

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation  
of Digitec for apparent  
violation of Sections 364.02(13)  
and 364.04, Florida Statutes.

DOCKET NO. 030947-TI  
ORDER NO. PSC-03-1346-PAA-TI  
ISSUED: November 25, 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.

CASE BACKGROUND

On May 12, 2003, this Commission's Division of Consumer Affairs (CAF) received a consumer complaint, assigned Request No. 532583T, against Digitec concerning a prepaid calling card. On May 16, 2003, it was discovered that Digitec was not registered with the Commission, accordingly CAF reassigned Request No. 532583T to the Division of Competitive Markets & Enforcement (CMP) for investigation. On July 1, 2003, CAF received another consumer complaint (Request No. 541837T) against Digitec.

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On July 3, 2003, our staff sent a certified letter concerning Request No. 532583T to Digitec via the United States Postal Service (U.S.P.S.) using an address found on the Internet. The letter also requested Digitec to provide contact information and file a tariff with this Commission. On July 8, 2003, CAF forwarded Request No. 541837T to CMP for investigation.

On July 14, 2003, our staff's July 3, 2003, letter to Digitec was returned by the U.S.P.S. marked, "Forwarding Order Expired." On July 15, 2003, our staff found a different address for Digitec on the Internet and prepared another letter and sent it to the company via the U.S.P.S. On August 8, 2003, Digitec did not respond to our staff's July 15, 2003, letter. Our staff resent the letter with a cover letter via certified mail. On August 21, 2003, Digitec signed the certified return receipt for our staff's August 8, 2003, certified letter.

On September 29, 2003, our staff opened Docket No. 030947-TI to investigate Digitec for its apparent violations of Sections 364.02(13) and 364.04, Florida Statutes.

This Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285, Florida Statutes.

#### Apparent Deficiency

On May 23, 2003, Florida state legislators 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 this 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), 364.285, 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, the Tele-Competition Act did not except IXC's from the requirements of Section 364.04, Florida Statutes. IXC's providing service within the state are still required to file a tariff with this Commission 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.

Penalty

We find that Digitec's failure to provide this Commission 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, this 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 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 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 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, Digitec's failure to provide this Commission with current contact information and file a tariff 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 Digitec claim that it did not know that it had the duty to provide this Commission 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 Digitec, 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, we find that Digitec 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. If Digitec fails to timely

file a protest and request a Section 120.57, Florida Statutes, hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. Further, if the company fails to timely file a protest and fails to file a tariff; provide this Commission with current contact information; or pay the penalty, the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order.

If this Commission's Order is not protested and the payment of the penalty is not received by the Commission within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty shall be referred to the Department of Financial Services. This docket shall 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Digitec is hereby fined \$25,000 for its apparent violation of Sections 364.02(13) and 364.04, Florida Statutes. If this 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 shall be referred to the Department of Financial Services. It is further

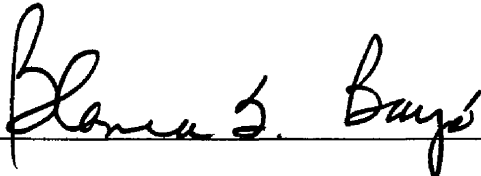
ORDERED that should Digitec fail to timely file a protest and fail to file a tariff; provide this Commission with current contact information; or pay the penalty, Digitec shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order.

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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 25th Day of November, 2003.

A handwritten signature in cursive script, reading "Blanca S. Bayó", is written over a solid horizontal line.

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

( S E A L )

JPR

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 December 16, 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.