

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-**

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**DATE:** June 17, 2004

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

**FROM:** Division of Competitive Markets & Enforcement (Buys)  
Office of the General Counsel (Fordham, Rojas, Teitzman)  
Office of Standards Control & Reporting (Lowery)

**RE:** Docket No. 040062-TI – Compliance investigation of New Century Telecom, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

**AGENDA:** 06/29/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** Place on agenda item list adjacent to Docket Nos. 020645-TI and 031031-TI.

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\040062.RCM.DOC

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**Discussion of Issues**

**Issue 1:** Should the Commission accept New Century Telecom, Inc.'s settlement offer to resolve forty-two (42) apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

**Recommendation:** No. The Commission should reject New Century Telecom, Inc.'s settlement offer. Instead, the Commission should penalize the company \$10,000 per apparent violation, for a total of \$420,000, for 42 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. If New Century Telecom, Inc. fails to request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If the company fails to pay the amount of the penalty within fourteen calendar days

after issuance of the Consummating Order, registration number TI427 should be removed from the register, the company's tariff should be cancelled, and the company should also be required to immediately cease and desist providing intrastate interexchange telecommunications services within Florida. **(Buys, L. Fordham, Rojas, Teitzman)**

**Staff Analysis:** Section 364.603, Florida Statutes, states:

The commission shall adopt rules to prevent the unauthorized changing of a subscriber's telecommunications service. Such rules shall be consistent with the Telecommunications Act of 1996, provide for specific verification methodologies, provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge, allow for a subscriber's change to be considered valid if verification was performed consistent with the commission's rules, provide for remedies for violations of the rules, and allow for the imposition of other penalties available in this chapter.

To implement Section 364.603, Florida Statutes, the Commission adopted Rule 25-4.118, F.A.C., to govern carrier change procedures (Attachment A).

On January 21, 2004, staff opened this docket to address New Century's apparent slamming infractions and misleading marketing tactics. Staff filed its recommendation on April 21, 2004, for the Commission to impose a \$420,000 penalty upon New Century for 42 apparent slamming violations. The item was deferred from the May 3, 2004, Agenda Conference at the company's request. Staff's recommendation was filed again on May 6, 2004. On May 12, 2004, New Century submitted its settlement proposal (Attachment B) to resolve the apparent slamming and marketing issues in this docket. Consequently, the item was deferred from the May 18, 2004, Agenda Conference to allow staff to address the company's settlement proposal.

In its settlement proposal, New Century is offering to do the following:

- Make a voluntary contribution to the Florida General Revenue Fund in the amount of \$151,000. The company is offering to pay \$15,150 within ten days of the effective date of its settlement; fourteen days thereafter, the company will pay the amount of \$5,000 each week until the balance is paid. A final payment in the amount of \$1,350 will be made in the final (28<sup>th</sup>) week.
- Refund or credit the full amount of any charges incurred by each of the 42 customers to the extent not already credited or refunded.
- Establish a compliance program that will establish a strict quality standard. The company did not expound on the compliance program.
- On a going forward basis, the company will promptly and in good faith address and resolve all complaints regarding its services in a reasonable manner consistent with its settlement and its compliance program.
- Within 60 days from the effective date of its settlement, the company will provide a formal report and additional reports every twelve months, continuing for 26 months

from the effective date. The reports will include (1) the status of the company's progress in implementing its settlement, (2) a list of all infractions assigned to personnel related to its settlement, and (3) copies of all customer complaints related to the company's compliance with its settlement for the period since the previous report, including copies of the resolution of any such complaint.

- Use the third party verification script attached to its settlement offer and implement any changes necessary to comply with the Commission's rules, if needed, within 60 days from the effective date of its settlement offer.

New Century structured its settlement as an agreement between staff and the company's president, Karyn Bartel. The company's settlement offer also states that its decision to enter into its settlement agreement is expressly contingent upon the settlement being signed without revision, change, addition, or modification. Staff cannot execute a settlement agreement between the Commission and the company. Further, the company also wants the docket sealed and hidden from the public record. In the agreement, the company included the following provisions which would not be compliant with the Florida Government in the Sunshine law:

- The parties agree that this Settlement shall become part of the Commission's record but shall be kept from disclosure to the public.
- The parties agree that, within five business days after the date of this Settlement the record shall be closed and sealed.

Moreover, in its settlement offer, the company failed to address the misleading marketing tactics that were apparently employed by the company. The company did not agree to cease marketing in Florida, nor did it agree to discontinue the specific marketing activities that caused the apparent slamming infractions. Further, staff does not believe that the proposed telemarketing script submitted by the company (Attachment C) will resolve the problems the company experienced with its verification process. The initial verification script used by the company included a simple "yes" response from the customer following a pre-recorded question. The revised script follows the same format with the exception that the specific statements that were previously excluded have been added. It is staff's opinion that the company is involved in editing the verification recordings it submits to the Commission so that it appears the customer authorized service. This issue is discussed in later paragraphs. The verification script format the company proposes to use, in staff's opinion, is still susceptible to editing.

Further, New Century should not be permitted to make payment installments and should be ordered to pay the full penalty amount of \$420,000. Staff fears that the company may not honor its obligation to make the payments according to its agreement and may move its customer base to another company and cease operations under New Century and abandon the corporation. Staff suspects New Century, along with Miko Telephone Communications, Inc. (Miko) is part of a consortium of at least nine companies (collectively referred to herein as the "Consortium") that are responsible for one-third of the slamming infractions in Florida during the past five years. The Consortium is discussed in detail in Attachment D.

Staff believes that New Century is the latest company in The Consortium to perpetuate the Consortium's slamming activities in Florida. By New Century's admission, Miko's customers were transferred to New Century. Staff believes the transfer of customers from Miko to New Century is an attempt by the Consortium to avoid regulatory enforcement against Miko and the Commission should also consider the additional 154 apparent slamming violations against Miko when considering staff's recommendation in this docket. In Docket No. 031031-TI, Miko is charged with 154 apparent slamming infractions and staff is recommending that the Commission impose a penalty upon Miko in the amount of \$1.54 million. However, The Helein Law Group, LLC (Helein) informed staff that it was former counsel to Miko, and that Miko currently has no assets, no employees, and no customers. Apparently, Miko has ceased to exist and staff does not expect any contact from Miko or its legal counsel.

New Century is a switchless reseller of interexchange telecommunications services located at 8180 Greensboro Drive., #700, McLean, VA, the same address of the company's legal counsel, Helein. In fact, Mr. Charles H. Helein was listed as the Chairman/CEO of New Century since the company's inception in March 1996. The ownership of New Century was transferred to Kayrn Bartel on or about August 1, 2002. The Commission acknowledged the transfer of ownership in Docket No. 020130-TI through Order No. PSC-02-1089-PAA-TI, issued August 9, 2002. On March 25, 2004, in its 2004 Annual Report filed with the Secretary of State, Division of Corporations, New Century deleted Charles H. Helein as the CEO and added Karyn Bartel. Karyn Bartel was associated with UKI Communications, Inc. (UKI) in some management capacity before becoming president of New Century as discussed in Attachment D. Further, staff has addressed slamming violations against UKI in Docket No. 020645-TI, which UKI has failed to resolve.

Upon reviewing the customer complaints, staff determined that New Century appears to be employing the same unlawful telemarketing tactics used by Miko. After more than seven years without any complaints against New Century, the Commission began to receive slamming complaints against New Century in August 2003; about the same time the complaints against Miko declined. However, staff believes that New Century did not provide any significant service in Florida prior to August 2003.

From August 26, 2003, through March 23, 2004, the Commission received fifty-four (54) slamming complaints against New Century Telecom, Inc. (New Century) from Florida consumers. Staff determined that forty-two (42) of the slamming complaints appear to be violations of Rule 25-4.118, F.A.C., because the company failed to comply with the specific verification methodologies required by the Commission's slamming rules and the apparent egregious nature of the marketing utilized by the company.

In 9 cases, listed in Attachment E, New Century failed to provide proof in the form of a TPV recording that the customer authorized New Century to change service providers in accordance with Rule 25-4.118(1) and (2), F.A.C.

In 27 cases, listed in Attachment F, the TPVs submitted by New Century did not contain all the specific verification information required by Rule 25-4.118(2)(c), F.A.C., listed in subsection (3)(a) 1. through 5. Staff determined that the TPVs submitted by New Century were missing the following:

- *The statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number.*

In the remaining six cases, listed in Attachment G, New Century provided staff with a TPV in which the customer authorized a carrier change for Miko, not New Century. The company claims that it purchased Miko's customer base and transferred Miko's customers to New Century. However, New Century did not request a rule waiver to transfer the customer base pursuant to Rule 25-24.455(4), F.A.C.

New Century markets its services to Florida consumers through its own telemarketers who apparently employ a variety of sales pitches to persuade the customers to provide their name, address, telephone number, and date of birth or mother's maiden name. Staff believes that information is then used to create a fraudulent verification recording. On September 22, 2003, Ms. Alicia Figueroa's long distance service was switched to New Century without her authorization. In its response to her complaint, Request No. 567027T, New Century reported to staff that it acquired the customer base from Miko, and that Miko was Ms. Figueroa's authorized provider. However, Ms. Figueroa states in her letter to staff dated October 31, 2003, that she utilized IDT as her long distance carrier at the time of the slam. In December 2002, Miko also switched Ms. Figueroa's service without her authorization. In its response to her complaint, Request No. 521163T, Miko stated that Ms. Figueroa's account was cancelled on February 24, 2003. Hence, Ms. Figueroa was not a Miko customer as New Century reported, and it appears New Century switched her service without her authorization. Thus, it appears that New Century provided the Commission with false information regarding Ms. Figueroa's complaint. Further, in its response to the complaint, New Century sent staff the same recording of the TPV that Miko sent staff for Ms. Figueroa's prior complaint against Miko. Upon review of both TPV recordings, staff determined that the two recordings appear to be from the same verification of Ms. Figueroa in December 2002, except the TPV recording submitted by New Century was missing additional statements and conversation between the customer and verifier that was heard in the original recording submitted by Miko. Hence, it appears that New Century electronically altered the verification recording before submitting it to the Commission.

New Century's sales tactics involve soliciting a free long distance calling card to try New Century's service without any obligation or offering customers a promotional check. After reviewing the complaints, staff found no evidence that New Century's telemarketers advised the customers that the purpose of the call was to solicit a change of the service provider of the customer as required by Rule 25-4.118(9)(b), F.A.C. Most importantly, it appears that New Century's telemarketers made misleading and deceptive references during telemarketing and verification while soliciting for subscribers in apparent violation of Rule 25-4.118 (10), F.A.C.; some of the customers reported they never received the free calling card promised them in the telemarketing solicitation.

In a follow-up letter to the complaint filed by Frank and Ricci App (Attachment H), the Apps state that New Century mislead them by offering a free prepaid phone card for no cost or obligation. Ricci App verified her name and address by responding "yes" to computer generated questions. The Apps did not receive the free prepaid calling card, and instead, their local toll and long distance service was switched to New Century. The Apps contacted New Century who

informed them that the company has a recording of the conversation with Ricci App. The Apps claim the recording was edited to include additional questions regarding the change in long distance service providers to make the recording appear as if she agreed to change their long distance service provider.

In some of the TPVs staff reviewed, the telemarketer stays on the line during the verification process and prompts the customer to answer verification questions; meaning the TPV is not performed by an independent third party as required by Rule 25-4.118(2)(c), F.A.C. Hence, the TPVs the company submitted to the Commission as proof the customers authorized New Century to change their service providers are not considered by staff to be valid. In addition, when resolving the slamming complaints, New Century failed to refund the charges within 45 days of notification to the company by the customer pursuant to Rule 25-4.118(8), F.A.C.

In addition, Rule 25-4.118(13)(b), F.A.C., states that in determining whether fines or other remedies are appropriate for a slamming infraction, the Commission shall consider among other actions, the actions taken by the company to mitigate or undo the effects of the unauthorized change. These actions include but are not limited to whether the company, including its agents and contractors followed the procedures required under subsection (2) with respect to the person requesting the change in good faith, complied with the credit procedures of subsection (8), took prompt action in response to the unauthorized change, and took other corrective action to remedy the unauthorized change appropriate under the circumstances.

Based on the requirements of Rule 25-4.118(13)(a), F.A.C., New Century appears to have committed 42 unauthorized carrier changes. First, New Century did not follow the procedures required under Rule 25-4.118(2), F.A.C. Second, New Century did not comply with the credit procedures required under Rule 25-4.118(8), F.A.C. Third, New Century's TPVs do not comply with Rule 25-4.118(3), F.A.C. Fourth, it appears that New Century's telemarketers made misleading and deceptive references during telemarketing and verification in apparent violation of Rule 25-4.118(10), F.A.C. Fifth, it appears New Century submitted fraudulent TPVs and false information to the Commission when responding to consumer complaints.

Based on the aforementioned, staff believes that New Century's failure to comply with the requirements of Rule 25-4.118, F.A.C. is a "willful violation" of Sections 364.603, 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. 1<sup>st</sup> 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, it is commonly understood that a “willful violation of law” is an act of purposefulness. As the First District Court of Appeal stated, relying on Black’s Law Dictionary:

An act or omission is ‘willfully’ done, if done voluntarily and intentionally and within 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. 1<sup>st</sup> 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 New Century to comply with Rule 25-4.118, F.A.C., meets the standard for 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. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all intrastate interexchange telecommunication companies, like New Century, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Staff believes that New Century’s settlement proposal is incongruous, due to the egregious nature of New Century’s marketing tactics, the apparent fact that the company provided false information to the Commission in response to slamming complaints, and the company’s apparent connection to other companies previously involved in slamming. Therefore, staff recommends that the Commission should not accept the company’s settlement offer and find that New Century has, by its actions, willfully violated Rule 25-4.118, F.A.C., and impose upon the company a penalty in the amount of \$420,000 to be paid to the Florida Public Service Commission. The amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other IXCs that were found to be slamming Florida subscribers. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, Florida Statutes. Accordingly, staff believes its recommendation is appropriate.

**Issue 2:** If, as a result of the Commission's Order resulting from this recommendation, New Century Telecom, Inc. is ordered to cease and desist providing intrastate interexchange telecommunications services in Florida, should the Commission also order any company that is providing billing services or underlying carrier services for New Century Telecom, Inc. to stop providing service for it in Florida?

**Recommendation:** Yes. (Buys, L. Fordham, Rojas, Teitzman)

**Staff Analysis:** Due to the egregious nature of New Century's business practices and alleged violations addressed in this recommendation, staff believes that additional measures may be necessary to prevent further improper conduct in the event New Century is required to cease and desist providing interexchange service in Florida. Therefore, staff recommends that the Commission also direct all companies that are providing billing services or underlying carrier services for New Century to stop providing those services for said company if it is ultimately required to cease and desist providing interexchange services in Florida. Staff believes this additional action is warranted, because it appears that any ability New Century has to continue billing through another company and providing resold services through an underlying carrier may serve as incentive to the company to continue operating in violation of a Commission Order to the detriment of Florida consumers.

Pursuant to Section 364.604(2), Florida Statutes, a customer shall not be liable for any charges to telecommunications or information services that the customer did not order or that were not provided to the customer. Clearly, if New Century is ordered to cease and desist providing interexchange telecommunications services in Florida, customers will no longer be ordering services from said company. Thus, any bills sent to a Florida customer for interexchange services provided by New Century would inherently be for services that were either not ordered or could not be provided. All telecommunications companies in Florida, as well as intrastate interexchange companies (IXCs), are subject to the statutory provision. As such, staff believes that the Commission is authorized to take this action.

Likewise, Rule 25-24.4701, Florida Administrative Code, prohibits registered IXCs from providing telecommunications services to unregistered resellers. In the event New Century is required to cease and desist providing interexchange service in Florida, then registered IXCs are no longer authorized to provide telecommunications services to New Century for resale in Florida.

In addition, staff believes that the Commission has the authority to take this additional action, because any company that continues to bill for or provide underlying carrier services to the penalized company will, in effect, be contributing to the ongoing violations of the company. Ultimately, the billing company and underlying carrier will be aiding and abetting in either a "slam" in violation of Section 364.603, Florida Statutes, or an improper billing in violation of Section 364.604, Florida Statutes. All telecommunications companies, as well as IXCs, are subject to these statutes.



**Issue 3:** Should this docket be closed?

**Recommendation:** Staff recommends that the Commission take action as set forth in the following Staff Analysis. **(L. Fordham, Rojas, 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 New Century 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 New Century fails to pay the penalty within fourteen (14) calendar days after issuance of the Consummating Order, the company's tariff should be cancelled and Registration No. TI427 should be removed from the register. If New Century's tariff is cancelled and Registration No. TI427 is removed from the register in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalty or upon the removal of the company's registration number from the register and cancellation of the company's tariff. If New Century subsequently decides to reapply for registration as an intrastate interexchange company, it should be required to first pay any outstanding penalties assessed by the Commission. Any action by the Commission, including but not limited to any settlement, should not preempt, preclude, or resolve any matters under review by any other Florida Agencies or Departments.