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Public Service Commission

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CLERK

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DATE: March 24, 2005

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

FROM: Division of Competitive Markets & Enforcement (Buys) DRB JK
Office of the General Counsel (Rojas) JR BLK

RE: Docket No. 050056-TX – Compliance investigation of AAA Reconnect, Inc. for apparent violation of Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries, Rule 25-24.480(2), F.A.C., Record and Reports, Rules Incorporated, and Rule 25-4.0161, F.A.C., Regulatory Assessment Fees, Telecommunications Companies.

AGENDA: 04/05/05 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050056.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a \$10,000 penalty on AAA Reconnect, Inc. for its apparent violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, incorporated by Rule 25-24.835, Florida Administrative Code, Rules Incorporated.

Recommendation: Yes. (Buys, Rojas)

Staff Analysis: AAA Reconnect, Inc. (AAA Reconnect) is a certificated competitive local exchange company (CLEC) located in Brooksville, Florida. On April 30, 2004, the Commission granted AAA Reconnect CLEC Certificate No. 8461. The Commission received a consumer complaint regarding slamming by AAA Reconnect (Request No. 623617T) on October 7, 2004. Staff sent AAA Reconnect a letter via Certified U.S. Mail on December 22, 2004, requesting that

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the company update its contact information and respond to the consumer complaint. The letter was returned marked unclaimed. As of March 24, 2005, the company has not provided staff with the necessary reply to the consumer complaint.

Rule 25-24.835, Florida Administrative Code, Rules Incorporated, incorporates by reference, Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, which applies to competitive local exchange companies such as AAA Reconnect.

Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, states:

The necessary replies to inquiries propounded by the Commission's staff concerning service or other complaints received by the Commission shall be furnished in writing within fifteen (15) days from the date of the Commission inquiry.

Staff believes that AAA Reconnect's failure to provide the Commission with the necessary reply to a consumer complaint is a "willful violation" of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries.

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.

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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 AAA Reconnect to provide staff with a reply to a consumer compliant 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 competitive local exchange companies, like AAA Reconnect, 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 364.183, and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange companies for similar violations. Therefore, staff recommends that the Commission impose a penalty upon AAA Reconnect, Inc. in the amount of \$10,000 for the company's apparent violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, incorporated by Rule 25-24.835, Florida Administrative Code, Rules Incorporated.

Issue 2: Should the Commission impose a \$500 penalty on AAA Reconnect, Inc. for its apparent violation of Rule 25-24.480(2), Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by Rule 25-24.835, Florida Administrative Code?

Recommendation: Yes. (Buys, Rojas)

Staff Analysis: Rule 25-24.835, Florida Administrative Code, Rules Incorporated, incorporates by reference, Rule 25-24.480(2), Florida Administrative Code, Records and Reports; Rules Incorporated, which applies to competitive local exchange companies such as AAA Reconnect.

Rule 25-24.480(2), Florida Administrative Code, Records and Reports; Rules Incorporated, states:

(2) Each company shall file updated information for the following items with the Division of Competitive Markets and Enforcement and the Division of the Commission Clerk and Administrative Services within 10 days after such changes occur.

(a) The address of the certificate holder's main corporate and Florida offices (if any), including street name and address and post office box, city, state, and zip code.

(b) Telephone number, name, and address of the individual who is to serve as primary liaison with the Commission is regards to the ongoing Florida operations of the certificated company.

On August 27, 2004, AAA Reconnect was acquired by new ownership and the company's former officers, Ray and Jessica Geroux, resigned. Staff sent AAA Reconnect a letter via Certified U.S. Mail on December 22, 2004, requesting that the company update its contact information and respond to a consumer complaint. The letter was returned marked unclaimed. Staff is unable to contact the company using the telephone numbers on file with the Commission. Also, the former officers of the company refused to provide staff with the name of the new owners, citing that they agreed not to disclose the name of the new owners in their sale contract. Further, an automated voice message on Ms. Geroux's cell phone number, which is on file with the Commission, states that she resigned from the company and for the new point of contact, call (877) 540-4999. However, the new point of contact is the original phone number listed in the Commission's Master Directory for the company. That number is not in service. Hence, the contact information on file with the Commission is not accurate and has not been updated to reflect the new ownership and new primary liaison.

Staff believes that AAA Reconnect's failure to provide the Commission with the company's current contact information is a "willful violation" of Rule 25-24.480(2), Florida Administrative Code, Records and Reports; Rules Incorporated.

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).

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Thus, the failure of AAA Reconnect to provide staff with the company's current contact information 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 competitive local exchange companies, like AAA Reconnect, 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 364.183, and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon competitive local exchange companies for similar violations. Therefore, staff recommends that the Commission impose a penalty upon AAA Reconnect, Inc. in the amount of \$500 for the company's apparent violation of Rule 25-24.480(2), Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by Rule 25-24.835, Florida Administrative Code.

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Issue 3: Should the Commission impose a penalty and a cost of collection, together totaling \$500, on AAA Reconnect, Inc. for its apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, incorporated by Rule 25-24.835, Florida Administrative Code?

Recommendation: Yes. (Buys, Rojas)

Staff Analysis: Rule 25-24.835, Florida Administrative Code, Rules Incorporated, incorporates by reference, Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees (RAFs), which applies to competitive local exchange companies such as AAA Reconnect.

Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee of \$50 if the certificate was active during any portion of the calendar year. Pursuant to Rule 25-4.0161(2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with Commission rules.

On December 1, 2004, the Division of the Commission Clerk & Administrative Services mailed the 2004 RAF return notice to AAA Reconnect. On February 18, 2005, the Office of General Counsel mailed a delinquent notice via certified mail to the company for nonpayment of its 2004 RAF. AAA Reconnect has not paid the RAF required by Rule 25-4.0161, Florida Administrative Code, for 2004. Also, accrued statutory late payment charges required by Section 350.113(4), Florida Statutes, have not been paid.

The Commission is vested with jurisdiction over this matter pursuant to Sections 350.113, 364.336, 364.337, and 364.285, Florida Statutes. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange companies for similar violations. Therefore, staff recommends that the Commission impose a penalty and a cost of collection, together totaling \$500, for apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, incorporated by Rule 25-24.835, Florida Administrative Code.

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Issue 4: Should this docket be closed?

Recommendation: Staff recommends that the Order issued from this recommendation become final and 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 AAA Reconnect fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted and the right to a hearing waived. If the company fails to pay the imposed penalties in Issues 1 through 3 within fourteen (14) calendar days after the issuance of the Consummating Order, CLEC Certificate No. 8461 should be cancelled administratively and the collection of the past due Regulatory Assessment Fees, including statutory late payment charges, should be referred to the Florida Department of Financial Services for further collection efforts. For any payment received applicable to the penalty, including cost of collection, in Issue 3, the cost of collection should be subtracted from the amount received and should be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. Any monetary amount exceeding the cost of collection should be remitted to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. If the company's certificate is cancelled in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing competitive local exchange services in Florida. This docket should be closed administratively either upon receipt of the payment of the penalties and cost of collection, and Regulatory Assessment Fees, including statutory late payment charges, or upon cancellation of the company's certificate. **(Rojas)**

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