

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Alternative Telecommunication Services, Inc. d/b/a Second Chance Phone for apparent violation of Rule 25-22.032(6)(b), F.A.C., Customer Complaints.	DOCKET NO. 041147-TX ORDER NO. PSC-04-1247-PAA-TX ISSUED: December 17, 2004
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The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION ORDER  
IMPOSING A PENALTY ON ALTERNATIVE TELECOMMUNICATION SERVICES, INC.  
d/b/a SECOND CHANCE PHONE OR CANCELING THEIR CERTIFICATE IN THE  
ALTERNATIVE

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. Case Background

Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone (Second Chance Phone) is a certificated competitive local exchange telecommunications company based in Brooksville, Florida that provides competitive local exchange telecommunications services in Florida. From June 24, 2004, through October 12, 2004, the Commission received twelve customer complaints filed against Second Chance Phone. Staff contacted the company after receiving each complaint and requested that the company investigate the complaints and submit a written response. While attempting to obtain a response to the customer complaints, staff determined that Second Chance Phone was purchased by another company. Staff later issued a subpoena on October 6, 2004, to Mr. Jeffery Stolberg of JBS & Associates to request information regarding the purchase of the company. According to Mr. Stolberg's response, JBS & Associates represented the investment group Hofcom LLC in the purchase of Second Chance Phone. Mr. Stolberg also provided staff with the contact information for Hofcom LLC; however, staff has been unable to communicate with anyone from the company. To date, Second Chance

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Phone has not provided a response to the consumer complaints and is in violation of Rule 25-22.032(6)(b), Florida Administrative Code, Consumer Complaints.

## II. Analysis

According to Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, a company shall provide staff with a written response to a customer complaint within 15 working days after staff sends the complaint to the company.

Pursuant to Section 364.285(1), Florida Statutes, the 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, 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. 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 Second Chance Phone to provide staff with written responses to the customer complaints within fifteen working days meets the standard for a “refusal to comply”

and a "willful violation" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

### III. Conclusion

The failure of Second Chance Phone to provide our staff with written responses to the consumer complaints within fifteen working days meets the standard for a "refusal to comply" and 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, 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 Second Chance Phone, by virtue of their Certificate of Public Convenience and Necessity, 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 are vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285, and 364.337, Florida Statutes. Accordingly, this Commission hereby orders a penalty of \$10,000 on Second Chance Phone for each of the twelve apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, or cancel Second Chance Phone's CLEC certificate and require the company to immediately cease and desist providing CLEC services in Florida, if the company fails to timely protest this Commission's Order and fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order. The amount of the proposed penalty is consistent with penalties previously imposed by this Commission upon other CLECs that have failed to respond to consumer complaints.

Based on the foregoing, it is hereby

ORDERED by the Florida Public Service Commission that Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone is hereby penalized in the amount of \$120,000 for twelve apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. The penalty shall be paid to the Florida Public Service Commission within fourteen (14) calendar days after the issuance of the Consummating Order. It is further

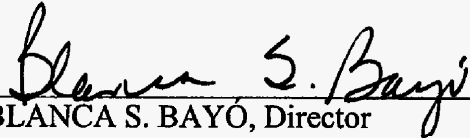
ORDERED that in the event Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone fails to timely pay the penalty, and fails to protest this Commission's Order within 21 days of its issuance, then Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone's CLEC certificate will be canceled and the company must immediately cease and desist providing CLEC services in Florida. It is further

ORDERED that this docket will be closed administratively upon receipt of the payment of the penalty or upon cancellation of the company's CLEC certificate. 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 in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 17th day of December, 2004.

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

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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 January 7, 2005.

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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.