

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of CariLink International, Inc. for apparent violation of Section 364.183(1), F.S., Access to Company Records.

DOCKET NO. 060620-TX

In re: Compliance investigation of Baldwin County Internet/DSSI Service, L.L.C. for apparent violation of Section 364.183(1), F.S., Access to Company Records.

DOCKET NO. 060621-TX

In re: Compliance investigation of Phone 1 Smart LLC for apparent violation of Section 364.183(1), F.S., Access to Company Records.

DOCKET NO. 060622-TX

In re: Compliance investigation of EFFECTEL CORP for apparent violation of Section 364.183(1), F.S., Access to Company Records.

DOCKET NO. 060623-TX
ORDER NO. PSC-06-0955-PAA-TX
ISSUED: November 16, 2006

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
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.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

I. Case Background

Section 364.386, Florida Statutes, requires this Commission to submit a report to the Legislature on December 1st of each year on the status of local competition in the telecommunications industry. To obtain the data required to compile this report (hereinafter referred to as the "local competition report") each year, our staff mails data requests via United States Postal Service (U.S.P.S.) Certified Mail to all certificated incumbent and competitive local exchange telecommunications companies (ILECs and CLECs) in Florida in early June, with a response due in mid-July. For the companies that do not respond by the due date, our staff sends a second letter via U.S.P.S. Certified Mail with a due date in the first week of August. Since there are several hundred active CLEC certificates each year (over 400 as of the date of this Order), we strongly encourage all companies to file these responses by the first week in August to be able to compile the report in a timely manner.

On May 26, 2006, our staff sent the first certified letter to each of the four companies listed in Attachment A. The response deadline was July 14, 2006. Of the four companies listed, only three of the companies signed the certified mail receipt indicating that the company had received the data request. The data requests sent to the remaining company was returned to staff by the United States Postal Service (U.S.P.S.) marked unclaimed. Since the companies did not respond by the deadline, a second certified letter was sent on July 20, 2006, with a response due date of July 31, 2006. Staff received signed receipts from three of the companies. The remaining company data request was returned by the U.S.P.S. marked unclaimed or no longer in business.

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

II. Analysis

As stated in the Case Background, our staff needs information contained in the company records of all Florida ILECs and 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 the 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 records. It is imperative that this Commission receive 100% participation to fully reflect the status of local telecommunications competition to the Legislature and the Governor. Both the May 26, 2006, and the July 14, 2006, letters referenced Section 364.285(1), Florida Statutes, and notified the recipients of the possible consequences of failure to provide the requested information.

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 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 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, 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. 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 each of the companies listed in Attachment A 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. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of these dockets, all competitive local exchange telecommunications companies, like the companies listed in Attachment A, 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 our staff access to their company records. Accordingly, we find that a penalty in the amount of \$10,000 shall be imposed on each of the companies listed in Attachment A or cancellation of each company's respective certificate, as listed in Attachment A, for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

III. Decision

We hereby impose a penalty in each respective docket in the amount of \$10,000 for the company's apparent violation of Section 364.183(1), Florida Statutes. This Order shall become final and effective upon issuance of a Consummating Order in each respective docket, unless a person whose substantial interests are affected by our decision in a given docket 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 any of the companies listed in Attachment A fails to timely file a protest in its respective docket and request a Section 120.57, Florida Statutes, hearing, the facts in that docket shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. If any of the companies listed in Attachment A fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order in its respective docket, the company's CLEC certificate, as listed in Attachment A, shall be canceled. If a company's certificate is canceled in accordance with this Commission's Order, that company shall be required to immediately cease and desist providing telecommunications services in Florida. These dockets shall be closed administratively upon either receipt of the payment of the penalty imposed in the respective docket or upon the cancellation of the respective company's certificate. A protest in one docket shall not prevent the action in a separate docket from becoming final.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that we hereby impose a penalty upon each company listed in Attachment A in the amount of \$10,000 for the company's apparent violation of Section 364.183(1), Florida Statutes. It is further

ORDERED that this Order shall be 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, F.A.C., within 21 days of the issuance of the Proposed Agency Action Order. It is further

ORDERED that as provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute shall be deemed stipulated. If any company in each docket 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 the company in its respective docket fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC certificate shall be canceled and the company shall be required to immediately cease and desist providing telecommunications services in Florida. It is further

ORDERED that these dockets shall be closed upon either receipt of the payment of the penalty imposed in the respective docket or upon the cancellation of the respective company's certificate. It is further

ORDERED that a protest in one docket shall not prevent the action in a separate docket from becoming final.

By ORDER of the Florida Public Service Commission this 16th day of November, 2006.

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

By: Marcia Sharma
Marcia Sharma, Assistant Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

VSM

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 December 7, 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.

Attachment A

Docket No.	Provider	Regulation Date	Certificate No.	1st Letter Mailed 5/26/06	2nd Letter Mailed 7/20/06
060620-TX	*CariLink International, Inc.	09/18/01	7909	Receipt Signed	Receipt Signed
060621-TX	Baldwin County Internet/DSSI Service, L.L.C.	09/17/03	8382	Receipt Signed	Receipt Signed
060622-TX	Phone 1 Smart LLC	10/06/03	8384	Receipt Signed	Receipt Signed
060623-TX	EFFECTEL CORP	06/03/05	8581	Unclaimed	Unclaimed

* This is the second docket (first was Docket No. 050956-TX) against CariLink International, Inc. for failing to respond to staff's request for data to compile the local competition report. In the first docket CariLink paid \$3,500 to settle the docket.