff was engaged in attempting to make contact. For more than three months, following the filing of its protest, Protocall has failed to respond to staff's repeated inquiries.

Because Protocall has failed to take any action regarding its protest, to contact staff, and to respond to staff's repeated inquiries, staff believes Protocall's failure to act constitutes abandonment of its protest in this docket.

Because Protocall has failed to take any action subsequent to filing its protest and to respond to staff's repeated inquiries, staff recommends that the Commission dismiss Protocall's protest with prejudice. Additionally, staff recommends that PAA Order No. PSC-09-0336-PAA-TI, be reinstated for Docket No. 090241-TC and consummated as a Final Order.<sup>3</sup>

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<sup>3</sup> Staff's recommendation is consistent with action previously taken by the Commission upon companies that fail to respond to staff. In Order No. PSC-03-1170-FOF-TC, issued October 20, 2003, and Order No. PSC-08-0227-FOF-TI, issued April 7, 2008, this Commission dismissed the companies' protests of PAA Orders PSC-03-0134-PAA-TC and PSC-07-0808-PAA-TI with prejudice. The Commission found that the companies' repeated failures to respond to staff constituted abandonment of their protests. Additionally, the PAA Orders were reinstated and consummated as Final Orders.

**Issue 2:** Should the Commission grant the relief requested by waiving the \$500 automatic penalty including collection costs?

**Recommendation:** No. The Commission should not grant the relief requested by waiving the \$500 penalty including collection costs. The Commission should dismiss this protest on its own motion as Protocall has not provided facts upon which the requested relief can be granted. (Morrow, Pruitt)

**Staff Analysis:**

Standard of Review

The standard to be applied when determining whether to dismiss a protest is the same as that used in disposing of a Motion to Dismiss. A Motion to Dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action for which relief can be granted. *Id.* at 350. In determining the sufficiency of the petition, the Commission should review the petition and the documents incorporated therein, and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

Protocall's Position

In support of Protocall's position, Mr. Jett asserts the following in his protest: (1) He was unaware that the RAF form had not been filed due to the resignation of Protocall's comptroller; (2) He received notice to pay the minimum RAF fee on March 13, 2009, and paid it within 14 days; (3) He received the notice to pay the minimum RAF fee on March 13, 2009 because, as he was informed, a non-employee third party signed for the notice; (4) He has been certified since 1987 and has never been late; and (5) He has gone from over 900 pay stations to around 150-200 and does not have the money to pay the Commission penalty.

Analysis

Sections (9), (10), and (11) of Rule 25-4.0161, Florida Administrative Code, read as follows:

(9) The Division of Administrative Services shall send by certified mail a regulatory assessment fee delinquency notice to any company that fails to file a regulatory assessment fee return and that fails to pay the regulatory assessment fee by the date specified in subsection (2), unless the company has met the requirements of subsections (6) and (7).

(10) If a company fails to pay the regulatory assessment fee within 15 days after receiving a delinquency notice, the Division of Administrative Services, in cooperation with the Division of Regulatory Compliance and the Office of General Counsel, will establish a docket and administratively issue a Notice of

Proposed Agency Action Order Imposing Penalties and Collection Costs, and Requiring Payment of Delinquent Regulatory Assessment Fees, or Cancelling Certificates or Removing From the Register for Violation of Rule 25-4.0161, F.A.C., and Section 364.336, F.S. The company must pay the past due regulatory assessment fees, the penalty and interest for late payment as provided in Section 350.113, F.S., and as stated in subsection (8) above, and must also pay the applicable penalty stated in subsection (11) for failure to file the regulatory assessment fee return.

(11) Pursuant to Section 364.285, F.S., the Commission has the authority to impose a penalty or cancel a certificate or registration if a company refuses to comply with Commission rules, orders, or Florida Statutes. The penalty, which will include collection costs, for failure to file the regulatory assessment fee return by the date stated in the delinquency notice shall be as follows:

- (a) First violation – \$500;
- (b) Second violation – \$1,000;
- (c) Third violation – \$2,000.

Failure of the company to pay the full amount due and stated in the Notice of Proposed Agency Action will result in the cancellation of the company's Certificate of Public Convenience and Necessity, or will result in the cancellation of the company's tariff and removal of its name from the Commission's register, whichever is applicable.

The Commission complied with Rule 25-4.0161(9), F.A.C., by mailing a delinquent notice via certified mail on February 20, 2009. Protocall had not paid the 2008 RAF due on January 30, 2009, and had not requested an extension.

The delinquent notice was received and signed for on February 26, 2009. Protocall had until March 13, 2009, (15 days from receipt) to pay the 2008 RAF to avoid the \$500 penalty. The RAF was not postmarked until March 27, 2009.

Rule 25-4.0161(10), F.A.C., requires Commission staff to "establish a docket and administratively issue a Notice of Proposed Agency Action Order Imposing Penalties and Collection Costs, and Requiring Payment of Delinquent Regulatory Assessment Fees, or Cancelling Certificates or Removing From the Register for Violation of Rule 25-4.0161, Florida Administrative Code and Section 364.336, Florida Statutes" if a company fails to pay the RAF within 15 days. Staff established Docket No. 090241-TC on April 27, 2009. The statutory late payment charges were postmarked May 6, 2009.

Rule 25-4.0161(11), F.A.C., states that "[t]he penalty, which will include collection costs, for failure to file the regulatory assessment fee return by the date stated in the delinquency notice shall be as follows: (a) First violation - \$500...."

On May 15, 2009, the Commission issued Order No. PSC-09-0336-PAA-TC requiring payment of the \$500 penalty or cancellation of the certificate.

### Conclusion

Even assuming all of Mr. Jett's allegations of fact to be true and accurate, and construing them in the light most favorable to Protocall, Mr. Jett has failed to state a cause of action for which the relief prayed for may be granted by this Commission. While Mr. Jett has asserted that certain mitigating factors may be present, he has not provided evidence that Protocall did not, indeed, violate Rule 25-4.0161, F.A.C. As a holder of a PATS certificate for 22 years, Mr. Jett is aware that RAFs are due January 30 for the preceding year. His companies have paid numerous statutory late payment charges and most recently Protocall received a RAF delinquent notice by certified mail in 2006 and paid the 2005 RAF and statutory late payment charges within the 15 days and avoided the \$500 penalty.

As Protocall has failed to dispute the fact that it was in violation of a Commission Rule, the \$500 penalty including collection costs should not be waived. Protocall has failed to take any action subsequent to filing its protest and to respond to staff's repeated inquiries. Staff recommends that the Commission dismiss Protocall's protest with prejudice. Additionally, staff recommends that PAA Order No. PSC-09-0336-PAA-TI, be reinstated for Docket No. 090241-TC and consummated as a Final Order.

**Issue 3:** Should this docket be closed?

**Recommendation:** If the Commission approves staff's recommendation, Protocall Communications, Inc. should make payment of the penalty as required by PAA Order No. PSC-09-0336-PAA-TC, within 14 days after the issuance of the Commission's Final Order from this recommendation. This docket should be closed administratively upon either receipt of the payment of the penalty, or upon cancellation of Protocall Communications, Inc.'s PATS certificate. (Morrow)

**Staff Analysis:** Payment of the \$500 penalty should be postmarked within 14 days of the issuance of the Final Order from this recommendation. The docket should be closed administratively upon the timely receipt of the penalty or upon cancellation of Protocall Communications, Inc.'s PATS certificate.