

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Arrow Communications, Inc. d/b/a ACI for apparent violation of Section 364.183(1), F.S., Access to Company Records.	DOCKET NO. 050948-TX ORDER NO. PSC-06-0440-PAA-TX ISSUED: May 22, 2006
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The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman  
J. TERRY DEASON  
ISILIO ARRIAGA  
MATTHEW M. CARTER II  
KATRINA J. TEW

NOTICE OF PROPOSED AGENCY ACTION ORDER DENYING SETTLEMENT OFFER  
AND IMPOSING PENALTY FOR APPARENT VIOLATION OF SECTION 364.183(1),  
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.

**I. Case Background**

On December 27, 2005, our staff opened Docket No. 050948-TX against Arrow Communications, Inc. d/b/a ACI (ACI) for its apparent violation of Section 364.183(1), F.S., Access to Company Records. On June 3 and July 19, 2005, our staff sent certified letters via the United States Postal Service (U.S.P.S.) to ACI requesting data contained in its company records for inclusion in the Florida Public Service Commission's (this Commission's) annual report to the Legislature on the status of local competition in Florida (local competition report). ACI signed the return receipt card for each certified letter, but our staff did not receive the company's response.

Docket No. 050948-TX was scheduled to be heard at the February 28, 2006, Agenda Conference. However, on February 23, 2006, ACI submitted a request to defer the docket from the scheduled Agenda Conference pending settlement negotiations with our staff. ACI's request was approved.

We are vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285 and 364.386, Florida Statutes.

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## II. Analysis:

### A. Settlement Offer

On March 21, 2006, Mr. David Erwin, counsel for ACI, submitted an offer to settle the issue in this docket. In the letter, Mr. Erwin acknowledged that ACI failed to respond to the data request, but stated that this failure was inadvertent and unintentional. Thus, ACI proposed the following:

- A monetary offer of \$500; and
- To place \$3,000 in escrow conditioned upon a timely response to the Commission's data request for its 2006 local competition report

We find terms of the settlement agreement as summarized are not acceptable. ACI believes that a settlement offer of \$3,500 is too high for what it purports to be an inadvertent failure. However, the company signed two return receipts for correspondence sent more than one month apart from this Commission that clearly outlined the possible penalty for failure to comply, provided multiple means for submission of the required data, and urged the companies to contact this Commission to confirm receipt of its data to preclude this situation. A settlement offer of \$3,500 is consistent with this Commission's action in accepting similar terms of settlement for the first instance of the same violation in previous dockets. Furthermore, this Commission accepted settlement offers of \$7,000 from companies charged with a second violation in previous dockets. Thus, ACI's proposal of \$500 for its first apparent violation and an additional \$3,000 in the case of a second violation in the following year is not consistent with this Commission's actions with other CLECs.

### B. Imposing Penalty

Our staff needs information contained in the company records of all Florida incumbent local exchange telecommunications companies (ILECs) and competitive local exchange telecommunications companies (CLECs) to compile its annual local competition report for the Legislature. Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports or other data directly related to matters within the Commission's jurisdiction in the form specified by this Commission and may

require such company to retain such information for a designated period of time.

A company's failure to respond to our staff's data request effectively denies our staff access to its company records. Based on the return receipts our staff received from the initial and subsequent data request, it appears that ACI received the data request and could have responded. It is imperative that this Commission receive 100% participation to accurately reflect the status of local telecommunication competition to the Legislature and the Governor. Since the 2005 local competition report has already been submitted to the Legislature, it is too late for data from ACI to be included. However, pursuant to Section 364.183(1), Florida Statutes, all ILECs and CLECs should timely respond to our staff's data requests for future reports.

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.

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. 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 commission or an intentional act.

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 ACI to allow our staff access to its respective company records meets the standard for a "refusal to comply" and "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. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all competitive local exchange telecommunications companies, like ACI, are subject to the statutes published in the Florida Statutes. 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 this Commission upon other telecommunications companies that have failed to allow staff access to their company records.

### **III. Decision:**

Therefore, we hereby deny Arrow Communications, Inc. d/b/a ACI's settlement offer to voluntarily contribute \$500 to this Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order, and to place \$3,000 in escrow conditioned upon its timely response to this Commission's 2006 data request to resolve its apparent violation of Section 364.183(1), Florida Statutes.

Additionally, we find it appropriate to impose a penalty in the amount of \$10,000 on Arrow Communications, Inc. d/b/a ACI or cancel Certificate No. 4468 for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

This Order issued will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of that docket's Proposed Agency Action Order. As provided by Section 120.80(13) (b), Florida Statutes, any issues not in dispute shall be deemed stipulated. If ACI 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. If ACI fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC Certificate No. 4468 shall be canceled. If ACI's certificate is canceled in accordance with this Commission's Order from this recommendation, ACI shall be required to immediately cease and desist providing telecommunications services in Florida. This docket shall be closed administratively upon either receipt of the payment of the penalty imposed or upon the cancellation of the company's certificate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Arrow Communications, Inc. d/b/a ACI's settlement offer to voluntarily contribute \$500 to this Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order, and to place \$3,000 in escrow conditioned upon its timely response to this Commission's 2006 data request to resolve its apparent violation of Section 364.183(1), Florida Statutes be denied. It is further

ORDERED that a penalty in the amount of \$10,000 on Arrow Communications, Inc. d/b/a ACI or cancel Certificate No. 4468 for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records be imposed. It is further

ORDERED that this Order issued will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of that docket's Proposed Agency Action Order. As provided by Section 120.80(13) (b), Florida Statutes, any issues not in dispute shall be deemed stipulated. It is further

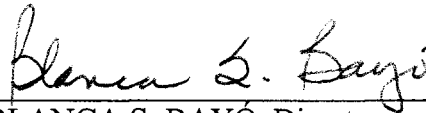
ORDERED that if ACI fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that if ACI fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC Certificate No. 4468 shall be canceled. It is further

ORDERED that if ACI's certificate is canceled in accordance with this Commission's Order from this recommendation, ACI shall be required to immediately cease and desist providing telecommunications services in Florida. It is further

ORDERED that this docket shall be closed administratively upon either receipt of the payment of the penalty imposed or upon the cancellation of the company's certificate.

By ORDER of the Florida Public Service Commission this 22nd day of May, 2006.



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

( S E A L )

TLT

DISSENT:

Chairman Lisa Polak Edgar and Commissioner J. Terry Deason respectfully dissent from the majority's decision

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 June 12, 2006.

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.