

State of Florida



Public Service Commission
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TALLAHASSEE, FLORIDA 32399-0850

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DATE: March 18, 2004

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

FROM: Division of Competitive Markets & Enforcement (Curry) *KLC DM*
Office of the General Counsel (Rojas) *JK*

RE: Docket No. 040162-TI – Compliance Investigation of PHI Telecommunications Corporation for Apparent Violation of Sections 364.02 and 364.04, Florida Statutes.

AGENDA: 03/30/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040162.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a \$25,000 penalty upon PHI Telecommunications Corporation (PHI) for its apparent violation of Sections 364.02 and 364.04, Florida Statutes, to be paid to the Florida Public Service Commission within fourteen (14) calendar days after the issuance of the Consummating Order?

Recommendation: Yes. (Curry/Rojas)

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty if a company refuses to comply with the Commission rules or any provision of Chapter 364, Florida Statutes. Section 364.02(13), Florida Statutes, states in pertinent part:

...Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a) and (d), 364.163, 364.285, 364.501, 364.603, and 364.604, shall provide

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the commission with such current information as the commission deems necessary to contact and communicate with the company....

Section 364.04(1), Florida Statutes, states:

Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges of that company for service to be performed within the state.

From August 6, 2003, to February 12, 2004, staff received two complaints filed against PHI. After receiving the first complaint, staff determined that PHI was providing intrastate interexchange telecommunications services through the provisioning of prepaid calling card services in Florida and had not registered or filed a tariff with the Commission. Staff made several attempts to notify PHI of its requirement to register and file a tariff with the Commission and to obtain resolution of the customer complaint. Between August 6, 2003, and December 30, 2003, several letters were sent to the company, via certified mail, first class mail, and facsimile. The certified letters were mailed to PHI's post office box address as well as its physical address, but were later returned marked unclaimed by the United States Postal Service.

Since the initial letter that was sent to PHI's post office box address was never returned, staff assumes that the company did receive the letter. In addition, staff also faxed two letters to the company and both of the Facsimile Transmission Verification Reports indicated that the letters were transmitted successfully. Therefore, staff believes that PHI has been adequately notified of its requirement to register and file a tariff with the Commission and has been given sufficient time to do so.

Staff believes that PHI's failure to provide the Commission with current contact information and file a tariff are "willful violations" of Sections 364.02 (13) and 364.04, Florida Statutes, 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 Smith 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).

"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 PHI are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to file a tariff and to provide the Commission with the company's current contact information. Therefore, staff recommends that the Commission impose a penalty upon PHI Telecommunications Corporation in the amount of \$25,000 for the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes to be paid to the Florida Public Service Commission within fourteen (14) calendar days after the issuance of the Consummating Order.

Issue 2: Should this docket be closed?

Recommendation: 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. If PHI fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty should be referred to the Department of Financial Services for collection and the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon receipt of:

1. The company's tariff;
2. The company's current contact information; and
3. The payment of the penalty, or
4. Upon the referral of the penalty to the Department of Financial Services. **(Rojas)**

Staff Analysis: Whether staff's recommendation on Issue 1 is approved or denied, the result will be a Proposed Agency Action Order. 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. If PHI fails to timely file a protest and request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty should be referred to the Department of Financial Services for collection and the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon receipt of:

1. The company's tariff;
2. The company's current contact information; and
3. The payment of the penalty, or
4. Upon the referral of the penalty to the Department of Financial Services.