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April 4, 2001


Blanca S. Bayó, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Order No. PSC-01-0623-SC-TX

Dear Ms. Bayó:

Please find attached the response of Teleglobe Business Solutions, Inc., to the Florida Public Service Commission's Order to Show Cause, Order No. PSC-01-0623-SC-TX.

Sincerely,



Patrick K. Wiggins
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attachment

DOCUMENT NUMBER-DATE

04193 APR-4 2001

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause
Proceedings against Teleglobe
Business Solutions, Inc., for
Apparent violation of Section
364.183(1), F.S., Access to
Company Records.

DOCKET NO. 010136-TX
FILED: April 4, 2001

**TBS'S RESPONSE AND MEMORANDUM IN OPPOSITION TO
FPSC'S ORDER TO SHOW CAUSE**

Teleglobe Business Solutions, Inc. ("TBS"), hereby files its response and memorandum in opposition to the Commission's Order to Show Cause, Order No. PSC-01-0623-SC-TX., and states as follows:

I. TBS's failure to respond was not "willful"

1. In basic response to the Commission Show Cause Order, TBS acknowledges that its response to the Commission's request for information to include in its report to the Legislature on competition in telecommunications markets in Florida was apparently not filed. TBS apologizes to the Commission and its staff for any inconvenience that may have resulted from TBS's omission. TBS is without sufficient knowledge to admit or deny the Commission's allegation that the report was not filed. TBS does deny, however, that any failure to respond to the Commission's request for information pursuant to section 364.183(1) was "willful" or an act violating a Commission rule or order for purposes of imposing penalties on TBS pursuant to section 364.285(1).

2. TBS denies the Commission's interpretation of the penalties provision of Chapter 364, relating to the regulation of telecommunications companies, on one legal and one factual basis. On a legal basis, TBS objects to the Commission's interpretation of

section 364.285(1) because the Commission's interpretation renders meaningless the Legislature's use of the word "willful" in the statute. On a factual basis, TBS objects to the Commission's interpretation of the statute as it applies to TBS's apparent failure to respond to the Commission's request for information because, without more, a simple failure to respond is an omission and not an act that violates a Commission rule or order within the meaning of the statute.

3. Case law establishes the principle that statutory language is to be given its plain and ordinary meaning as it is used in the statutory context and that punitive statutes are not to be extended by construction, but instead are to be narrowly construed. See, e.g., Capital National Financial Corporation v. Department of Insurance and Treasurer, 690 So. 2d 1335, 1336-1337 (Fla. 3d DCA 1997) (finding that "financing" as it is used in the context of insurance statutes has the meaning contained in *Black's Law Dictionary* and *Webster's Third New Int'l Dictionary* and that, when a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction). *Black's Law Dictionary* defines willful when used in the context of the type of violation that is subject to a penalty as follows:

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

See *Black's Law Dictionary*, 6th ed. (1991). *Webster's Third New International Dictionary* also defines "willful" both in an affirmative and negative manner as something "done deliberately[;] not accidental or without purpose." See *Webster's Third New International Dictionary, Unabridged* (1986).

4. The Commission's statutory characterization of "willful" under section 364.285, Florida Statutes, is improper because it expansively interprets the Commission's legislative delegation of authority, and thus may lead to *ultra vires* actions. The Commission interprets "willful" to mean any willful act, whether or not there was a willful intent to violate a rule, order, or provision of Chapter 364. Section 364.285(1), provides in pertinent part as follows:

The [C]ommission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have *willfully* violated any lawful rule or order of the [C]ommission or any provision of this chapter a penalty ... [emphasis added].

See § 364.285(1), Fla. Stat. (2000). The Commission should adopt the interpretation of the word "willful" accepted among courts. Courts interpret "willful" to mean "intentional or deliberate" and "not merely negligent." See, e.g., Antenor v. D & S Farms, 39 F.Supp.2d 1372, 1379 (S.D. Fla. 1999); American General Finance v. Taylor, 187 B.R. 736, 738 (N.D. Ala. 1995). When a statute by its terms proscribes a "willful" violation of its provisions, mere wrongful violation, without more, does not rise to the level of a statutory violation. See, e.g., Littlefield v. Torrence, 26 Fla. L. Weekly D225 (Fla. 2d DCA Jan. 12, 2001) (holding that, when the rule providing sanctions for discovery violations proscribed only "willful, flagrant, contumacious, or contemptuous" violations, a plaintiff's failure to attend medical examinations was not a willful violation of a court order when the plaintiff lacked available funds or credit with which to make a trip to attend the examination); Teich v. Florida, 776 So. 2d 1084, 1085-86 (Fla. 4th DCA 2001) (reversing the trial court's final order revoking the defendant's community control because the evidence in the trial court record did not support the court's finding of a willful violation of community control); Cooper v. Lewis, 719 So. 2d 944, 945-46 (Fla.

5th DCA 1998) (reversing and remanding on the basis that the trial court erred in striking a witness from the witness list because, even if the witness wrongfully withheld requested information, the record did not indicate that the witness was "attempting to obfuscate the requested data"); The Florida Bar v. Kaufman, 684 So 2d 806, 809 (Fla. 1996) citing Commonwealth Federal Savings and Loan Association v. Tubero, 569 So. 2d 1271, 1272-73 (Fla. 1990) (finding that because an order compelling sanctions required "willful disregard or gross indifference to an order of the court the subject order should contain an explicit finding of willful noncompliance"). Under the Commission's construction, there was no reason for the Legislature to include the word "willful" in the statute. Under the Commission's interpretation, the Legislature need not distinguish between those violations subject to a penalty and those that are not.

5. If there was a failure on the part of TBS to respond to the Commission's request for information, it certainly did not rise to the level of a willful act. Rather, any failure to respond on the part of TBS was a simple oversight. TBS was in the process of relocating its offices from Virginia to Texas at the time of the Commission's request. In the confusion of the relocation, TBS apparently failed to respond. TBS's failure to respond was inadvertence or, at most, negligence, rather than an "intentional, knowing, or purposeful" disregard of the Commission request.

6. TBS acknowledges that the Commission sent two letters to TBS at its Virginia offices and that one of the letters was sent by certified mail. As reflected on the receipt contained in the Commission's records, the certified letter was addressed to Ms. Kim Logue in TBS's corporate division. The signature on the receipt is illegible, but it does not appear to be the signature of the addressee. On information and belief, at the

time the receipt of the certified letter was signed in TBS's Virginia offices, correspondence on regulatory matters was forwarded upon receipt to TBS's Dallas offices. TBS is without knowledge as to whether it was forwarded, or if forwarded, whether it was misdelivered.

7. The Commission's claim that the apparent failure to respond was "willful" is further undermined by the fact TBS's sister corporation responded to the Commission's request by submitting information identical to that which TBS would submit. The parent corporation of TBS, Bell Canada, has operational control of two ALECs that hold certificates in Florida, but do not yet conduct business in Florida. Even if TBS did not respond to the Commission's request, its sister corporation, Excel, did. Any failure on the part of TBS to respond and submit information identical to that submitted by its sister corporation, though wrongful, does not amount to a willful violation of a Commission order.

II. TBS's failure to respond had no material effect on the Commission's report

8. The Commission's penalty is excessive compared to the lack of harm caused by TBS's apparent failure to respond. Even if TBS failed to respond to the Commission's data requests, absence of information from TBS did not hinder the ability of the Commission to prepare a complete report on competition in telecommunications markets in Florida to the Legislature. The Commission states, in its February 8, 2001, memorandum regarding the initiation of show cause proceedings for apparent violation of a Commission data request, that "[i]t is imperative that the Commission receive 100% participation to accurately reflect the status of local telecommunication competition to the Legislature and the Governor." Memorandum re: Initiation of Show Cause Proceedings

by Fla Public Serv. Com'n for Apparent Violation of Section 384.183(1), F.S., Access to Company Records (Feb. 8, 2001) at 4. Still, the report does not indicate that the Commission lacked sufficient information to prepare a complete report to the Legislature. Competition in Telecommunications Markets in Florida ("Competition Report") Fla. Public Serv. Com'n, Div. of Competitive Svcs., Dec. 2000 at 55.

9. Although TBS is certificated as an ALEC, it is not currently providing local exchange service in Florida. Given the fact that TBS was not yet providing local exchange service in Florida, any failure to provide information had virtually no impact on the Commission's description of the status of local telecommunications competition. TBS simply would have been among the 100 ALECs referred to in the Competition Report as being "poised to enter the state's market." See Competition Report at 55.

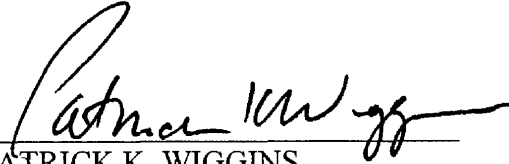
10. TBS's sister corporation, Excel, responded to the Commission's request by providing it with the identical information that TBS would have supplied. There was, thus, no impact on the Commission's ability to prepare its Competition Report to the Legislature.

III. Conclusion

BASED ON THE FOREGOING, TBS respectfully requests a hearing pursuant to section 120.57, Florida Statutes, for the purpose of determining whether evidence exists to support the Commission's contention that TBS willfully violated a lawful rule or order of the Commission within the meaning of section 364.285, Florida Statutes.

RESPECTFULLY SUBMITTED this 4th day of April, 2001.

TBS BUSINESS SOLUTIONS, INC.

A handwritten signature in black ink, appearing to read "Patrick K. Wiggins", written over a horizontal line.

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