

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Hosting-Network, Inc. for apparent violation of Rules 25-22.032(5)(a), F.A.C., Customer Complaints, 25-24.835, F.A.C., Rules Incorporated, and 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

DOCKET NO. 030795-TX
ORDER NO. PSC-03-1149-PAA-TX
ISSUED: October 15, 2003

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 FOR VIOLATION OF RULES 25-22.032(5)(A),
F.A.C., CUSTOMER COMPLAINTS, 25-4.0161, F.A.C., REGULATORY
ASSESSMENT FEES; TELECOMMUNICATIONS COMPANIES; AND CANCELLATION
OF CERTIFICATE

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. Background

From January 27, 2003, to July 16, 2003, the Division of Consumer Affairs (CAF) received five consumer complaints against

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Hosting-Network, Inc. (HNI) that CAF forwarded to HNI for response and resolution. HNI failed to respond. Our staff called HNI using the telephone number listed in this Commission's Master Commission Directory (MCD) in order to resolve the situation by phone. However, on July, 24, 2003, a recorded message from the operator informed our staff that its call could not be completed as dialed, indicating that the telephone number was a non-working number. As of the date of this Order, no response has been received from HNI for any of the five complaints against it. Furthermore, HNI failed to update its contact information with this Commission and pay its RAF for the year 2002.

HNI failed to pay its RAF for the year 2002. On December 15, 2002, our staff mailed HNI its 2002 Regulatory Assessment Fee (RAF) notice and requested payment by January 30, 2003. HNI did not respond. On February 19, 2003, our staff mailed a certified letter containing a delinquent notice to HNI advising the company that its RAF payment was overdue and requesting payment within 15 days. On March 3, 2003, our staff's February 19, 2003 certified letter was returned by the United States Postal Service marked "Refused" on the envelope. On April 11, 2003, our staff mailed another certified letter advising the company of the requirements of Rule 25-4.0161, Florida Administrative Code, and of the actions it needed to take to avoid a docket being established. Three days later, our staff was able to communicate with HNI via telephone concerning the overdue RAF.

Our staff's conversations with HNI began on April 14, 2003, and carried on through June 6, 2003. Our staff thought it was making progress with HNI when HNI indicated on April 15, 2003, that it would send a check for the outstanding balance. However, HNI never made any payment, and on June 6, 2003, the last contact with HNI, HNI indicated that the company was in negotiations to sell its customer base to another CLEC.

Finally, on June 26, 2003, our staff e-mailed a fourth notice of overdue RAF in a last attempt to collect payment but was unsuccessful. As of the date of this Order, we have not received payment for the 2002 RAF, including statutory penalty and interest charges.

It should also be noted that during the August 19, 2003, Agenda Conference, we voted to close Docket No. 021247-TI, Application for certificate to provide interexchange telecommunications service by Hosting-Network, Inc., because HNI repeatedly failed to respond to our staff's certified letters, e-mails and telephone calls.

We are vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285, 364.336 and 364.337, Florida Statutes.

II. Failure to Respond to Customer Complaints

Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, states:

The staff member will notify the company of the complaint and request a response. The company shall provide its response to the complaint within fifteen (15) working days. The response shall explain the company's actions in the disputed matter and the extent to which those actions were consistent with applicable statutes and regulations. The response shall also describe all attempts to resolve the customer's complaint.

As noted previously, on January 27, 2003, to July 16, 2003, CAF received five consumer complaints against HNI that CAF forwarded to HNI for response and resolution, but the company never responded.

We find that HNI's failure to provide the required responses to consumer complaints is a "willful violation" of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, 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, 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 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 HNI to provide our staff with written responses to consumer complaints within fifteen working days meets the standard for a "refusal to comply" and a "willful violation" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

HNI cannot defend the matter, claiming that it did not know that it had the duty to respond to our staff's inquiries. "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, like HNI, by virtue of their Certificate of Public Convenience and Necessity¹, 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 holds that HNI has, by its actions and inactions, willfully violated Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, and imposes a penalty of \$10,000 per apparent violation, for a total of \$50,000, on the company to be paid to the Florida Public Service Commission. Our decision regarding these complaints and the company's failure to respond is consistent with this Commission's previous decision for similar violations in Docket No. 010206-TI, Initiation of show cause proceedings against Telquest Communications, Inc. d/b/a Advantage Plus Telecommunications, Inc. for apparent violation of Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries.

III. Violation of Records and Reports

Rule 25-24.480, Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by reference into Rule 25-24.835, Florida Administrative Code, Rules Incorporated, requires that a company update its contact information with the Commission within 10 days of a change.

On July 24, 2003, our staff attempted to contact HNI using the contact information contained in this Commission's MCD. Our staff found that the telephone number for the company's contact person, Mr. Travis Johnson, was a non-working number. As of the date of this Order, the company has not updated its contact information

¹On July 13, 2001, Hosting-Network, Inc. (HNI) obtained Florida Public Service Commission (Commission) competitive local exchange telecommunications company (CLEC) certificate number 7840.

with us. Our decision in this matter is consistent with our decisions in previous dockets for similar violations.

We find that HNI's apparent violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated, has been "willful" in the sense intended by Section 364.285, Florida Statutes, and pursuant to Section 364.285, Florida Statutes, we are authorized to impose upon any entity subject to our jurisdiction a penalty of not more than \$25,000 for each offense, if such entity is found to have refused to comply with any lawful rule of this Commission. Accordingly, we find that HNI has, by its actions and inactions, willfully violated Rule 25-24.835, Florida Administrative Code, Rules Incorporated, and imposes a \$500 penalty on the company to be paid to the Florida Public Service Commission.

IV. Failure to Pay Regulatory Assessment Fees

HNI failed to pay its 2002 RAFs, plus statutory penalty and interest charges. Our staff wrote HNI three times in an attempt to bring it into compliance with the RAF rule.² However, no payment or written response was ever received; therefore, HNI has failed to comply with Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, incorporated by Rule 25-24.835, Florida Administrative Code, Rules Incorporated. Furthermore, HNI has not requested cancellation of its certificate in compliance with Rule 25-24.820(2), Florida Administrative Code, Revocation of a Certificate. The penalty amount issued in this docket is consistent with amounts imposed for recent, similar violations. Pursuant to Section 364.336, Florida Statutes, cancellation of an entity's certificate does not relieve the obligation to pay RAFs, including statutory penalty and interest charges, if the certificate was active during any portion of the calendar year, including the year of cancellation.

We hold that HNI's apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, has been "willful" in the sense

²Our staff wrote HNI on December 15, 2002; February 19, 2003; and April 11, 2003.

intended by Section 364.285, Florida Statutes, and pursuant to Section 364.285, 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 offense, if such entity is found to have refused to comply with any lawful rule of this Commission.

On December 15, 2002, our staff mailed the 2002 Regulatory Assessment Fee (RAF) notice to HNI and requested payment by January 30, 2003. HNI failed to respond. On February 19, 2003, our staff mailed a certified letter containing a delinquent notice to HNI advising the company that its RAF payment was overdue and requesting payment within 15 days. On March 3, 2003, our staff's February 19, 2003 certified letter was returned by the United States Postal Service marked "Refused" on the envelope. On April 15, 2003, HNI admitted to our staff that it had not paid the overdue RAF. During this same conversation with our staff, HNI also agreed to resolve the situation by mailing a check to the PSC for HNI's outstanding balance. This April 15, 2003, conversation is unrefuted evidence that HNI had knowledge of the overdue RAF. It is also unrefuted that HNI never mailed a check for the overdue RAF. Therefore, this we find that HNI's noncompliance is willful and not accidental. HNI had knowledge of the overdue RAF, but intentionally chose not to pay it.

Accordingly, we find that if Hosting-Network, Inc. fails to timely protest this Order and fails to pay the \$500 penalty and the Regulatory Assessment Fees, including statutory penalty and interest charges, within fourteen calendar days after the issuance of the Consummating Order, Certificate No. 7840 shall be canceled with an effective date of October 31, 2003, and the company must also immediately cease and desist providing competitive local exchange telecommunications services in Florida. If the Regulatory Assessment Fees, including statutory penalty and interest charges, are not received in accordance with this Order, the collection of the past due fees will be referred to the Department of Financial Services for further collection efforts.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Hosting-Network Inc. is hereby penalized \$10,000 for each violation, for a total of \$50,000, for its willful violation of Rule 25-22.032(5)(a), Florida Administrative Code. It is further

ORDERED that Hosting-Network, Inc. is hereby penalized \$500 for its apparent violation of Rule 25-24.480, Florida Administrative Code, Records and Reports; incorporated by reference into Rule 25-24.835, Florida Administrative Code, regarding its contact information as set forth in the body of this Order. It is further


ORDERED that Hosting-Network Inc. shall pay the past due Regulatory Assessment Fees, statutory penalties, interest charges, and a \$500 penalty to the Florida Public Service Commission for failure to comply with Section 364.336, Florida Statutes, Regulatory Assessment Fees; and Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, incorporated by Rule 25-24.835, Florida Administrative Code, within 14 days after the issuance of the Consummating Order. The penalties will be transmitted to the Office of the Comptroller for deposit in the State of Florida General Revenue Fund. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is 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 the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 15th
Day of October, 2003.



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.

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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 November 5, 2003.

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.