

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M COMMISSION CLERK

DATE: FEBRUARY 5, 2004
TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYO)
FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (CURRY) OFFICE OF THE GENERAL COUNSEL (MCKAY, ROJAS)
RE: DOCKET NO. 040016-TI - COMPLIANCE INVESTIGATION OF ESS.COM, L.L.C. FOR APPARENT VIOLATION OF SECTION 364.02, F.S., DEFINITIONS.
AGENDA: 02/17/04 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE
CRITICAL DATES: NONE
SPECIAL INSTRUCTIONS: NONE
FILE NAME AND LOCATION: S:\PSC\GCL\WP\040016.RCM

CASE BACKGROUND

- December 8, 2000 - ESS.COM, L.L.C. (ESS.COM) obtained Florida Public Service Commission Interexchange Telecommunications Registration No. TJ410.
April 22, 2003 - Staff received complaint 528814T against ESS.COM regarding an unauthorized switch of the customer's long distance service.
May 8, 2003 - Staff received a second complaint 531891T against ESS.COM regarding an unauthorized switch of a customer's long distance service.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

investigate this complaint and submit a response by May 30, 2003.

- July 7, 2003 - Staff notified ESS.COM that its response to complaint 531891T was past due and requested that the company respond by July 14, 2003.
- July 29, 2003 - Staff faxed complaint 531891T again to ESS.COM. According to the Transmission Verification Report, the facsimile was transmitted successfully.
- September 15, 2003 - Staff mailed a certified letter to ESS.COM, regarding the two complaints. The letter explained that if ESS.COM failed to respond to the Commission regarding the customer complaints that it may be subject to a penalty as prescribed by Section 364.285, Florida Statutes. A response was due from the company on October 6, 2003.
- October 8, 2003 - Staff checked the status of the delivery of the certified letter sent to ESS.COM using the United States Postal Service's website. According to the website, the postal delivery person made an attempt to deliver the letter on September 22, 2003, but was unable to reach anyone. A notice was left notifying the company of the attempt made to deliver the letter.
- October 13, 2003 - Staff searched the Florida Department of State's website to obtain information on the company. The company was administratively dissolved on September 26, 2003, by the Department of State and is no longer active.
- October 23, 2003 - The certified letter sent to the company was returned by the United States Postal Service marked unclaimed.
- January 7, 2004 - Staff opened this docket to address ESS.COM's apparent violation of Section 364.02, Florida Statutes, Definitions. The company has failed to respond to staff's inquiries regarding customer complaints. Staff also notified the complainants of this proceeding.

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

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission impose a penalty upon ESS.COM of \$10,000 per apparent violation, for a total of \$20,000, for the two apparent violations of Section 364.02, Florida Statutes, Definitions, 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 upon ESS.COM of \$10,000 per apparent violation, for a total of \$20,000, for the two apparent violations of Section 364.02, Florida Statutes, Definitions. If ESS.COM fails to timely protest the Commission's Order, and fails to pay the \$20,000 penalty within fourteen calendar days after the issuance of the Consummating Order, the company's tariff should be cancelled and registration number TJ410 should be removed from the register. The company should also be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order. **(Curry, McKay, Rojas)**

STAFF ANALYSIS:

APPARENT DEFICIENCY

As outlined in the case background, staff received two customer complaints against ESS.COM. Upon receiving the complaints, staff faxed each of them to the company and requested that ESS.COM investigate both complaints and submit a written response. According to the facsimile Transmission Verification Reports, the facsimiles were transmitted successfully. After not receiving a response to the facsimiles by the reply dates, staff then notified the company that its responses were past due and requested again that the company respond to the complaints. A certified letter was also mailed to the company requesting a response to the complaints; however, the certified letter was later returned by the United States Postal Service marked unclaimed. As of the date of filing this recommendation, ESS.COM has not communicated with staff or replied to the customer complaints which are apparent violations of Section 364.02 (13), Florida Statutes. Even though the company apparently refused to claim the certified letter, the company was adequately notified of its obligation to reply to the customer complaints and was provided sufficient time to contact and communicate with staff.

APPLICABLE STATUTES

Section 364.02(13), Florida Statutes, requires each interexchange telecommunications company (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), 364.163, 364.285, 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....

The customers' complaints alleged that ESS.COM slammed their long distance service and ESS.COM is subject to the Commission's Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. Thus, it appears that ESS.COM has violated Section 364.02, Florida Statutes, by not responding to staff's inquiries regarding the customers' complaints.

PROPOSED PENALTY

Staff believes that ESS.COM's failure to communicate with Commission staff is a "willful violation" of Section 364.02(13), Florida Statutes, 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.

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 ESS.COM to communicate with Commission staff meets the standard for a "refusal to comply" and "willful violations" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

Nor could ESS.COM claim that it did not know that it had the duty to communicate with Commission staff. "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 ESS.COM are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

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Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon IXCs that failed to respond to consumer complaints. Thus, staff recommends that the Commission find that ESS.COM has, by its actions and inactions, willfully violated Section 364.02(13), Florida Statutes, and impose a \$20,000 penalty on the company to be paid to the Florida Public Service Commission.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the 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, this docket should be closed upon receipt of the payment of the penalty or the cancellation of the company's tariff and the removal of registration number TJ410 from the register. **(McKay, Rojas)**

STAFF ANALYSIS: Whether staff's recommendation on Issue 1 is approved or denied, the result will be a Proposed Agency Action Order. If no timely protest to the Proposed Agency Action is filed within 21 days of the date of issuance of the Order, this docket should be closed administratively upon receipt of the payment of the penalty or the cancellation of the company's tariff and the removal of registration number TJ410 from the register.