

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation of CLEC Certificate No. 6068, issued to Rebound Enterprises, Inc. d/b/a REI Communications, for apparent violation of Section 364.183(1), F.S., Access to Company Records and second-time violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

DOCKET NO. 080425-TX

In re: Compliance investigation of CLEC Certificate No. 7413, issued to Vycera Communications, Inc., for apparent violation of Section 364.183(1), F.S., Access to Company Records and second-time violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

DOCKET NO. 080444-TX  
ORDER NO. PSC-08-0654-PAA-TX  
ISSUED: October 7, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

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, Reports to the Legislature, requires us to submit a report on August 1<sup>st</sup> of each year to the President of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders of the Senate and the House of Representatives, on the status of competition in the telecommunications industry. Section 364.386(1)(b), Florida Statutes, specifically requires that we make a request to providers of local exchange telecommunications services on or before March 1 for the data required to complete the report. It also requires the providers of local exchange telecommunications services to file their responses to this Commission's request on or before April 15.

To fulfill these statutory mandates, on February 15, 2008, a data request was sent via certified mail to all certificated incumbent and competitive local exchange telecommunications companies (ILECs and CLECs) in Florida. The data request included, but was not limited to, explanations of the statutory requirements, the filing requirements, and the potential of penalties for failure to provide a response to the request.

Both of the companies listed in Attachment A had not filed a response as the April 15, 2008 deadline approached. Because the companies had not responded, a second request was mailed via first-class post on April 7, 2008, reiterating the response due date of April 15, 2008. In addition, attempts were made to contact each company via telephone or e-mail. The companies identified in Attachment A failed to provide a response to letters, telephone calls, or e-mails by the established due dates.

Additionally, as required by Rule 25-4.0161, Florida Administrative Code, each of the companies listed in Attachment A failed to pay its Regulatory Assessment Fee (RAF), including statutory late payment charges, within 15 days of receiving a delinquent notice. This Order addresses only the companies' failure to provide the data required to complete the competition report, which is an apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. We have addressed the companies' failure to pay RAF in accordance with the procedures specified in Rule 25-4.0161, Florida Administrative Code.

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

## II. Analysis

Section 364.386, Florida Statutes, provides specific dates for this Commission to request information from local exchange telecommunications providers and to submit a report to the Legislature on the status of competition in the telecommunications industry. It also provides a specific date by which local exchange telecommunications providers must submit information to this Commission.

We need information contained in the company records of all Florida ILECs and CLECs to compile the annual 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.

It is imperative that we receive 100% participation to fully reflect the status of local telecommunications competition in its report to the Legislature. In this instance, the companies' refusal to claim our staff's letters effectively denied us access to their records. Our staff's certified letters were unclaimed or refused by each of the companies listed in Attachment A. As stated in the case background, our staff made further attempts by various means to obtain the data from each company.

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 or any provision of this chapter. 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 or any provision of this chapter. 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 each of the companies listed in Attachment A to allow 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 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).

### **III. Decision**

Further, the amount of the proposed penalty is consistent with penalties previously imposed by us upon other telecommunications companies that have failed to provide a response to a data request, thereby denying staff access to their records. Therefore, we find it appropriate that the Commission impose a penalty in the amount of \$10,000 or cancel the respective certificate of each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

This Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this Commission’s 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 the Proposed

Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should 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 should be deemed admitted, the right to a hearing waived, and the penalty should 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, the company's CLEC certificate, as listed in Attachment A, should be canceled. If a company's certificate is canceled in accordance with this Commission's Order from this recommendation, that company should be required to immediately cease and desist providing telecommunications services in Florida. A protest in one docket should not prevent the action in a separate docket from becoming final. These dockets should remain open.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that a penalty in the amount of \$10,000 be imposed to each company listed in Attachment A for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. 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 Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business of the date set forth in the "Notice of Further Proceeding attached hereto. It is further

ORDERED that 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. It is further

ORDERED that a protest in one docket shall not prevent the action in a separate docket from becoming final. 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 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, the company's CLEC certificate, as listed in Attachment A, shall be canceled. It is further

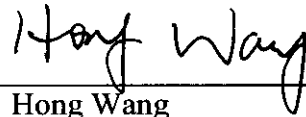
ORDERED that if a company's certificate is canceled in accordance with this Order, that company shall be required to immediately cease and desist providing telecommunications services in Florida. It is further

ORDERED that these dockets shall remain open.

By ORDER of the Florida Public Service Commission this 7th day of October, 2008.

ANN COLE  
Commission Clerk

By:



Hong Wang  
Office of Commission Clerk

( S E A L )

TJB

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 Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 28, 2008.

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.

<b>Docket No.</b>	<b>Company</b>	<b>Regulation Date</b>	<b>Certificate No.</b>	<b>Certified Mail Returned:</b>
080425-TX	Rebound Enterprises, Inc. d/b/a REI Communications	4/17/1999	6068	Unclaimed
080444-TX	Vycera Communications, Inc.	5/10/2000	7413	Refused