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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-

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 (Rockette-Gray)
Division of Regulatory Compliance & Consumer Assistance (Hicks)

RE: Docket No. 041147-TX – Compliance investigation of Alternative Telecommunication Services, Inc. d/b/a Second Chance Phone for apparent violation of Rule 25-22.032(6)(b), F.A.C., Customer Complaints.

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\CMP\WP\041147.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty upon Alternative Telecommunication Services, Inc. d/b/a Second Chance Phone in the amount of \$10,000 per apparent violation, for a total of \$120,000 for twelve apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints?

Recommendation: Yes. (Curry, Hicks, Rockette-Gray)

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.

Alternative Telecommunications Services, Inc. d/b/a Second Chance Phone (Second Chance Phone) is a certificated competitive local exchange telecommunications company based in Brooksville, Florida that provides competitive local exchange telecommunications services in Florida. From June 24, 2004, through October 12, 2004, staff received twelve customer complaints filed against Second Chance Phone. Staff contacted the company after receiving each complaint and requested that the company investigate the complaints and submit a written response. While attempting to obtain a response to the customer complaints, staff determined that Second Chance Phone was purchased by another company. Staff later issued a subpoena on October 6, 2004, to Mr. Jeffery Stolberg of JBS & Associates to request information regarding the purchase of the company. According to Mr. Stolberg's response, JBS & Associates represented the investment group Hofcom LLC in the purchase of Second Chance Phone. Mr. Stolberg also provided staff with the contact information for Hofcom LLC; however, staff has been unable to communicate with anyone from the company.

Staff has made several attempts to obtain a response from Second Chance Phone to each of the complaints. However, as of the date of filing this recommendation Second Chance Phone 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 Second Chance Phone 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.

Staff believes that Second Chance Phone'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. 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, the failure of Second Chance Phone 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.

Second Chance Phone 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. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunication companies, like Second Chance Phone, 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 Second Chance Phone 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 \$120,000 to be paid to the Florida Public Service Commission.

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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 Second Chance Phone 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 Second Chance Phone fails to timely protest the Commission's Order and fails to pay the penalty 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. 5620 shall be cancelled. Should Second Chance Phone 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 penalty or upon the cancellation of Competitive Local Exchange Certificate No. 5620. **(Rockette-Gray)**

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