

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation
of Dakota Telecommunications,
Corp. for apparent violation of
Sections 364.02 and 364.04,
Florida Statutes.

DOCKET NO. 030875-TI
ORDER NO. PSC-03-1159-PAA-TI
ISSUED: October 20, 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 FOR APPARENT 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.

I. Background

On April 8, 2003, our staff received a consumer complaint
regarding the purchase of a prepaid calling card. The prepaid
calling service provider listed on the card was Dakota
Telecommunications, Corp. (Dakota). Our staff determined that
Dakota had not obtained a certificate of public convenience and
necessity (certificate). At that time, our rules required that
intrastate interexchange telecommunications companies (IXCs)
providing services within the state obtain a certificate.

On May 1, 2003, our staff mailed a certified letter to Dakota
requesting that the company investigate the complaint and obtain a

DOCUMENT NUMBER-DATE

10229 OCT 20 03

FPSC-COMMISSION CLERK

certificate. The letter notified the company that it was required to submit its IXC application by May 30, 2003. According to the certified mail receipt, Dakota received this letter on May 3, 2003, but it did not respond.

On May 29, 2003, our staff mailed a second certified letter to Dakota requesting that the company investigate the complaint filed against it. This letter was sent after the passage of the Tele-Competition Innovation and Infrastructure Enhancement Act (Tele-Competition Act). The Tele-Competition Act no longer required an IXC to obtain a certificate. Therefore, the second letter did not request Dakota submit an application for an IXC certificate rather, it requested the company respond to the consumer complaint. According to the certified mail receipt, the letter was received by Dakota on June 4, 2003, but the company failed to respond.

On July 17, 2003, our staff mailed a third and final certified letter to Dakota. This letter informed the company of the requirement that it submit a tariff and its current company contact information to us. The deadline for Dakota to submit the requested information was August 4, 2003, but the company never responded. This letter was returned to us by the United States Post Office on August 13, 2003, and marked "unclaimed." Even though Dakota may not have received this third certified letter requesting it to file a tariff and provide the us with the company's current contact information, the company did receive the initial letter requesting that it obtain a certificate. Part of the certification process includes filing a tariff and providing us with the company's current contact information. Therefore, Dakota was well aware of the requirement to file a tariff and provide us with current contact information.

As of the date of this Order, we find that Dakota has not filed a tariff or provided us with its current contact information, which is in apparent violation of Sections 364.02(13) and 364.04, Florida Statutes. Dakota has been adequately notified of these requirements and has had sufficient time to meet those requirements. Therefore, on September 2, 2003, our staff opened this docket to address Dakota's apparent violation of Sections 364.02 and 364.04, Florida Statutes.

We are vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285, Florida Statutes. Further, the penalty set forth below is consistent with penalties imposed upon other prepaid calling service providers by this Commission in previous dockets for the same apparent violation.

II. Failure to File Tariff and Provide Company Contact Information

As noted above in the background section, on May 23, 2003, Legislature passed 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 us 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, Section 364.04, Florida Statutes, was not amended. IXCs providing service within the state are still required to file a tariff with us 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.

We find that Dakota's failure to provide us with current contact information and file a tariff are "willful violations" 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, we are authorized to impose upon any entity subject to our 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 this 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 our orders or rules. 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 Smith 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, Dakota's failure to provide us with current contact information and file a tariff with us meets the standard for a "refusal to comply" and a "willful violation" as contemplated by the Legislature when enacting Section 364.285, Florida Statutes.

Nor could Dakota claim that it did not know that it had the duty to provide us with current contact information and file a tariff. "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 Dakota are subject to the rules published in the Florida Administrative Code. 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 this Commission upon IXCs that were providing intrastate interexchange services within the state and failed to file a tariff and to provide us with the company's current contact information. Thus, we find that Dakota has, by its actions and inactions, willfully violated Sections 364.02(13) and 364.04, Florida Statutes, and impose a \$25,000 penalty on the company to be paid to the Florida Public Service Commission.

This Order will become final upon issuance of the Consummating Order, unless a person whose substantial interests are affected by our decision files a protest within 21 days of the issuance of this Proposed Agency Action Order. This docket should be closed administratively upon either receipt of the payment of the penalty or upon the referral of the penalty to the Department of Financial Services.

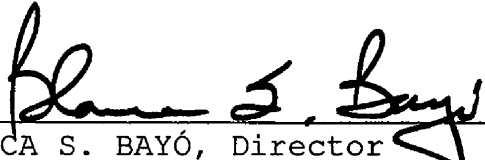
ORDERED by the Florida Public Service Commission that Dakota Telecommunications, Corp. is hereby fined \$25,000 for its apparent violation of Sections 364.02(13) and 364.04, Florida Statutes. If our Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty should be referred to the Department of Financial Services. It is further

ORDER NO. PSC-03-1159-PAA-TI
DOCKET NO. 030875-TI
PAGE 6

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 administratively upon receipt of penalty payment or referral to the Department of Financial Services for collection.

By ORDER of the Florida Public Service Commission this 20th Day of October, 2003.



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

(S E A L)

JLS

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 November 10, 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.