

Matilda Sanders

0022 - PAA

From: Jackie Schindler
Sent: Friday, January 09, 2004 4:11 PM
To: CCA - Orders / Notices; Jason Rojas; Toni McCoy
Subject: Order / Notice Submitted

id

Date and Time: 1/9/2004 4:08:00 PM
Docket Number: 030696-ti and 031037-tc
Filename / Path: see below

The following orders have been moved to GC Orders for issuance:

Docket No. 030696-TI
File Name: 030696or.jpr

PAA Order Imposing Penalty Upon 9278 Communications, Inc. for Violation of Sections 364.02 and 364.04, Florida Statutes

Docket No. 031037-TC
File Name: 031037or.jpr

PAA Order Granting Certificate to Provide Pay Telephone Services

I certified

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation
of 9278 Communications, Inc. for
apparent violation of Sections
364.02 and 364.04, Florida
Statutes.

DOCKET NO. 030696-TI
ORDER NO. PSC-04-0022-PAA-TI
ISSUED: January 12, 2004

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING PENALTY UPON 9278 COMMUNICATIONS, INC. FOR
VIOLATION OF SECTIONS 364.02 AND 364.04, FLORIDA STATUTES

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.

CASE BACKGROUND

On March 3, 2003, our staff received a consumer complaint
regarding a prepaid phone card labeled *La Rendidora Pa' Colombia*.
The back of the phone card lists Universal Phones, Inc. as the
service provider and 9278 Communications, Inc. (9278
Communications) as the distributor. Universal Phones, Inc.
informed our staff via email that it does not provide service for
the *La Rendidora Pa' Colombia* prepaid phone card.

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On April 10, 2003, our staff received a consumer complaint regarding a prepaid phone card labeled *Welcome Florida Phonecard*. The back of the phone card lists NTSE Communications as the service provider. Our staff was unable to locate any information on a company using the name NTSE Communications, Inc. According to the 10-K report filed with the Securities and Exchange Commission for 9278 Communications fiscal year ended December 31, 2002, NTSE Holding Corp., wholly owned by Sajid Kapadia, merged with 9278 Communications on January 31, 2003. As a result, 9278 Communications became a privately held corporation owned by Sajid Kapadia. Our staff concluded that 9278 Communications was the service provider and was responsible for the prepaid phone cards branded as *La Rendiadora Pa' Colombia* and *Welcome Florida Phonecard*.

On April 21, 2003, our staff mailed 9278 Communications a certified letter via United States Postal Service (USPS) requesting that the company investigate the consumer complaints and notifying the company that a certificate of public convenience and necessity (certificate) is required. Our staff received a green card certified receipt indicating that the company received our staff's letter. A response was due on May 9, 2003.

On May 14, 2003, our staff received a consumer complaint regarding a prepaid phone card labeled *Arroz Con Pollo Florida Phone Card*. The back of the phone card lists 9278 Communications as the service provider. On May 22, 2003, our staff mailed 9278 Communications a second certified letter via USPS requesting that the company investigate the consumer complaint regarding the *Arroz Con Pollo Florida Phone Card*. Again, our staff requested that the company submit an application for an interexchange company certificate. At that time, Commission rules required that intrastate interexchange telecommunications companies (IXCs) providing prepaid calling services (PPCS) within the state obtain a certificate. The certified mail return receipt indicated that the company received the letter on or about May 27, 2003. A response was due on June 16, 2003.

On June 3, 2003, our staff received a second consumer complaint regarding the *Arroz Con Pollo Florida Phone Card*. Additionally on June 25, 2003, our staff received a third consumer complaint regarding the *Arroz Con Pollo Florida Phone Card*. In all three

complaints, the consumers claim that the *Arroz Con Pollo Florida Phone Card* did not provide the full amount of minutes as advertised.

On July 25, 2003, our staff opened this docket to address the company's apparent violation of Sections 364.02(13) and 364.04, Florida Statutes.

On August 7, 2003, our staff filed its initial recommendation in this docket. On August 15, 2003, 9278 Communications requested deferral of this item from the August 19, 2003, Agenda Conference. 9278 Communications submitted its original letter requesting deferral on August 19, 2003. Through September 23, 2003, our staff worked with 9278 Communications on a negotiated resolution to this docket.

However, on September 4, 2003, our staff received a fourth consumer complaint regarding two of 9278 Communication's prepaid phone cards. One is branded as *Arroz Con Pollo Florida Phone Card* and the other is branded as *X Phone Card MIAMI*.

On September 24, 2003, 9278 Communications sent our staff an email stating that it is not providing service in Florida and the company believes that it is not required to register and file a tariff with this Commission. The company indicated that IBGH Communications, Inc. (IBGH) is the carrier that should be listed as the service provider on the phone cards, not 9278 Communications.

On September 29, 2003, our staff mailed 9278 Communications a letter via USPS and facsimile requesting documents and information related to the company's explanation in its email sent on September 24, 2003. On October 3, 2003, 9278 Communications sent an email stating that it would respond to our staff's letter dated September 29, 2003, and provide our staff with the requested documentation and information by October 10, 2003.

On November 4, 2003, in Docket No. 031032-TI, IBGH registered as an intrastate interexchange telecommunications company in Florida. On November 6, 2003 our staff sent 9278 Communications a certified letter via USPS informing the company that it had not yet received its response to our staff's letter dated September 29, 2003, and that the docket could not be resolved until the company

provided the requested documentation and resolved the outstanding consumer complaint.

On November 19, 2003, our staff received the USPS certified mail receipt indicating that on November 11, 2003, 9278 Communications received staff's letter dated November 6, 2003.

On December 2, 2003, in Docket No. 030876-TI, this Commission approved the settlement proffered by IBGH for providing intrastate interexchange telecommunications service in Florida without providing this Commission with current company contact information and filing a tariff, a violation of Sections 364.02, and 364.04, Florida Statutes.

This Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285 Florida Statutes.

ANALYSIS AND FINDINGS

As outlined in the case background, this Commission received six consumer complaints regarding the prepaid phone card services apparently provided by 9278 Communications during the period from March 3, 2003, through September 4, 2003. The phone cards branded as *Arroz Con Pollo Florida Phone Card* and *X Phone Card MIAMI* list 9278 Communications as the service provider. Hence, it appears that 9278 Communications is providing intrastate interexchange telecommunications services to the public within Florida, and thus, is required to provide this Commission with current contact information and file a tariff and as required by Sections 364.02(13) and 364.04, Florida Statutes.

Our staff filed a recommendation in this docket on August 7, 2003, at which point 9278 Communications requested a deferral of the item from the August 19, 2003, Agenda Conference. Subsequently, our staff and 9278 Communications entered into negotiations to settle this matter. During negotiations, 9278 Communications indicated to our staff that it is not providing service in Florida and does not believe that it is required to file a tariff and provide this Commission with current contact information. In addition, the company indicated to our staff that 9278 Communications was inadvertently listed as the service provider on some of its phone

cards whereas IBGH is the carrier and should have been listed on the phone cards. Although IBGH recently filed a tariff and registered with this Commission, our staff is not satisfied with 9278 Communications' explanation of its relationship with IBGH. In 9278 Communications' email sent on September 24, 2003, the company provided the following explanation:

IBGH Communications LLC, one of the carriers, is owned in part by the stockholder of 9278 Communications. There is no parent-subsidary relationship between the companies, nor is their financial information consolidated or reported together in any way. The companies operate separately, although due to the overlap in ownership, management of 9278 takes an active role in consulting with IBGH management as to strategic decisions at IBGH and 9278 provides personnel support from time to time. To help establish IBGH's facilities, 9278 provided certain loans to IBGH in exchange for preferential use of IBGH's telecommunications platform.

Further, both 9278 Communications and IBGH list 1942 Williamsbridge Road, Bronx, New York, 10461 as their address.

Our staff then requested that 9278 Communications provide additional information and documentation to clarify the company's relationship with IBGH. However, the company at this time is no longer communicating with our staff. As of December 4, 2003, 9278 Communications has not responded to our staff's inquiries, nor taken the necessary actions to settle this matter, nor has the company provided this Commission with current contact information and filed a tariff in apparent violation of Sections 364.02(13) and 364.04, Florida Statutes.

APPLICABLE FLORIDA STATUTES

On May 23, 2003, the Governor signed the Tele-Competition Act which no longer requires an IXC providing services within the state to obtain a certificate. However, Section 364.02(13), Florida Statutes, requires each IXC to provide the Commission with information to contact and communicate with the company. Section 364.02(13), Florida Statutes, states in pertinent part:

Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a), and (d), 364.285, 364.163, 364.501, 364.603, and 364.604, shall provide the commission with such current information as the commission deems necessary to contact and communicate with the company

Further, the Tele-Competition Act did not amend Section 364.04, Florida Statutes. IXCs providing service within the state are still required to file a tariff with the Commission in accordance with Section 364.04(1), Florida Statutes, which states:

Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges that a company for service to be performed within the state.

PROPOSED PENALTY

We find that 9278 Communications' failure to provide this Commission with current contact information and file a tariff is a "willful violation" of Sections 364.02(13) and 364.04, Florida Statutes, 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 the Commission, or any provision of Chapter 364, Florida Statutes.

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, the failure of 9278 Communications to file a tariff and provide this Commission with current contact information meets the standard for a "refusal to comply" and "willful violations" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

9278 Communications also cannot claim that it did not know that it had the duty to file a tariff and provide this Commission with current contact information. "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 intrastate interexchange telecommunication companies, like 9278 Communications, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Thus, this Commission finds that 9278 Communications, Inc. has, by its actions and inactions, willfully violated Sections 364.02(13) and 364.04, Florida Statutes, and imposes a \$25,000 penalty on the company to be paid to the Florida Public Service Commission. If 9278 Communications, Inc. 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. Further, if the company fails to timely file a protest and fails to do any of the following:

1. file a tariff;
2. provide the Commission with current contact information; or
3. pay the penalty,

the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order until the company pays the penalty, files a tariff and provides this Commission with current contact information.

This Order will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty shall be referred to the Department of Financial Services. This docket shall be closed administratively upon receipt of the company's tariff, the company's current contact information, and the payment of the penalty, or upon referral of the penalty to the Department of Financial Services.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that 9278 Communications, Inc. has, by its actions and inactions, willfully violated Sections 364.02(13) and 364.04, Florida Statutes. It is further

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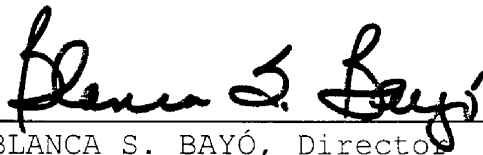
ORDERED that 9278 Communications, Inc. shall pay a \$25,000 penalty to the Florida Public Service Commission. If 9278 Communications, Inc. fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that should 9278 Communications, Inc. fail to timely file a protest and fails to: 1) file a tariff; 2) provide the Commission with current contact information; and 3) pay the penalty, the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order. It is further

ORDERED that if this Commission's Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty shall be referred to the Department of Financial Services. It is further

ORDERED that this docket shall be closed administratively upon receipt of the company's tariff, the company's current contact information, and the payment of the penalty, or upon referral of the penalty to the Department of Financial Services.

By ORDER of the Florida Public Service Commission this 12th Day of January, 2004.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

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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 Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 2, 2004.

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.