

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of New Century Telecom, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection. | DOCKET NO. 040062-TI
ORDER NO. PSC-04-1029-SC-TI
ISSUED: October 25, 2004

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

ORDER TO SHOW CAUSE

BY THE COMMISSION:

I. Background

New Century Telecom, Inc. (New Century) is a switchless reseller of interexchange telecommunications services headquartered in McLean, Virginia. New Century's interexchange company (IXC) registration and tariff became effective on March 20, 1996.

From August 26, 2003, through March 23, 2004, we received fifty-four (54) slamming complaints against New Century from Florida consumers. It was determined that forty-two (42) of the slamming complaints appear to be violations of Rule 25-4.118, F.A.C., because New Century failed to comply with the specific verification methodologies required by the Commission's slamming rules and apparently used misleading statements during the company's telemarketing to solicit those consumers as subscribers.

Since March 23, 2004, we received an additional twenty-two (22) slamming complaints, three complaints regarding improper billing, and one cramming complaint. Those additional complaints are not addressed in this Order. As of August 20, 2004, the Commission had received a total of eighty-two (82) complaints against New Century.

On January 21, 2004, this docket was opened to address New Century's apparent slamming infractions and misleading telemarketing. Our staff filed a recommendation on April 21, 2004, urging that we impose a \$420,000 penalty upon New Century for 42 apparent slamming violations. The item was deferred from our May 3, 2004, Agenda Conference at New Century's request. The recommendation was again filed on May 6, 2004, for the May 18, 2004,

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Agenda Conference. On May 12, 2004, New Century submitted its first settlement offer to resolve the apparent slamming violations in this docket. Consequently, our staff's recommendation was deferred from the May 18, 2004, Agenda Conference to facilitate review of the company's settlement proposal. On June 17, 2004, our staff filed a recommendation for the Commission to reject New Century's first settlement offer. At the June 29, 2004, Agenda Conference, we deferred the recommendation and directed our staff and New Century to negotiate a possible settlement within 30 days.

From July 9, 2004, through September 14, 2004, our staff and New Century corresponded through six letters, numerous emails, and held a face to face meeting on July 13, 2004, in an effort to reach a settlement. In its settlement offer dated July 20, 2004, New Century offered to do the following:

- Make a voluntary contribution to the Florida General Revenue Fund in the amount of \$151,500. The company is offering to pay \$15,150 within ten days of the effective date of its settlement; fourteen days thereafter, the company will pay the amount of \$5,000 each week, for twenty-seven (27) weeks, and a final payment in the amount of \$1,350 in the final (28th) week.
- Refund or credit the full amount of any charges incurred by each of the 42 customer complaints cited in the recommendation to the extent not already credited or refunded.
- Establish the telemarketing compliance program (Attachment B) included in its settlement proposal.
- On a going forward basis, the company will promptly and in good faith address and resolve all complaints regarding its services in a reasonable manner consistent with its settlement and its compliance program.
- Within 60 days from the effective date of its settlement, the company will provide a formal report and additional reports every twelve months, continuing for 26 months from the effective date. The reports will include:
 1. The status of the company's progress in implementing its settlement.
 2. A list of all infractions assigned to personnel related to its settlement.
 3. Copies of all customer complaints related to the company's compliance with its settlement for the period since the previous report, including copies of the resolution of any such complaint.

- Use the third party verification (TPV) script (Attachment C) included in its settlement offer and implement any changes necessary to comply with the Commission's rules, if needed, within 60 days from the effective date of its settlement offer.
- Within 30 days from the effective date of the settlement agreement, discontinue using Teco Verification, Inc. as its third party verification company and require the new TPV company to use the verification script in its settlement and require the TPV company to include the date of the verification on the recording.
- Work with Commission staff to establish a warm transfer line between the Commission and the company's customer service department which shall be operational within 120 days of the effective date of the settlement.

We do not approve New Century's settlement proposal for the reasons listed herein.

1. Our staff requested that New Century cease using pre-recorded questions with a simple response of "yes" in its TPVs. The revised script cited in New Century's settlement offer follows the same format with the exception that the statements required by the Commission's slamming rule that were previously excluded have been added. New Century declined to change its verification methodologies.
2. Our staff requested that New Century record the telemarketing calls to Florida consumers and agree to make those recordings available to staff for review upon reasonable notification. New Century declined.
3. Our staff requested that New Century cease using its current TPV company and use a different independent and unaffiliated TPV company. New Century indicated to staff that InfoCorp., Inc. (InfoCorp) is the new TPV company it plans to use. Based on the information listed below, staff believes that InfoCorp is not independent of New Century as required by Rule 25-4.118(2)(c), F.A.C. New Century contends that InfoCorp is independent and unaffiliated with New Century.
 - a. The sole owner and officer of InfoCorp is Jane M. Scott. On March 5, 2002, Jane M. Helein-Scott submitted an annual report to the Connecticut Department of Public Utility & Control on behalf of New Century as a legal assistant for The Helein Law Group, LLP.
 - b. New Century shares the same address as that of its legal counsel, The Helein Law Group, LLP. Mr. Charles H. Helein, was listed as the Chairman/CEO of New Century since the company's inception in March 1996. The ownership of New Century was transferred to Kayrn Bartel on or about August 1, 2002. The Commission acknowledged the transfer of ownership in Docket No. 020130-TI through Order No. PSC-02-1089-PAA-TI, issued August 9, 2002. On March 25,

2004, in its 2004 Annual Report filed with the Florida Secretary of State, Division of Corporations, New Century deleted Charles H. Helein as the CEO and added Karyn Bartel.

- c. During our initial investigation of the slamming complaints against New Century, on November 20, 2003, Ms. Loubna W. Haddad, legal counsel for New Century, informed our staff via telephone that a company by the name of InfoCorp was handling New Century's complaints and that we should direct our inquiries regarding the customer complaints to InfoCorp, Inc. Hence, during the initial phase of this investigation, and this docket, our staff was working with InfoCorp to resolve the slamming complaints.
4. Our staff requested that New Century provide it with all information related to complaints the company received from Florida consumers during the past year. New Century declined. However, it did provide copies of all the consumer complaints it received from the Commission that are the subject of this docket.
5. Our staff requested that New Century post a \$1,000,000 Surety Bond to guarantee New Century's compliance with its settlement agreement. New Century declined.
6. The Office of Public Counsel (OPC) served New Century with a request for production of documents and interrogatories. New Century objected to each and every one of the requests, and as of the filing date of this recommendation, has not provided OPC with any documentation.

New Century's monetary offer of \$151,500 is consistent with previous settlement amounts this Commission has approved for similar cases. However, for the reasons cited above, because New Century was unwilling to change the processes and procedures that caused the slamming complaints initially, and because of New Century's demonstrated lack of cooperation in resolving the issues that are the subject of this Docket, we cannot approve the company's settlement proposal.

At the October 5, 2004, Agenda Conference, New Century made, for the first time, additional concessions in its position. However, it is unclear why those concessions could not have been made earlier, during the time period allowed by us for negotiations between New Century and our staff. Because New Century was still unwilling to agree to certain conditions which we deem essential, we reject its settlement offer and issue this Order to Show Cause why the penalties recommended by our staff should not be imposed. As indicated in Part V of this Order, we are willing to entertain a revised settlement offer that addresses the concerns we articulate there.

II. Apparent Violations

Section 364.603, Florida Statutes, states:

The commission shall adopt rules to prevent the unauthorized changing of a subscriber's telecommunications service. Such rules shall be consistent with the Telecommunications Act of 1996, provide for specific verification methodologies, provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge, allow for a subscriber's change to be considered valid if verification was performed consistent with the commission's rules, provide for remedies for violations of the rules, and allow for the imposition of other penalties available in this chapter.

To implement Section 364.603, Florida Statutes, we adopted Rule 25-4.118, F.A.C., to govern carrier change procedures. The 42 consumer complaints regarding carrier changes cited in this docket appear to be slamming infractions.

In 9 cases, listed in Attachment D, New Century failed to provide proof in the form of a TPV recording that the customer authorized New Century to change service providers in accordance with Rule 25-4.118(1) and (2), F.A.C.

In 27 cases, listed in Attachment E, the TPVs submitted by New Century did not contain all the specific verification information required by Rule 25-4.118(2)(c), F.A.C., listed in subsection (3)(a) 1. through 5. Our staff determined that the TPVs submitted by New Century were missing the following:

The statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number.

In the remaining six cases, listed in Attachment F, New Century provided our staff with a TPV in which the customer authorized a carrier change for Miko Telephone Communications, Inc. (Miko), not New Century. The company claims that it purchased Miko's customer base and transferred Miko's customers to New Century. However, New Century did not request from this Commission a waiver of Rule 25-4.118, F.A.C. to transfer the customer base.

New Century markets its services to Florida consumers through its own telemarketers. New Century's sales tactics involve soliciting a free long distance calling card to try New Century's service without any obligation or offering customers a promotional check. After reviewing the complaints, we found no evidence that New Century's telemarketers advised the customers that the purpose of the telemarketing call was to solicit a change of the service provider of the customer as required by Rule 25-4.118(9)(b), F.A.C. Further, it appears that New Century's telemarketers made misleading and deceptive references during telemarketing and verification while soliciting for subscribers in apparent violation of Rule 25-4.118 (10), F.A.C.

Some of the customers reported they never received the free calling card promised them in the telemarketing solicitation.

In a follow-up letter to the complaint filed by Frank and Ricci App, the Apps state that New Century mislead them by offering a free prepaid phone card for no cost or obligation. Ricci App verified her name and address by responding "yes" to computer generated questions. The Apps did not receive the free prepaid calling card, and instead, their local toll and long distance service was switched to New Century. The Apps contacted New Century who informed them that the company has a recording of the conversation with Ricci App. The Apps claim the recording was edited to include additional questions regarding the change in long distance service providers to make the recording appear as if they agreed to change their long distance service provider.

In some of the TPV recordings, the telemarketer stayed on the line during the verification process and prompted the customer to answer verification questions; meaning the TPV was not performed independently by the third party as required by Rule 25-4.118(2)(c), F.A.C. In addition, when resolving the slamming complaints, New Century failed to refund the charges within 45 days of notification to the company by the customer pursuant to Rule 25-4.118(8), F.A.C.

Rule 25-4.118(13)(b), F.A.C., states that in determining whether fines or other remedies are appropriate for a slamming infraction, the Commission shall consider, among other actions, the actions taken by the company to mitigate or undo the effects of the unauthorized change. These actions include, but are not limited to, whether the company, including its agents and contractors; followed the procedures required under subsection (2) with respect to the person requesting the change in good faith; complied with the credit procedures of subsection (8); took prompt action in response to the unauthorized change; and took other corrective action to remedy the unauthorized change appropriate under the circumstances.

Based on the requirements of Rule 25-4.118(13)(a), F.A.C., New Century appears to have committed 42 unauthorized carrier changes. First, New Century did not follow the procedures required under Rule 25-4.118(2), F.A.C. Second, New Century did not comply with the credit procedures required under Rule 25-4.118(8), F.A.C. Third, New Century's TPVs do not comply with Rule 25-4.118(3), F.A.C.

III. Analysis

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 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. 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, it is commonly understood that a “willful violation of law” is an act of purposefulness. As the First District Court of Appeal stated, relying on Black’s Law Dictionary:

An act or omission is ‘willfully’ done, if done voluntarily and intentionally and within 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 New Century to comply with Rule 25-4.118, F.A.C., meets the standard for a “willful violation” as contemplated by the Legislature when enacting section 364.285, Florida Statutes. “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, Peréz 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 New Century, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

IV. Finding

Therefore, we reject New Century Telecom, Inc.’s settlement offer, and hereby require the Company to show cause in writing, within 21 days of this order, why it should not be penalized \$10,000 per apparent violation, for a total of \$420,000, for 42 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. A timely written response will be deemed a request for a hearing pursuant to Section 120.57(1), Florida Statutes. In the event New Century submits a revised offer of settlement pursuant to Part V of this order within 21 days of this order, its time to show cause and request a hearing shall be extended until 14 days after the entry of an order addressing the acceptance or rejection of that

settlement. If New Century fails to timely respond to this show cause order and request a hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. If the company fails to pay the amount of the penalty within fourteen calendar days after issuance of the Consummating Order, registration number TI427 shall be removed from the register, the company's tariff shall be cancelled, and the company shall also be required to immediately cease and desist providing intrastate interexchange telecommunications services within Florida. We are vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, Florida Statutes.

V. Alternative considerations for New Century

It has perpetually been the philosophy of this Commission that disputes are best settled by agreement among the parties, rather than mandate, so long as the agreement serves the public interest. Accordingly, we will hereby provide some guidance for the benefit of New Century in the event it elects to submit a revised offer of settlement in this matter. There were four components of New Century's most recent settlement offer which were deemed unacceptable to the Commission. Regarding those four components, any new offer of settlement should contain, at a minimum, the following adjustment to those components:

1. New Century will use an unaffiliated and independent company for third party verifications. New Century will submit the name of the company to staff for approval prior to using said company.
2. New Century will abandon its current TPV script which uses prerecorded "yes" and "no" questions and require that its new TPV company use a live verifier to perform and record the verifications.
3. New Century will provide security for the promised payments on the settlement in the form of either a \$15,000 surity bond or a \$15,000 deposit in an escrow account. New Century will agree to provide staff copies of all information regarding any complaints New Century received directly from Florida consumers.

In the event a new offer of settlement is tendered, it should be submitted within 10 days of the issuance of this Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that New Century Telecom, Inc. shall show cause in writing within 21 days of the issuance of this Order why it should not be penalized \$420,000 or have registration number TI427 canceled for apparent violation of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. It is further

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ORDERED that any response to this Order to Show Cause filed by New Century Telecom, Inc. shall contain specific allegations of fact and law and shall identify the company name and this docket number. It is further

ORDERED that in the event New Century submits a revised offer of settlement pursuant to Part V of this order within 21 days of this order, the time to show cause and request a hearing shall be extended until 14 days after the entry of an order addressing the acceptance or rejection of that settlement. It is further

ORDERED that failure by New Century Telecom, Inc. to respond to this Order to Show Cause in the manner and date set forth in the "Notice of Further Proceedings and Judicial Review" section of this Order shall constitute an admission of the violations described in the body of this Order, waiver of the right to a hearing, and the penalties will be deemed assessed. It is further

ORDERED that in the event New Century Telecom, Inc. fails to respond to this Order and the \$420,000 penalty is not paid within 10 business days following the conclusion of the show cause period, Registration No. T1427 shall be canceled. It is further

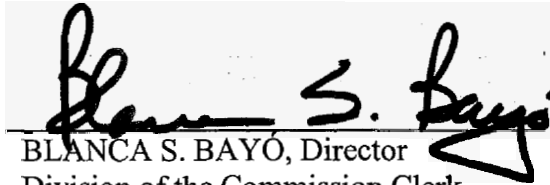
ORDERED that in the event New Century Telecom, Inc. fails to respond to this Order and the \$420,000 penalty is not paid within 10 business days following the conclusion of the show cause period, the penalty will be forwarded to the Comptroller's Office for further collection efforts. It is further

ORDERED that, if the penalty is paid, it shall be remitted to the Office of the Comptroller for deposit in the State General Revenue Fund. It is further

ORDERED that upon payment of the penalties or cancellation of the certificate, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 25th day of October, 2004.



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

(SEAL)

LF

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review 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.

This order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by this show cause order may file a response within 21 days of issuance of the show cause order as set forth herein. This response 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 15, 2004.

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Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.