State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 16, 2006

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

FROM: Division of Competitive Markets & Enforcement (M. Watts, Howell, Ollila)
Office of the General Counsel (Tan, Wiggins, Scott, Teitzman, Fordham, Banks)

RE: Compliance investigation for apparent violation of Section 364.183(1), F.S., Access to Company Records.

Docket No. 050948-TX – Arrow Communications, Inc. d/b/a ACI
Docket No. 050949-TX – Alternative Access Telephone Communications Corp. d/b/a AA Tele-Com
Docket No. 050950-TX – KingTel, Inc.
Docket No. 050951-TX – Yipes Enterprise Services, Inc.
Docket No. 050952-TX – France Telecom Corporate Solutions L.L.C.
Docket No. 050953-TX – Suntel Metro, Inc.
Docket No. 050954-TX – Movie, Television & Graphics Corp. d/b/a M.T.G.
Docket No. 050955-TX – Cypress Communications Operating Company, LLC
Docket No. 050956-TX – CariLink International Inc.
Docket No. 050957-TX – DSL Internet Corp d/b/a DSLi
Docket No. 050962-TX – BAK Communications, LLC
Docket No. 050963-TX – Vortex Broadband Communications, Inc.
Docket No. 050964-TX – Infotelecom, LLC
Docket No. 050965-TX – Benchmark Communications, LLC d/b/a Com One
Docket No. 050966-TX – Asia Talk Telecom, Inc. d/b/a HelloCom Inc.

AGENDA: 02/28/06 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER:

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\050948.RCM.DOC

Case Background

Section 364.386, Florida Statutes, requires the Florida Public Service Commission (the Commission) to submit a report to the Legislature on December 1st of each year on the status of local competition in the telecommunications industry. To obtain the data required to compile this report (hereinafter referred to as the "local competition report") each year, staff mails data requests via United States Postal Service (U.S.P.S.) Certified Mail to all certificated incumbent and competitive local exchange telecommunications companies (ILECs and CLECs) in Florida in early June, with a response date due in mid-July. For the companies that do not respond by the due date, staff sends a second letter via U.S.P.S. Certified Mail with a due date in the first week of August. Since there are several hundred active CLEC certificates each year (over 400 as of the date of this filing), staff strongly encourages all companies to file these responses by the first week in August to be able to compile the report in a timely manner.

On June 3, 2005, staff mailed the initial data request to each certificated ILEC and CLEC as described above with a due date of July 15, 2005. By the due date all ILECs and the vast majority of CLECs had responded to the data requests On July 19, 2005, staff sent a second letter to the CLECs that did not respond with a due date of August 1, 2005. Both the June 3, 2005, and July 19, 2005, letters referenced Section 364.285(1), Florida Statutes, and notified the recipients of the possible consequences of failure to provide the requested information. Each company identified in Attachment A did not provide a response to either of staff's letters by the established due dates or by the filing date of this recommendation.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285 and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of $10,000 on each of the companies listed in Attachment A or cancel each company's respective certificate, as listed in Attachment A, for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records?

Recommendation: Yes. The Commission should impose a penalty of $10,000 or cancel the certificate of each company listed in Attachment A for apparent violation of Section 364.183(1), Florida Statutes. **(M. Watts/Howell/Ollila)**

Staff Analysis: As stated in the Case Background, staff needs information contained in the company records of all Florida ILECs and CLECs to compile its annual local competition report for the Legislature. Section 364.183(1), Florida Statutes, Access to Company Records, states in part:

> The Commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the Commission's jurisdiction. The Commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The Commission may require a telecommunications company to file records, reports or other data directly related to matters within the Commission's jurisdiction in the form specified by the Commission and may require such company to retain such information for a designated period of time.

A company's failure to respond to staff's data request effectively denies staff access to its company records. Based on the return receipts staff received from the initial data request, it appears that each of the CLECs listed in Attachment A received the data request and could have responded. It is imperative that the Commission receive 100% participation to accurately reflect the status of local telecommunication competition to the Legislature and the Governor. Since the 2005 local competition report has already been submitted to the Legislature, it is too late for data from the CLECs listed in Attachment A to be included. However, pursuant to Section 364.183(1), Florida Statutes, all ILECs and CLECs should timely respond to staff's data requests for future reports.

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 commission or an intentional act.

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 each of the companies listed in Attachment A to allow staff access to its respective company records 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 these dockets, all competitive local exchange telecommunications companies, like the companies listed in Attachment A, are subject to the statutes published in the Florida Statutes. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other telecommunications companies that have failed to allow staff access to their company records. Therefore, staff recommends that the Commission impose a penalty in the amount of $10,000 on each of the companies listed in Attachment A or cancel each company's respective certificate, as listed in Attachment A, for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

Issue 2: Should these dockets be closed?

Recommendation: The Orders issued from this recommendation will become final and effective upon issuance of a Consummating Order in each respective docket, unless a person whose substantial interests are affected by the Commission's decision in a given docket 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 that docket's Proposed Agency Action Order. As provided by Section 120.80(13) (b), Florida Statutes, any issues not in dispute should be deemed stipulated. If any of the companies listed in Attachment A fails to timely file a protest in its respective docket and request a Section 120.57, Florida Statutes, hearing, the facts in that docket should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If any of the companies listed in Attachment A fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order in its respective docket, the company's CLEC certificate, as listed in Attachment A, should be canceled. If a company's certificate is canceled in accordance with the Commission's Orders from this recommendation, that company should be required to immediately cease and desist providing telecommunications services in Florida. These dockets should be closed administratively upon either receipt of the payment of the penalty imposed in the respective docket or upon the cancellation of the respective company's certificate. A protest in one docket should not prevent the action in a separate docket from becoming final. **(Tan, Wiggins, Scott, Teitzman, Fordham, Banks)**

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