

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of ESS.COM, L.L.C. for apparent violation of Section 364.02, F.S., Definitions.	DOCKET NO. 040016-TI ORDER NO. PSC-04-0316-PAA-TI ISSUED: March 23, 2004
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The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman  
J. TERRY DEASON  
LILA A. JABER  
RUDOLPH "RUDY" BRADLEY  
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION  
ORDER IMPOSING PENALTY UPON ESS.COM, L.L.C. FOR APPARENT VIOLATION OF  
SECTION 364.02, F.S. DEFINITIONS

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 April 22, 2003, our staff received complaint 528814T against ESS.COM regarding an unauthorized switch of the customer's long distance service. A copy of the complaint was faxed to the attention of Mr. Jack McHugh of ESS.COM. Our staff requested that the company investigate the complaint and respond by May 13, 2003. According to the Transmission Verification Report, the facsimile was transmitted successfully.

On May 8, 2003, our staff received a second complaint 531891T against ESS.COM regarding an unauthorized switch of a customer's long distance service. A copy of the complaint was faxed to Mr. McHugh and our staff requested that the company investigate this complaint and submit a response by May 30, 2003.

On January 7, 2004, our staff opened this docket to address ESS.COM's apparent violation of Section 364.02, Florida Statutes, Definitions. The company has failed to respond to

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our staff's inquiries regarding customer complaints. Our staff also notified the complainants of this proceeding.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02 and 364.285, Florida Statutes.

### ANALYSIS AND FINDINGS

As outlined in the case background, this Commission received two customer complaints against ESS.COM. Upon receiving the complaints, our staff faxed each of them to the company and requested that ESS.COM investigate both complaints and submit a written response. According to the facsimile Transmission Verification Reports, the facsimiles were transmitted successfully. After not receiving a response to the facsimiles by the reply dates, our staff then notified the company that its responses were past due and requested again that the company respond to the complaints. A certified letter was also mailed to the company requesting a response to the complaints; however, the certified letter was later returned by the United States Postal Service marked unclaimed. As of the date of this Order, ESS.COM has not communicated with our staff or replied to the customer complaints which are apparent violations of Section 364.02 (13), Florida Statutes. Even though the company apparently refused to claim the certified letter, the company was adequately notified of its obligation to reply to the customer complaints and was provided sufficient time to contact and communicate with our staff.

### APPLICABLE FLORIDA STATUTES

Section 364.02(13), Florida Statutes, requires each interexchange telecommunications company (IXC) to provide the 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), 364.163, 364.285, 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....

The customers' complaints alleged that ESS.COM slammed their long distance service and ESS.COM is subject to the Commission's Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. Thus, it appears that ESS.COM has twice violated Section 364.02, Florida Statutes, by not responding to our staff's inquiries regarding the customers' complaints.

PENALTY

We find that ESS.COM's failure to communicate with our staff is a "willful violation" of Section 364.02(13), Florida Statutes, in the sense intended by Section 364.285, Florida Statutes, and that ESS.COM has now violated this provision on two occasions.

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 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 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. 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 ESS.COM to communicate with this Commission's staff 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 ESS.COdM claim that it did not know that it had the duty to communicate with our staff. "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 this docket, all intrastate interexchange telecommunication companies, like ESS.COM are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

We find that ESS.COM has, by its actions and inactions, willfully violated Section 364.02(13), Florida Statutes, and do hereby impose a \$20,000 penalty on the company for the two violations to be paid to the Florida Public Service Commission.

This Order will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If our Commission's Order is not protested, this docket shall be closed upon receipt of the payment of the penalty or the cancellation of the company's tariff and the removal of registration number TJ410 from the register.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that ESS.Com, L.L.C. is hereby assessed a penalty of \$10,000 for each apparent violation of Section 364.02(13), Florida Statutes, for a total penalty of \$20,000. 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 should ESS.Com, L.L.C. fail to timely protest this Order, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that any protest must identify with specificity the issues in dispute. In accordance with Section 120.80(13)(b), Florida Statutes, issues not in dispute will be deemed stipulated. It is further


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ORDERED that should ESS.Com, L.L.C. fail to timely protest this Order, payment of the \$20,000 penalty must be received within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that if this Order is not protested and the penalty is not received within fourteen calendar days of the issuance of the Consummating Order, the company's tariff shall be cancelled, the company's registration number TJ410 shall be removed from the register, and the company shall be required to cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that if this Order is not timely protested, this Docket shall be closed administratively upon receipt of the \$20,000 penalty payment or upon cancellation of the company's tariff and removal of registration number TJ410 from the Commission's register.

By ORDER of the Florida Public Service Commission this 23rd day of March, 2004.

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

( S E A L )

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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.

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 April 13, 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.