

State of Florida



# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** October 12, 2006

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

**FROM:** Division of Competitive Markets & Enforcement (Curry, Ollila) *KLC S.O.*  
Office of the General Counsel (McKay, Tan) *TU, VSM ACW*

**RE:** Compliance investigation for apparent violation of Section 364.183(1), F.S.,  
Access to Company Records.

Docket No. 060619-TX – North American Telecommunications Corporation  
Docket No. 060620-TX – CariLink International, Inc.  
Docket No. 060621-TX – Baldwin County Internet/DSSI Service, L.L.C.  
Docket No. 060622-TX – Phone 1 Smart LLC  
Docket No. 060623-TX – EFFECTEL CORP  
Docket No. 060624-TX – Seven Bridges Communications, L.L.C.  
Docket No. 060625-TX – Telephone One Inc.

**AGENDA:** 10/24/06 – 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\060619.RCM.DOC

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## Case Background

Section 364.386, Florida Statutes, requires the Commission to submit a report to the Legislature on December 1<sup>st</sup> of each year on the status of local competition in the

telecommunications industry. To obtain the data required to compile the report (hereafter referred to as the "local competition report") each year staff mails a data request, via certified mail, to all certificated incumbent and competitive local exchange telecommunications companies (ILEC and CLEC) in Florida. Since there are several hundred CLEC certificates, staff strongly encourages each of the companies to respond by the initial due date to allow staff ample time to compile the report.

Staff sent the first certified letter to each of the seven companies listed in Attachment A on May 26, 2006. The response deadline was July 14, 2006. Of the seven companies listed in Attachment A, four of the companies signed the certified mail receipt indicating that the company had received the data request. The data requests sent to the remaining three companies were returned to staff by the United States Postal Service (U.S.P.S.) marked unclaimed, not in this box, and forwarding time expired. Since the companies did not respond by the deadline, a second certified letter was sent on July 20, 2006, with a response due date of July 31, 2006. Staff received signed receipts from five of the companies. The remaining two companies' data requests were returned by the U.S.P.S. marked unclaimed or no longer in business.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285, and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

### Discussion of Issues

**Issue 1:** Should the Commission impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records?

**Recommendation:** Yes, the Commission should impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. **(Curry, Ollila, McKay, Tan)**

**Staff Analysis:** As stated in the case background, staff needs information contained in the company records of all Florida ILECs and CLECs to compile its annual local competition report for the Legislature. Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports, or other data directly related to matters within the Commission's jurisdiction in the form specified by the Commission and may require such company to retain such information for a designated period of time.

A company's failure to respond to staff's data request effectively denies staff access to its records. It is imperative that the Commission receive 100% participation to fully reflect the status of local telecommunications competition to the Legislature and the Governor. Both the May 26, 2006, and the July 14, 2006, letters referenced Section 364.285(1), Florida Statutes, and notified the recipients of the possible consequences of failure to provide the requested information.

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. 1<sup>st</sup> 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 commission or an intentional act.

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. 1<sup>st</sup> 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 each of the companies listed in Attachment A to allow staff access to its respective company records meets the standard for a “refusal to comply” and “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. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of these dockets, all competitive local exchange telecommunications companies, like the companies listed in Attachment A, are subject to the statutes published in the Florida Statutes. 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 other telecommunications companies that have failed to provide a response to a data request, thereby denying staff access to their records. Therefore, staff recommends that the Commission impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

**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 in each respective docket, unless a person whose substantial interests are affected by the Commission's decision in a given docket 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 docket's Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If any of the companies listed in Attachment A fails to timely file a protest in its respective docket and request a Section 120.57, Florida Statutes, hearing, the facts in that docket should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If any of the companies listed in Attachment A fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order in its respective docket, the company's CLEC certificate, as listed in Attachment A, should be cancelled. If a company's certificate is cancelled in accordance with the Commission's Orders from this recommendation, that company should be required to immediately cease and desist providing telecommunications services in Florida. These dockets should be closed administratively upon either receipt of the payment of the penalty imposed in the respective docket or upon the cancellation of the respective company's certificate. A protest in one docket should not prevent the action in a separate docket from becoming final. **(McKay, Tan)**

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

<b>Docket No.</b>	<b>Provider</b>	<b>Regulation Date</b>	<b>Certificate No.</b>	<b>1<sup>st</sup> Letter Mailed 5/26/06</b>	<b>2<sup>nd</sup> Letter Mailed 7/20/06</b>
060619-TX	North American Telecommunications Corporation	08/03/01	7864	Receipt Signed	Receipt Signed
060620-TX	*CariLink International, Inc.	09/18/01	7909	Receipt Signed	Receipt Signed
060621-TX	Baldwin County Internet/DSSI Service, L.L.C.	09/17/03	8382	Receipt Signed	Receipt Signed
060622-TX	Phone 1 Smart LLC	10/06/03	8384	Receipt Signed	Receipt Signed
060623-TX	EFFECTEL CORP	06/03/05	8581	Unclaimed	Unclaimed
060624-TX	Seven Bridges Communications, L.L.C.	10/20/00	7608	Returned-Marked Not in this box	Return-Marked No Longer in Business
060625-TX	**Telephone One Inc.	03/25/99	5806	Returned-Forward time expired	Receipt Signed

\* This is the second docket (first was Docket No. 050956-TX) against CariLink International, Inc. for failing to respond to staff's request for data to compile the local competition report. In the first docket CariLink paid \$3,500 to settle the docket.

\*\* The second certified letter was returned by the United States Postal Service with a forwarding address for the company. Staff resent the second letter to the new address on 08/01/06. The signed receipt was returned to staff on 08/14/06.