

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Globcom,
Inc. for apparent violation of Section
364.02(13) and 364.04, Florida Statutes.

DOCKET NO. 040196-TI
ORDER NO. PSC-04-0616-PAA-TI
ISSUED: June 21, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING PENALTIES

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.

Globcom, Inc. (Globcom) is a registered interexchange company (IXC) based in Northbrook, Illinois, that provides IXC telecommunications services in Florida. On September 23, 2002, our staff received a complaint from a customer of Globcom alleging that Globcom was overcharging for long distance calls. The customer, who was formerly an agent for Globcom, provided bill copies to our staff for review via facsimile and the United States Postal Service (U.S.P.S.). Globcom's tariff specifies that charges for intrastate long distance are \$0.0286 for the first 18 seconds and \$0.0095 for each additional 6 second period, rounded up to the next multiple of 6 seconds. This equates to \$0.0951 for the first minute and \$0.095 for every subsequent minute. The bill our staff reviewed shows a charge of \$0.12 per minute, with calls rounded to the next minute. Our staff sent Globcom a certified letter via the U.S.P.S. requesting that it resolve the customer complaint, provide information regarding possible overcharges for its Florida customers, and submit a refund proposal. The company responded that it re-rated the complainant's calls, but denied that it was overcharging its other customers.

Our staff was not persuaded by the company's response that it did not overcharge its customers, so it initiated an audit of the company's billing records. The company was notified of the audit on November 7, 2002, and that an audit report would be issued on January 15, 2003. During the audit, our staff requested that Globcom provide certain data required to conduct the

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audit. The company provided a partial response to the data request, providing the remaining data only after our staff made a second request. Because of the delay in receiving the requested data, the audit report was issued on February 24, 2003. Our staff found that the company charged its Florida customers rates higher than the rates listed in its tariff.

On March 20, 2003, our staff noted the findings of its audit report (provided to the company upon completion) and again requested via certified mail that the company provide a detailed description of its overcharges and its refund proposal by April 9, 2003. When the company did not respond, a certified letter was sent to the company on April 21, 2003. The company provided its response on May 13, 2003, indicating it would issue a refund to its customers. As with previous requests, the response was not complete and our staff could not determine the amount to be refunded or the interest to be paid. Globcom's response did not contain the amounts of the overcharges due to rounding errors and to per minute rates erroneously charged, or the total dollar amount to be refunded to its customers.

Our staff attempted to contact the company several times via telephone to obtain clarification and left messages requesting a return call, but the company did not respond. Our staff finally sent another certified letter to the company requesting clarification on September 10, 2003. The company responded on September 26, 2003.

After reviewing the response, our staff requested on October 7, 2003, that the Division of Regulatory Compliance and Consumer Assistance (RCA), formerly the Division of Auditing and Safety, review Globcom's response to determine whether the company's calculations for the period that the overcharges occurred were reasonable compared to the sample it examined during its audit. Our audit review staff had some concerns and requested additional data from the company several times via telephone and e-mail between October 2003 and January 2004. Our staff mailed another certified letter to the company on February 10, 2004, with a response due date of February 25, 2004. To date, the company has not responded.

Pursuant to Section 364.285, Florida Statutes, we may impose a penalty or cancel a certificate if a company refuses to comply with the provisions 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 the commission with such current information as the commission deems necessary to contact and communicate with the company, ...

Pursuant to Section 364.04(1), Florida Statutes,

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.

Clearly, in fulfilling this obligation, any tariff filed by a company must be accurate and represent the current rates and charges assessed by that company.

We find that Globcom's failure to provide the requested documentation needed to reconcile its audit with the refund calculations provided to our staff, thereby denying our staff sufficient confidence in the company's calculations to initiate a refund docket for having failed to comply with its filed tariff, is a "willful violation" 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, we are 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. 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, Globcom's failure to provide this Commission with the requested documentation 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 this docket, all intrastate interexchange telecommunications companies, like Globcom, are subject to the laws published in the Florida Statutes. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

We are vested with jurisdiction over these matters pursuant to Sections 350.117, 364.02, 364.04 and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by this Commission upon other interexchange telecommunications companies in previous dockets for similar apparent violations. Therefore, we hereby penalize Globcom, Inc. \$10,000 for its apparent violations of Sections 364.02(13) and 364.04, Florida Statutes, and order the company to submit the required information listed in Attachment A to the Division of Regulatory Compliance and Consumer Assistance.

This Proposed Agency Action Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by our decision 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 this Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Globcom fails to timely file a protest and to 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. If Globcom fails to submit the required audit documentation and pay the \$10,000 penalty within fourteen (14) calendar days after the issuance of the Consummating Order, Registration No. TJ529 shall be removed from the register, Globcom's tariff shall be cancelled and the company shall be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket shall be closed administratively upon either the receipt of the payment of the penalty imposed and the required audit documentation, or upon cancellation of Registration No. TJ529 with its associated tariff.

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ORDERED by the Florida Public Service Commission that Globcom, Inc. is hereby assessed a penalty of \$10,000 for its apparent violations of Sections 364.02(13) and 364.04, Florida Statutes. It is further

ORDERED that Globcom, Inc. shall submit the required information listed in Attachment A of this order.

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 Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that should Globcom, Inc. fail to timely protest this Order, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that any protest must identify with specificity the issues in dispute. In accordance with Section 120.80(13)(b), Florida Statutes, issues not in dispute will be deemed stipulated. It is further

ORDERED that should Globcom, Inc. fail to timely protest this Order, payment of the \$10,000 penalty must be received within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that if this Order is not protested and the penalty is not received within fourteen calendar days of the issuance of the Consummating Order, the penalty shall be referred to the Department of Financial Services for further collection efforts and the company shall be required to cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

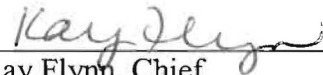
ORDERED that if this Order is not timely protested, this Docket shall be closed administratively upon: 1) receipt of the \$10,000 penalty payment and the required audit documentation; or 2) upon cancellation of Registration No. TJ529 with its associated tariff.

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By ORDER of the Florida Public Service Commission this 21st day of June, 2004.

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

By:



Kay Flynn, Chief
Bureau of Records

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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 July 12, 2004.

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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.

1. Company letter indicated intrastate minutes as follow:

Date	Worldcom	Williams
08/01/2002	25,377.00	5.90
09/01/2002	25,816.00	2,461.00
10/01/2002	21,253.00	3,069.00
11/01/2002	22,308.00	2,827.00
12/01/2002	25,675.00	2,730.00
01/01/2003	27,592.00	3,783.00
02/01/2003	21,827.00	5,994.00
03/01/2003	18,936.00	4,980.00
	188,784.00	25,849.90
TOTAL		214,633.90

Using the company's EDP billing data, we identified total September minutes for Williams as 2,952.53. Reconcile the difference of 492.53 (2,461-2,952.53) minutes. Provide a discussion addressing the time period used to identify total minutes of 2,461 for Williams for September. Address if a billing period different than the calendar month (September 1 – 30) was used.

2. Electronic Billing data for August 2002
3. Electronic Billing data for October 2002
4. Electronic Billing data for November 2002