

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: January 6, 2005

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

FROM: Division of Competitive Markets & Enforcement (Curry) *KLC*
Office of the General Counsel (Rockette-Gray) *DRS BK*

RE: Docket No. 041316-TI – Compliance investigation of NEC Prepaid, Inc. for apparent violation of Sections 364.02 and 364.04, F.S.

AGENDA: 01/18/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041316.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty upon NEC Prepaid, Inc. in the amount of \$25,000 for its apparent violation of Sections 364.02 and 364.04, Florida Statutes?

Recommendation: Yes. (Curry, Rockette-Gray)

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate 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 the commission with such current information as the commission deems necessary to contact and communicate with the company....

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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.

On September 1, 2004, staff received a complaint regarding the purchase of a prepaid calling card. Gandhi Communications was listed on the calling card as the network service provider and the distributor of the card. After receiving the complaint, staff sent a letter dated September 13, 2004, to Gandhi Communications and requested that the company investigate the complaint, provide the Commission with the company's current contact information, and file a tariff with the Commission. On September 17, 2004, staff received a telephone call from Mr. Pravin Gandhi, the owner of Gandhi Phone Card, Inc. Mr. Gandhi acknowledged that Gandhi Communications, the company listed on the phone card, was owned and operated by him. However, the company was only the distributor of the phone card and did not provide the network services for the card. According to Mr. Gandhi, NEC Prepaid, Inc. (NEC) was the network service provider for the phone card. However, Mr. Gandhi agreed to issue the customer a full refund for the cost of the calling card. Mr. Gandhi later provided staff with a letter reiterating what was discussed during his telephone conversation with staff. The letter included the contact information for NEC and a copy of the letter and money order that was sent to the customer.

After receiving the letter from Mr. Gandhi, staff later determined that NEC was providing intrastate interexchange telecommunications services in Florida through the provisioning of prepaid calling card services and had not provided the Commission with the company's current contact information or filed a tariff with the Commission. In a letter dated September 21, 2004, staff informed the company of its requirements to provide the Commission with the company's current contact information and to file a tariff with the Commission. The deadline for the company to respond was October 11, 2004. After not receiving a response, staff mailed a second letter dated October 13, 2004, via certified mail, to the company. The deadline for the company to respond was November 5, 2004. The signed certified mail receipt, indicating that the company did receive staff's letter, was received by staff on October 25, 2004. As of the date of filing this recommendation, NEC has not provided the Commission with the company's current contact information or filed a tariff with the Commission, which is in apparent violation of Sections 364.02(13) and 364.04, Florida Statutes. Staff believes that the company has been adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

Staff believes that NEC's failure to provide the Commission with the company's current contact information and to file a tariff with the Commission 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).

Thus, the failure of NEC to provide staff with the company's current contact information and to file a tariff with the Commission meets the standard for a "refusal to comply" and a "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 telecommunication companies, like NEC 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

Docket No. 041316-TI

Date: January 6, 2005

telecommunications companies that were providing intrastate interexchange services within the state that failed to provide the Commission with the company's current contact information and to file a tariff with the Commission. Therefore, staff recommends that the Commission impose a penalty upon NEC Prepaid, Inc. in the amount of \$25,000 for the company's apparent violation of Sections 364.02 and 364.04, Florida Statutes.

Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's 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 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 NEC 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; and
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. **(Rockette-Gray)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the above staff recommendation.