

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Tel-Tec, Inc. for apparent violation of Section 364.02, Florida Statutes, Definitions, and Section 364.04, Florida Statutes, Schedules of Rates, Tolls, Rentals, Contracts, and Charges; Filing; Public Inspection.

DOCKET NO. 030964-TI
ORDER NO. PSC-03-1443-PAA-TI
ISSUED: December 22, 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
FOR APPARENT VIOLATION OF
SECTIONS 364.02 and 364.04, FLORIDA STATUTES

I. Case Background

On December 4, 2002, our staff received a consumer complaint in which the complainant claimed that Qwest Communications Corporation (Qwest) changed the customer's long distance service without authorization - a practice known as slamming. On December 17, 2002, Qwest responded to the complaint via letter in which it stated that the customer's long distance service was provisioned by a switchless reseller using the name Tel-Tec, Inc (Tel-Tec).

On January 3, 2003, Tel-Tec responded to the consumer complaint via facsimile. The company stated that the customer incurred no charges for the long distance service and the account was removed from Qwest's database. The complaint was resolved to the consumer's satisfaction and closed on January 27, 2003.

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However, it came to our staff's attention that the company failed to obtain a certificate of public convenience and necessity.

On February 5, 2003, our staff sent Tel-Tec a letter via United States Postal Service (USPS) certified mail advising the company that it is required to obtain a certificate of public convenience and necessity. Our staff requested that the company submit its application for a certificate by February 28, 2003. On February 14, 2003, our staff received the USPS certified mail receipt indicating that Tel-Tec received our staff's letter. On February 28, 2003, our staff telephoned Tel-Tec and spoke with Mr. Jack Lambert regarding the application for a certificate. Mr. Lambert told our staff he was in the process of submitting Tel-Tec's application.

On March 31, 2003, our staff sent Tel-Tec a second letter via USPS certified mail advising the company that this Commission has not received Tel-Tec's certificate application, and again, requested that Tel-Tec submit its application for a certificate by April 18, 2003. On April 7, 2003, our staff received the USPS certified mail receipt indicating that Tel-Tec received our staff's second letter.

On April 18, 2003, our staff received a facsimile of Tel-Tec's application for a certificate. However, Tel-Tec did not send the original application and application fee to this Commission. Therefore, on May 2, 2003, our staff called Mr. Lambert at Tel-Tec and left a voice mail requesting that Mr. Lambert return our staff's call. To date, our staff has not received a return phone call from the company.

On May 6, 2003, our staff sent Tel-Tec a notice via facsimile that the this Commission did not receive the original application or application fee. Lastly, on July 21, 2003, our staff sent Tel-Tec a third letter via USPS certified mail and facsimile. The letter advised the company of the changes in the Florida Statutes whereby the requirement for interexchange telecommunications companies (IXCs) to obtain a certificate was eliminated, however, IXCs are still required to file a tariff and register with the this Commission. Our staff requested that Tel-Tec submit its tariff and a completed registration form by August 11, 2003.

On July 29, 2003 , our staff received the USPS certified mail receipt indicating that on July 25, 2003, Tel-Tec received our staff's third letter, however, no response to the letter was ever received by our staff. Therefore, on October 10, 2003, our staff opened this docket to address the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes.

This Commission is vested with jurisdiction over this matter pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes. Accordingly, our staff believes the following recommendations are appropriate.

II. Apparent Deficiency

By its own admission to our staff, Tel-Tec is apparently providing intrastate interexchange telecommunications service within the state. To date, Tel-Tec has not provided this Commission with current contact information, nor filed a tariff with us which is in apparent violation of Sections 364.02(13), and 364.04, Florida Statutes.

As written above, our staff sent three certified letters to Tel-Tec and the certified mail return receipts indicate that the company received all three letters. The first two letters were sent prior to the date of passage of the Tele-Competition Innovation and Infrastructure Enhancement Act (Tele-Competition Act) and informed the company of its requirement to obtain a certificate. Part of the certification process included the filing of a tariff and providing current company contact information to us. The third and final letter addressed the elimination of the certification requirement for IXCs and informed the company of its obligation to file a tariff and register with this Commission. Our staff believes that Tel-Tec has been adequately notified of its obligations and provided sufficient time to comply with the requirements of Sections 364.02(13) and 364.04, Florida Statutes.

A. Applicable Florida Statutes

On May 23, 2003, the Governor signed 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, the Tele-Competition Act did not amend Section 364.04, Florida Statutes. IXCs 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.

B. Proposed Penalty

Our staff believes that Tel-Tec's failure to provide us with current contact information and file a tariff is a "willful violation" 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 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 this Commission's 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 Tel-Tec to file a tariff and provide this Commission with current contact information meets the standard for a "refusal to comply" and "willful violations" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

Nor could Tel-Tec claim that it did not know that it had the duty to file a tariff and provide this Commission with current contact information. "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 Tel-Tec, 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 us 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, this Commission finds that Tel-Tec has, by its actions and inactions, willfully violated Sections 364.02(13) and 364.04, Florida Statutes, and we impose a \$25,000 penalty on the company to be paid to us.

III. Conclusion

We are imposing a \$25,000 penalty upon Tel-Tec for its apparent violations of Sections 364.02(13) and 364.04, Florida Statutes. If Tel-Tec fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts will be deemed admitted, the right to a hearing waived, and the penalty will be deemed assessed. Further, if the company fails to timely file a protest and fails to do any of the following:

1. file a tariff;
2. provide the Commission with current contact information; or
3. pay the penalty,

the company must be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order until the company pays the penalty, files a tariff and provides this Commission with current contact information.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tel-Tec, Inc, pay a \$25,000 penalty within fourteen (14) calendar days from the issuance date of this Proposed Agency Action Order for its apparent violations of Sections 364.02(13) and 364.04, Florida Statutes. It is further

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ORDERED that 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 will be referred to the Department of Financial Services. It is further

ORDERED that this docket will be closed administratively upon receipt of:

1. The company's tariff, and
2. The company's current contact information, and
3. The payment of the penalty, or

upon the referral of the penalty to the Department of Financial Services. It is further

ORDERED that the provisions of this Order, issued as a 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 the business on the date set forth in the "Notice of Further Proceedings" attached hereto.

By ORDER of the Florida Public Service Commission this 22nd Day of December, 2003.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
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 January 12, 2004.

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.