



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: March 4, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Payo)

FROM: Division of Competitive Markets & Enforcement (Isler) *Pij*
Office of the General Counsel (McKay) *ISM BK*

RE: Docket No. 030629-TX – Cancellation by Florida Public Service Commission of CLEC Certificate No. 7770 issued to Delta Phones, Inc. for violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies and compliance investigation for apparent violation of Rule 25-22.032(5)(a), F.A.C., Customer Complaints.

AGENDA: 03/16/04 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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Discussion of Issues

Issue 1: Should the Commission accept the \$250 settlement offer proposed by Delta Phones, Inc. to resolve the apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies?

Recommendation: Yes. (Isler)

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a fine or cancel a certificate if a company refuses to comply with Commission rules. Rule 25-24.820, Florida Administrative Code, establishes the requirements for cancellation of a certificate. The rule provides for the Commission to cancel a certificate on its own motion for violation of Commission rules and Orders.

Rule 25-4.0161, Florida Administrative Code, which implements Section 364.336, Florida Statutes, requirements the payment of Regulatory Assessment Fees (RAFs) by January

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30 of the subsequent year for telecommunications companies, and provides for penalties and interest as outlined in Section 350.113, Florida Statutes, for any delinquent amounts.

Delta Phones, Inc., which has held Competitive Local Exchange Company (CLEC) Certificate No. 7770 since April 5, 2001, had not paid the 2002 RAF. Delta Phones, Inc. failed to respond to the 2002 Regulatory Assessment Fee (RAF) return notice and a subsequent delinquent notice. In an attempt to collect the RAF, staff wrote and faxed the company. No response was received; therefore, staff established this docket on July 16, 2003.

On July 25, 2003, staff was contacted by Ms. Rhonda Walters of Delta Phones, Inc. After several facsimiles and phone conversations, Delta Phones, Inc. submitted a settlement offer on December 1, 2003, of a \$250 contribution to resolve this docket. Delta Phones, Inc. reported revenues in the amount of \$405,314 for the period ended December 31, 2002.

The recommended settlement amount in this docket is consistent with amounts the Commission has accepted for recent, similar violations. Accordingly, the Commission should accept the company's \$250 settlement proposal to resolve this docket.

Issue 2: Should the Commission impose a penalty on Delta Phones, Inc. of \$10,000 per apparent violation, for a total of \$20,000, for the two apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, or cancel Delta Phones, Inc.'s CLEC Certificate No. 7770 and require the company to immediately cease and desist providing CLEC services in Florida, if the company fails to timely protest the Commission's Order and fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order?

Recommendation: Yes. (Isler)

Staff Analysis: Rule 25-22.032(5) (a), Florida Administrative Code, Customer Complaints, provides:

- (5) Complaints not resolved within three days. If the customer does not agree to contact the company directly, if the customer is not satisfied with the company's proposed resolution of the complaint, or if the company does not subscribe to the transfer-connect system, a Commission staff member will investigate the complaint and attempt to resolve the dispute in the following manner:
 - (a) The staff member will notify the company of the complaint and request a response. The company shall provide its response to the complaint within fifteen (15) working days. The response shall explain the company's actions in the disputed matter and the extent to which those actions were consistent with applicable statutes and regulations. The response shall also describe all attempts to resolve the customer's complaint.

On October 7, 2003, the Division of Consumer Affairs received two complaints from consumers who advised their service had been disconnected without notice on October 3, 2003. Both customers stated that their bills were paid up-to-date. The Division of Consumer Affairs either faxed or called the company and requested a response to both complaints on October 3, October 15, December 8, December 10, and December 12, 2003. In addition, staff faxed the company a copy of both complaints on January 14, 2004. As of February 12, 2004, Delta Phones, Inc. has not responded to the complaints.

Staff believes that Delta Phones, Inc.'s failure to provide the required responses to consumer complaints is a "willful violation" of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, in the sense intended by Section 364.285, Florida Statutes.

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. 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 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. 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 Delta Phones, Inc. to provide staff with written responses to 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.

Delta Phones, Inc. cannot defend the matter, claiming that it did not know that it had the duty to respond to staff's inquiries. "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 Delta Phones, Inc., 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).

Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon competitive local exchange telecommunications companies for similar violations. Thus, staff recommends that the Commission find that Delta Phones, Inc. has, by its actions and inactions, willfully violated Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, and impose a \$20,000 penalty on the company to be paid to the Florida Public Service Commission.

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Issue 3: Should this docket be closed?

Recommendation: No. (McKay)

Staff Analysis: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. The docket should then be closed upon receipt of the settlement and penalty or cancellation of the certificate.