

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 070560-TI
ORDER NO. PSC-07-0808-PAA-TI
ISSUED: October 8, 2007

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION ORDER
COMPLIANCE INVESTIGATION FOR APPARENT VIOLATIONS OF RULE 25-24.470,
FLORIDA ADMINISTRATIVE CODE, REGISTRATION REQUIRED, AND 25-22.032(6)(b),
FLORIDA ADMINISTRATIVE CODE, CUSTOMER COMPLAINTS

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

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 this Commission to provide intrastate interexchange company (IXC) services in Florida.

On June 27, 2007, our 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, 2007. Our staff's letter was delivered by the United States Postal Service as indicated by the signed certified mail receipt.

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FPSC-COMMISSION CLERK

To date, Virtual Reach has not submitted its IXC registration and tariff which is an apparent violation of Rule 25-24.470, 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. Our staff opened this docket on August 10, 2007, to address Virtual Reach's apparent violations of this Commission's rules. Since this docket was opened, our 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, our staff was contacted by Mr. Michael Geoffroy of Telrite, a registered IXC in Florida. Mr. Geoffroy alerted our 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 our 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, our staff immediately placed a phone call to Mr. Steve Markley of Virtual Reach. Our 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 our staff upon return to his office. Shortly thereafter, our staff received a call from Ms. Lacy Loar claiming to be an attorney representing Virtual Reach. Our staff advised Ms. Loar that Virtual Reach, by slamming Florida customers, would be in violation of this Commission's rules and could be subject to significant financial penalties. Our 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. Our staff made further attempts to contact Ms. Loar, however, she failed to return our staff's phone calls. Our staff also cautioned Telrite that it should resolve its dispute with ACL without creating any negative impact on the long distance customers. This Commission received slamming complaints, hence this docket was established.

We is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, 364.285, 364.603, and 364.604, Florida Statutes.

II. Analysis:

Rule 25-22.032(6)(b), Florida Administrative Code, requires that the company provide our staff a written response to the complaint within 15 working days. Virtual Reach should have responded to our staff by July 19, 2007. As noted in the Case Background, the company signed for our staff's June 27, 2007, letter on July 2, 2007, and should have responded. Our staff notes that the letter informed the company of the possible penalties for failure to respond. To date, this Commission has not received a response from the company.

Our 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, this 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 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 this Commission's 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 IXC's 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 this Commission upon intrastate interexchange telecommunications companies that failed to timely respond to customer complaints. Therefore, our staff recommends that this 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.

Rule 25-24.470(1), F.A.C., 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, our staff attempted to contact the company via certified letter. The letter requested that the company resolve the customer complaints and provide our 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 this Commission. As of the date of filing this recommendation, Virtual Reach has not resolved the customer complaints, registered as an IXC, or provided our staff with any of the requested information. Since Virtual Reach never provided our staff with a copy of the LOA or TPV, they were unable to determine if the company operated in apparent violation of Rule 24-4.118, Florida Administrative Code. However, our staff did determine that Virtual Reach was operating in apparent violation of Rule 25-24.470, Florida Administrative Code, Registration Required.

Our staff believes that Virtual Reach'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, this 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 this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

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Thus, Virtual Reach’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 telecommunication companies, including IXC’s 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 this Commission upon IXC’s that were providing intrastate interexchange services within the state that failed to register and to file a tariff with this Commission. Therefore, our 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.

III. Decision

This Order shall become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, F.A.C., within 21 days of the issuance of this Order. As provided by Section 120.80(13)(b), F.S., any issues not in dispute shall be deemed stipulated.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that Virtual Reach Corporation pay \$10,000 per violation for a total of \$40,000 for 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. It is further

ORDERED that Virtual Reach Corporation pay a penalty of \$25,000 for its apparent violation of Rule 25-24.470, Florida Administrative Code, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that this Order shall become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this 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 this Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute shall be deemed stipulated. It is further

ORDERED that his 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.

By ORDER of the Florida Public Service Commission this 8th day of October, 2007.



ANN COLE
Commission Clerk

(S E A L)

VSM

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 October 29, 2007.

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.