

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 20, 2004

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

FROM: Division of Competitive Markets & Enforcement (M. Watts)
Division of Regulatory Compliance and Consumer Assistance (Vandiver)
Office of the General Counsel (Teitzman)

RE: Docket No. 040196-TI – Compliance investigation of Globcom, Inc. for apparent violations of Sections 364.02(13) and 364.04, Florida Statutes.

AGENDA: 06/01/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040196.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty upon Globcom, Inc. in the amount of \$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?

Recommendation: Yes. (Teitzman)

Staff Analysis: Globcom, Inc. (Globcom) is a registered interexchange company (IXC) based in Northbrook, Illinois, that provides IXC telecommunications services in Florida. On September 23, 2002, 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 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 staff reviewed shows a charge of \$0.12 per minute, with calls rounded to the next minute. 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.

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. Staff notified the company of the audit on November 7, 2002, and stated an audit report would be issued on January 15, 2003. During the audit, staff requested that Globcom provide certain data required to conduct the audit. The company provided a partial response to the data request, providing the remaining data only after staff made a second request. Because of the delay in receiving the requested data, staff issued the audit report on February 24, 2003. Staff found that the company charged its Florida customers rates higher than the rates listed in its tariff.

On March 20, 2003, 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, staff sent another certified letter 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 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.

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. 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, 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. The 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. 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, the Commission 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.

Staff believes that Globcom's failure to provide the requested documentation needed to reconcile its audit with the refund calculations provided to staff, thereby denying 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, 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 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 staff 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).

The Commission is 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 the Commission upon other interexchange telecommunications companies in previous dockets for similar apparent violations. Therefore, staff recommends that the Commission penalize Globcom, Inc. in the amount of \$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.

Issue 2: 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 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 Globcom fails to timely file a protest and to 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 Globcom fails to submit the required audit documentation and pay the \$10,000 penalty imposed in Issue 1 within fourteen (14) calendar days after the issuance of the Consummating Order, Registration No. TJ529 should be removed from the register, Globcom's tariff should be cancelled and the company should be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket should 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. **(Teitzman)**

Staff Analysis: 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 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 Globcom fails to timely file a protest and to 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 Globcom fails to submit the required audit documentation and pay the \$10,000 penalty imposed in Issue 1 within fourteen (14) calendar days after the issuance of the Consummating Order, Registration No. TJ529 should be removed from the register, Globcom's tariff should be cancelled and the company should be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket should 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