

State of Florida



Public Service Commission
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DATE: April 20, 2006

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

FROM: Division of Competitive Markets & Enforcement (M. Watts, Howell, Ollila) *JWT*
Office of the General Counsel (Tan, Banks) *Plu RT*

RE: Docket No. 050948-TX – Compliance investigation of Arrow Communications, Inc. d/b/a ACI for apparent violation of Section 364.183(1), F.S., Access to Company Records. *S.O.*

AGENDA: 05/02/06 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050948S.RCM.DOC

Case Background

On December 27, 2005, staff opened Docket No. 050948-TX against Arrow Communications, Inc. d/b/a ACI (ACI) for its apparent violation of Section 364.183(1), F.S., Access to Company Records. On June 3 and July 19, 2005, staff sent certified letters via the United States Postal Service (U.S.P.S.) to ACI requesting data contained in its company records for inclusion in the Florida Public Service Commission's (Commission's) annual report to the Legislature on the status of local competition in Florida (local competition report). ACI signed the return receipt card for each certified letter, but staff did not receive the company's response.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Docket No. 050948-TX

Date: April 20, 2006

Docket No. 050948-TX was scheduled to be heard at the February 28, 2006, Agenda Conference. However, on February 23, 2006, ACI submitted a request to defer the docket from the scheduled Agenda Conference pending settlement negotiations with staff. ACI's request was approved. This recommendation addresses ACI's proposed settlement.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285 and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission accept Arrow Communications, Inc. d/b/a ACI's settlement offer to voluntarily contribute \$500 to the Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order, and to place \$3,000 in escrow conditioned upon its timely response to the Commission's 2006 data request to resolve its apparent violation of Section 364.183(1), Florida Statutes?

Recommendation: No. The Commission should not accept the company's settlement proposal. (M. Watts/Howell/Ollila/Banks/Tan)

Staff Analysis: On March 21, 2006, Mr. David Erwin, counsel for ACI, submitted an offer to settle the issue in this docket. In the letter, Mr. Erwin acknowledged that ACI failed to respond to the data request, but stated that this failure was inadvertent and unintentional. Thus, ACI proposed the following:

- A monetary offer of \$500; and
- To place \$3,000 in escrow conditioned upon a timely response to the Commission's data request for its 2006 local competition report

Staff believes the terms of the settlement agreement as summarized in this recommendation are not acceptable. ACI believes that a settlement offer of \$3,500 is too high for what it purports to be an inadvertent failure. However, the company signed two return receipts for correspondence sent more than one month apart from the Commission that clearly outlined the possible penalty for failure to comply, provided multiple means for submission of the required data, and urged the companies to contact the Commission to confirm receipt of its data to preclude this situation. A settlement offer of \$3,500 is consistent with the Commission's action in accepting similar terms of settlement for the first instance of the same violation in previous dockets (see Attachment A for a list of the previous dockets). Furthermore, the Commission accepted settlement offers of \$7,000 from companies charged with a second violation in previous dockets (see Attachment B). Thus, ACI's proposal of \$500 for its first apparent violation and an additional \$3,000 in the case of a second violation in the following year is not consistent with the Commission's actions with other CLECs.

Therefore, staff recommends that the Commission not accept Arrow Communications, Inc. d/b/a ACI's settlement offer to voluntarily contribute \$500 to the Commission for deposit in the General Revenue Fund within 30 days of the issuance of the Consummating Order, and to place \$3,000 in escrow conditioned upon its timely response to the Commission's 2006 data request to resolve its apparent violation of Section 364.183(1), Florida Statutes.

Issue 2: Should the Commission impose a penalty in the amount of \$10,000 on Arrow Communications, Inc. d/b/a ACI or cancel Certificate No. 4468 for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records?

Recommendation: Yes. The Commission should impose a penalty of \$10,000 on Arrow Communications, Inc. d/b/a ACI or cancel Certificate No. 4468 for apparent violation of Section 364.183(1), Florida Statutes. **(M. Watts/Howell/Ollila/Banks/Tan)**

Staff Analysis: Staff needs information contained in the company records of all Florida incumbent local exchange telecommunications companies (ILECs) and competitive local exchange telecommunications companies (CLECs) to compile its annual local competition report for the Legislature. Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports or other data directly related to matters within the Commission's jurisdiction in the form specified by the Commission and may require such company to retain such information for a designated period of time.

A company's failure to respond to staff's data request effectively denies staff access to its company records. Based on the return receipts staff received from the initial and subsequent data request, it appears that ACI received the data request and could have responded. It is imperative that the Commission receive 100% participation to accurately reflect the status of local telecommunication competition to the Legislature and the Governor. Since the 2005 local competition report has already been submitted to the Legislature, it is too late for data from ACI to be included. However, pursuant to Section 364.183(1), Florida Statutes, all ILECs and CLECs should timely respond to staff's data requests for future reports.

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.

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 commission or an intentional act.

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 ACI to allow staff access to its respective company records 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 competitive local exchange telecommunications companies, like ACI, are subject to the statutes published in the Florida Statutes. 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 other telecommunications companies that have failed to allow staff access to their company records. Therefore, staff recommends that the Commission impose a penalty in the amount of \$10,000 on Arrow Communications, Inc. d/b/a ACI or cancel Certificate No. 4468 for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

Issue 3: Should this docket be closed?

Recommendation: The Order issued from this recommendation will 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 that docket's Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If ACI 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 ACI fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC Certificate No. 4468 should be canceled. If ACI's certificate is canceled in accordance with the Commission's Order from this recommendation, ACI should be required to immediately cease and desist providing telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalty imposed or upon the cancellation of the company's certificate. **(Banks/Tan)**

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

Previous Local Competition Report Dockets

First Violation

Docket No.	Company
000221-TX	Orlando Digital Telephone Corporation
000229-TX	Burno, Inc. d/b/a Citywide-Tel
000231-TX	Ernest Communications, Inc.
000235-TX	TotalTel USA Communications, Inc.
000239-TX	Atlantic.Net Broadband, Inc.
010126-TX	Wireless One Network, L.P. d/b/a Cellular One of Southwest Florida
010134-TX	Network Multi-Family Security Corporation d/b/a Priority Link
010136-TX	Teleglobe Business Solutions Inc.

The Commission approved settlements of at least \$3,500 in these dockets.

Previous Local Competition Report Dockets

Second Violation

Docket No.	Company
010124-TX	TotalTel USA Communications, Inc.
010125-TX	Atlantic.Net Broadband, Inc.

The Commission approved settlements of \$7,000 in these dockets.