

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:** September 23, 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:** 10/05/2004 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\040062.REV2.RCM.DOC

---

**Discussion of Issues**

**Issue 1:** Should the Commission accept New Century Telecom, Inc.'s settlement offer, dated July 20, 2004, 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 be required to immediately cease and desist providing intrastate interexchange telecommunications services within Florida. **(Buys, L. Fordham, Rojas, Teitzman)**

**Staff Analysis:** New Century Telecom, Inc. (New Century) is a switchless reseller of interexchange telecommunications services headquartered in McLean, Virginia. New Century's interexchange company (IXC) registration and tariff became effective on March 20, 1996.

From August 26, 2003, through March 23, 2004, the Commission received fifty-four (54) slamming complaints against 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 New Century failed to comply with the specific verification methodologies required by the Commission's slamming rules and apparently used misleading statements during the company's telemarketing to solicit those consumers as subscribers.

Since March 23, 2004, the Commission received an additional twenty-two (22) slamming complaints, three complaints regarding improper billing, and one cramming complaint. These additional complaints are not addressed in this docket. As of August 20, 2004, the Commission had received a total of eighty-two (80) complaints against New Century.

On January 21, 2004, staff opened this docket to address New Century's apparent slamming infractions and misleading telemarketing. Staff filed a 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 New Century's request. Staff's recommendation was again filed on May 6, 2004, for the May 18, 2004, Agenda Conference. On May 12, 2004, New Century submitted its first settlement offer to resolve the apparent slamming violations in this docket. Consequently, staff's recommendation was deferred from the May 18, 2004, Agenda Conference to facilitate review of the company's settlement proposal. On June 17, 2004, staff filed a recommendation for the Commission to reject New Century's first settlement offer. At the June 29, 2004, Agenda Conference, the Commission deferred staff's recommendation and directed staff and New Century to negotiate a possible settlement within 30 days.

From July 9, 2004, through September 14, 2004, staff and New Century corresponded through six letters, numerous emails, and held a face to face meeting on July 13, 2004, in an effort to reach a settlement. In its settlement offer dated July 20, 2004 (Attachment A), New Century is offering to do the following:

- Make a voluntary contribution to the Florida General Revenue Fund in the amount of \$151,500. 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, for twenty-seven (27) weeks, and a final payment in the amount of \$1,350 in the final (28<sup>th</sup>) week.
- Refund or credit the full amount of any charges incurred by each of the 42 customer complaints cited in the recommendation to the extent not already credited or refunded.

- Establish the telemarketing compliance program (Attachment B) included in its settlement proposal.
- 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.
  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 (TPV) script (Attachment C) included in 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.
- Within 30 days from the effective date of the settlement agreement, discontinue using Teco Verification, Inc. as its third party verification company and require the new TPV company to use the verification script in its settlement and require the TPV company to include the date of the verification on the recording.
- Work with Commission staff to establish a warm transfer line between the Commission and the company's customer service department which shall be operational within 120 days of the effective date of the settlement.

Staff does not support New Century's settlement proposal for the reasons listed herein.

1. Staff requested that New Century cease using pre-recorded questions with a simple response of "yes" in its TPVs. The revised script cited in New Century's settlement offer follows the same format with the exception that the statements required by the Commission's slamming rule that were previously excluded have been added. New Century declined to change its verification methodologies.
2. Staff requested that New Century record the telemarketing calls to Florida consumers and agree to make those recordings available to staff for review upon reasonable notification. New Century declined.
3. Staff requested that New Century cease using its current TPV company and use a different independent and unaffiliated TPV company. New Century indicated to staff that InfoCorp., Inc. (InfoCorp) is the new TPV company it plans to use. Based on the information listed below, staff believes that InfoCorp is not independent of New Century

as required by Rule 25-4.118(2)(c), F.A.C. New Century contends that InfoCorp is independent and unaffiliated with New Century.

- a. The sole owner and officer of InfoCorp is Jane M. Scott. On March 5, 2002, Jane M. Helein-Scott submitted an annual report to the Connecticut Department of Public Utility & Control on behalf of New Century as a legal assistant for The Helein Law Group, LLP.
  - b. New Century shares the same address as that of its legal counsel, The Helein Law Group, LLP. 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 Florida Secretary of State, Division of Corporations, New Century deleted Charles H. Helein as the CEO and added Karyn Bartel.
  - c. During staff's initial investigation of the slamming complaints against New Century, on November 20, 2003, Ms. Loubna W. Haddad, legal counsel for New Century, informed staff via telephone that a company by the name of InfoCorp was handling New Century's complaints and that staff should direct its inquiries regarding the customer complaints to InfoCorp, Inc. Hence, during the initial phase of its investigation, and this docket, staff was working with InfoCorp to resolve the slamming complaints.
4. Staff requested that New Century provide staff with all information related to complaints the company received from Florida consumers during the past year. New Century declined. However, it did provide copies of all the consumer complaints it received from the Commission that are the subject of this docket.
  5. Staff requested that New Century post a \$1,000,000 Surety Bond to guarantee New Century's compliance with its settlement agreement. New Century declined.
  6. The Office of Public Counsel (OPC) served New Century with a request for production of documents and interrogatories. New Century objected to each and every one of the requests, and as of the filing date of this recommendation, has not provided OPC with any documentation.

New Century's monetary offer of \$151,500 is consistent with previous settlement amounts the Commission has approved for similar cases. However, for the reasons cited above, and because New Century is apparently unwilling to change the processes and procedures it uses that caused the slamming complaints initially, staff cannot support the company's settlement proposal.

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. The 42 consumer complaints regarding carrier changes cited in this docket appear to be slamming infractions.

In 9 cases, listed in Attachment D, 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 E, 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 F, New Century provided staff with a TPV in which the customer authorized a carrier change for Miko Telephone Communications, Inc. (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 waiver of Rule 25-4.118, F.A.C. to transfer the customer base.

New Century markets its services to Florida consumers through its own telemarketers. 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 telemarketing 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. Further, 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, 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 TPV recordings staff reviewed, the telemarketer stayed on the line during the verification process and prompted the customer to answer verification questions; meaning the TPV was not performed independently by the third party as required by Rule 25-4.118(2)(c), F.A.C. 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.

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.

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).

Therefore, staff recommends that the Commission should reject New Century Telecom, Inc.’s settlement offer, and 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. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, Florida Statutes.

**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 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. **(L. Fordham, Rojas, Teitzman)**

**Staff Analysis:** Staff recommends that the Commission take action as set forth in its recommendation.