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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:** November 18, 2004

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

**FROM:** Division of Competitive Markets & Enforcement (Curry)  
Office of the General Counsel (Susac)  
Division of Regulatory Compliance & Consumer Assistance (Hicks)

**RE:** Docket No. 041146-TX – Compliance investigation of TeleConex, Inc. d/b/a TeleConex for apparent violation of Rules 25-22.032(6)(b), F.A.C., Customer Complaints, and 25-24.835, F.A.C., Rules Incorporated.

**AGENDA:** 11/30/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCA\WP\041146.RCM.DOC

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#### Discussion of Issues

**Issue 1:** Should the Commission impose a penalty upon TeleConex, Inc. d/b/a TeleConex in the amount of \$10,000 per apparent violation, for a total of \$410,000 for forty-one (41) apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints?

**Recommendation:** Yes. (Curry, Hicks, Susac)

**Staff Analysis:** 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 Commission's rules. According to Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, a company shall provide staff with a written response to a customer complaint within 15 working days after staff sends the complaint to the company.

TeleConex, Inc. d/b/a TeleConex (TeleConex) is a certificated competitive local exchange telecommunications company based in Pensacola, Florida that provides competitive local exchange telecommunications services in Florida. From June 2, 2004, through September 17, 2004, staff received 121 complaints filed against TeleConex. Staff contacted the company after receiving each complaint and requested that the company investigate the complaints and submit a written response. Of the 121 complaints that were filed against the company, TeleConex failed to respond to forty-one of those complaints. Staff made several attempts to obtain responses to the forty-one unresolved customer complaints. However, as of the date of filing this recommendation TeleConex has yet to respond, which is in apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. Staff has since determined that TeleConex has failed to pay its underlying carriers for services rendered. As a result, the company has been unable to provide services to its end users and it appears that the company is no longer in business.

Staff believes that TeleConex's failure to provide the required responses to the customer complaints is a "willful violation" of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, 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, 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. 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, 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. 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 TeleConex to provide staff with written responses to the customer complaints within fifteen working days meets the standard for a "refusal to comply" and a "willful violation" as contemplated by the Legislature when enacting section 364.285, Florida Statutes.

TeleConex cannot defend the matter, claiming that it did not know that it had the duty to respond to staff's inquiries. "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 telecommunication companies, like TeleConex, by virtue of their Certificate of Public Convenience and Necessity, 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, 364.285, 364.337, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange telecommunications companies for similar violations. Therefore, staff recommends that the Commission find that TeleConex has, by its actions and inactions, willfully violated Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints, and impose a penalty in the amount of \$10,000 per apparent violation for a total of \$410,000 to be paid to the Florida Public Service Commission.

**Issue 2:** Should the Commission impose a penalty of \$500 upon TeleConex for its apparent violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated?

**Recommendation:** Yes. (Curry, Hicks, Susac)

**Staff Analysis:** Rule 25-24.480, Florida Administrative Code, Records and Reports; Rule Incorporated, incorporated by reference into Rule 25-24.835, Florida Administrative Code, Rules Incorporated, requires that a company update its contact information with the Commission within ten (10) days of a change. On July 26, 2004, when staff attempted to contact TeleConex regarding a customer complaint, staff determined that the fax number that was listed in the Master Commission Directory for the company was no longer in service. When staff attempted to contact the company by phone, staff also determined that the company's telephone number was not in service. To date, TeleConex has not updated its contact information with the Commission.

Staff believes that TeleConex's failure to provide staff with the company's updated contacted information within ten (10) days of a change is a "willful" violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other competitive local exchange telecommunications companies for similar violations. Accordingly, staff recommends that the Commission find that TeleConex has, by its actions and inactions, willfully violated Rule 25-24.835, Florida Administrative Code, Rules Incorporated, and impose a penalty of \$500 upon TeleConex for its apparent violation.

**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 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 TeleConex 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 penalties should be deemed assessed. If TeleConex fails to timely protest the Commission's Order and fails to pay the penalties within fourteen (14) calendar days after the issuance of the Consummating Order, the company shall be required to immediately cease and desist providing competitive local exchange telecommunications services in the state of Florida and Certificate No. 5207 shall be cancelled. Should TeleConex respond to the Commission's Order, staff will at that time require the company to resolve the customer complaints as part of any settlement. This docket should be closed administratively upon either the receipt of the payment of the penalties or upon the cancellation of Competitive Local Exchange Certificate No. 5207. **(Susac)**

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