

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: August 29, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (M. Watts)
Office of the General Counsel (McKay) *MM* *PKW*

RE: Docket No. 070560-TI – Compliance investigation of Virtual Reach Corporation for apparent violation of Rules 25-470, F.A.C., Registration Required, and 25-22.032(6)(b), F.A.C., Customer Complaints.

AGENDA: 09/11/07 – 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\070560.RCM.DOC

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Case Background

Between June 19, 2007, and June 26, 2007, the Florida Public Service Commission (Commission) received four consumer complaints against Virtual Reach Corporation (Virtual Reach) for apparent unauthorized carrier changes. Only the consumers' toll services were affected. Virtual Reach is not registered with the Commission to provide intrastate interexchange company (IXC) services in Florida.

On June 27, 2007, staff mailed Virtual Reach a certified letter requesting resolution of the four complaints and instructing the company to submit its IXC registration and tariff by July 19,

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2007. Staff's letter was delivered by the United States Postal Service as indicated by the signed certified mail receipt.

To date, Virtual Reach has not submitted its IXC registration and tariff which is an apparent violation of Rule 25-470, Florida Administrative Code, Registration Required. In addition, Virtual Reach has not responded to the consumer complaints which is an apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. Staff opened this docket on August 10, 2007, to address Virtual Reach's apparent violations of the Commission's rules. Since this docket was opened, staff has received seven more consumer complaints which have been sent to the company for resolution.

The potential slamming of customers by Virtual Reach appears to be the result of a business dispute between two parties, Telrite Corporation (Telrite) and ACCXX Communications, LLC (ACL). The following paragraphs explain.

In early June, staff was contacted by Mr. Michael Geoffroy of Telrite, a registered IXC in Florida. Mr. Geoffroy alerted staff to the possibility that Virtual Reach may be slamming Telrite's Florida customers' long distance service. Mr. Geoffroy explained that Telrite had purchased the long distance customers of ACL, also a registered IXC in Florida. This transaction occurred in early to mid 2006 and was not known to staff because the companies did not seek a waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code.

Mr. Geoffroy claimed that many of the customers acquired from ACL seemed to migrate away in one week's time. Telrite contacted its underlying carrier and found that over 25,000 customers nationwide had been switched to Virtual Reach. Telrite contacted some of the customers to investigate. These customers stated to Telrite that they did not authorize a switch of their toll service to Virtual Reach. It is Telrite's belief that one or more ACL employees used records of the previously transferred customer base to switch the customers from Telrite to Virtual Reach, a newly formed corporation.

In response to Mr. Geoffroy's concerns, staff immediately placed a phone call to Mr. Steve Markley of Virtual Reach. Staff briefly spoke with Mr. Markley, but the conversation was cut short due to a poor connection with his cell phone. Mr. Markley offered to call staff upon return to his office. Shortly thereafter, staff received a call from Ms. Lacy Loar claiming to be an attorney representing Virtual Reach. Staff advised Ms. Loar that Virtual Reach, by slamming Florida customers, would be in violation of the Commission's rules and could be subject to significant financial penalties. Staff further advised Ms. Loar that Virtual Reach and ACL should pursue their dispute with Telrite in a different manner other than switching customers' long distance service from Telrite to Virtual Reach. Ms. Loar indicated a complete understanding of the potential consequences of slamming customers and agreed to advise her client accordingly. Staff made further attempts to contact Ms. Loar, however, she failed to return staff's phone calls. Staff also cautioned Telrite that it should resolve its dispute with ACL without creating any negative impact on the long distance customers. The Commission received slamming complaints, hence this docket was established.

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The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, 364.285, 364.603, and 364.604, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty of \$10,000 per violation, for a total of \$40,000, on Virtual Reach Corporation for four 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 total penalty of \$40,000 on the company for apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code. (M. Watts/McKay)

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. Virtual Reach should have responded to staff by July 19, 2007. As noted in the Case Background, the company signed for staff's June 27, 2007, letter on July 2, 2007, and should have responded. Staff notes that the letter informed the company of the possible penalties for failure to respond. To date, the Commission has not received a response from the company.

Staff believes that Virtual Reach'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.

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, Virtual Reach'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 Virtual Reach, 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 intrastate interexchange telecommunications companies that failed to timely respond to customer complaints. Therefore, staff recommends that the Commission impose a penalty of \$10,000 per violation, for a total of \$40,000, on Virtual Reach Corporation for four 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 2: Should the Commission impose a penalty in the amount of \$25,000 upon Virtual Reach Corporation for its apparent violation of Rule 25-24.470, Florida Administrative Code, 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 Virtual Reach Corporation for its apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order. (M. Watts/McKay)

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 Office of Commission Clerk.

As stated in the case background, staff attempted to contact the company via certified letter. The letter requested that the company resolve the customer complaints 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. The letter also requested that the company register as an IXC and file a tariff with the Commission. As of the date of filing this recommendation, Virtual Reach has not resolved the customer complaints, registered as an IXC, or provided staff with any of the requested information. Since Virtual Reach never provided staff with a copy of the LOA or TPV, staff was unable to determine if the company operated in apparent violation of Rule 24-4.118, Florida Administrative Code. However, staff did determine that Virtual Reach was operating in apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required.

Staff believes that Virtual Reach'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:

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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, Virtual Reach'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, including IXCs like Virtual Reach, 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 IXCs 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 in the amount of \$25,000 upon Virtual Reach Corporation for its apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required, 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 Virtual Reach 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 penalties should be deemed assessed. If payment of the penalties is 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, tariff, customer complaint responses, and payment of the penalties, or upon the referral of the penalties to the Department of Financial Services. **(McKay)**

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