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State of Florida



Public Service Commission
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TALLAHASSEE, FLORIDA 32399-0850

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DATE: April 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Buys) *DRB*
Office of the General Counsel (Rojas) *CR*
Office of Standards Control & Reporting (Lowery) *RM*

RE: Docket No. 040210-TI – Compliance investigation of Global Crest Communications, Inc. d/b/a Dimensions for apparent violation of Section 364.02(13), Florida Statutes, Definitions.

AGENDA: 05/03/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040210.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty on Global Crest Communications, Inc. d/b/a Dimensions of \$10,000 per apparent violation, for a total of \$60,000, for six apparent violations of Section 364.02(13), Florida Statutes, Definitions?

Recommendation: Yes. (Buys, Lowery, Rojas)

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with the Commission rules or any provision of Chapter 364, Florida Statutes.

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....

Global Crest Communications, Inc. d/b/a Dimensions (Dimensions) is a registered interexchange telecommunications company (IXC), based in Miami, Florida that provides intrastate interexchange telecommunications services in Florida through prepaid calling card services. On March 25, 2003, staff received a complaint filed against Dimensions regarding a prepaid calling card for which Dimensions is listed as the service provider. From February 10, 2004, through March 2, 2004, staff received five additional complaints regarding Dimension's prepaid calling cards. Between March 25, 2003, and February 13, 2004, staff made several attempts, via facsimile, telephone, and certified mail, to notify Dimensions of the complaints and to request that the company investigate the complaints and submit a written response to staff. On February 13, 2004, staff sent an additional certified letter to Dimensions requesting that the company provide staff with a working sample of each prepaid phone card product that can be used for intrastate calls so that staff could evaluate the company's service.

As of the date of filing this recommendation, Dimensions has not communicated with staff or replied to the customer complaints, which is in apparent violation of Section 364.02(13), Florida Statutes. The certified mail receipts were returned by the United States Postal Service indicating that the company received the certified letters that were sent by the General Counsel and other staff. Therefore, staff believes that the company has been adequately notified of its obligation to reply to the complaints and has been provided sufficient time to contact and communicate with staff.

Staff believes that Dimension'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, Dimension’s failure 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.

“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 Dimensions, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02 and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other intrastate interexchange telecommunications companies that failed to respond to customer complaints. Therefore, staff recommends that the Commission impose a penalty upon Global Crest Communications, Inc. d/b/a Dimensions of \$10,000 per apparent violation, for a total of \$60,000, for six apparent violations of Section 364.02(13), Florida Statutes, Definitions.

Issue 2: 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 Dimensions fails to timely file a protest and to request a Section 120.57, Florida Statutes hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If Dimensions fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, Dimensions' tariff should be cancelled and Registration Number TJ437 should be removed from the register 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 either the receipt of the payment of the penalty, or upon cancellation of the company's tariff and removal of Registration Number TJ473 from the register. **(Rojas)**

Staff Analysis: 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 Dimensions fails to timely file a protest and to request a Section 120.57, Florida Statutes hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If Dimensions fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, Dimensions' tariff should be cancelled and Registration Number TJ437 should be removed from the register 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 either the receipt of the payment of the penalty, or upon cancellation of the company's tariff and removal of Registration Number TJ473 from the register.