

.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: January 16, 2008

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Curry)
Office of the General Counsel (Poblete)

RE: Docket No. 070711-TI – Compliance investigation of NCOM Networks, LLC for
apparent violation of Rule 25-24.470, F.A.C., Registration Required.

AGENDA: 01/29/08 – Regular Agenda – Proposed Agency Action – Interested Persons May
Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\070711.RCM.DOC

Case Background

On March 13, 2007, the Commission received a customer complaint regarding a prepaid calling card. After receiving the complaint, staff determined that the network service provider of the calling card was NCOM Networks, LLC (NCOM). Staff also determined that NCOM was not registered as an intrastate interexchange telecommunications company (IXC) and had not filed a tariff with the Commission. To obtain contact information for NCOM, staff contacted the company's application service provider. The application service provider provides software and back office support for NCOM. Staff was informed by the application service provider that it had contacted NCOM and requested that the company contact staff directly.

On June 5, 2007, a representative from NCOM contacted staff. During the telephone conversation, staff informed the representative of the customer complaint and of the company's requirement to register as an IXC and file a tariff with the Commission. The company's representative assured staff that he would quickly resolve the matter and requested that staff fax to him a copy of the customer complaint. The complaint, along with an IXC Registration form and a copy of the Commission rules governing prepaid calling services, was immediately faxed to the company. The deadline for the company to respond was June 8, 2007. The facsimile transmittal form indicated that the fax was transmitted successfully. However, the company did not respond.

After not receiving a response from the company, staff called NCOM several times and left numerous voicemail messages, but the company never returned staff's calls. On September 13, 2007, staff again faxed a copy of the complaint, an IXC Registration form, and a copy of the rules. The facsimile transmittal form indicated that the fax was transmitted successfully. The company never responded.

On September 17, 2007, staff obtained additional contact information for NCOM and sent a certified letter to the company. Staff requested that the company respond by October 2, 2007. On September 28, 2007, staff received the signed certified mail receipt indicating that NCOM did receive the letter. To date, the company has not responded.

This recommendation addresses NCOM's failure, as required by Rule 25-24.470, Florida Administrative Code (F.A.C.), to register as an IXC and file a tariff prior to providing intrastate interexchange telecommunications services in Florida. The Commission is vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, and 364.285, 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 \$25,000 upon NCOM Networks, LLC for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order?

Recommendation: Yes, the Commission should impose a penalty in the amount of \$25,000 upon NCOM Networks, LLC for its apparent violation of Rule 25-24.470, F.A.C., Registration Required, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order. **(Curry, Poblete)**

Staff Analysis: Rule 25-24.470, F.A.C., Registration Required, states:

No person shall provide intrastate interexchange telephone service without first filing an initial tariff containing the rates, terms, and conditions of service and providing the company's current contact information with the Division of the Commission Clerk and Administrative Services.

As stated in the case background, staff made several attempts to contact NCOM via telephone, facsimile, and certified mail. Each time staff contacted the company, staff requested that NCOM resolve the customer complaint, register as an IXC, and file a tariff with the Commission. As of the date of filing this recommendation, NCOM has failed to comply with staff's requests. Staff believes that the company has been adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

Staff believes that NCOM's failure to register and file a tariff with the Commission is a "willful violation" of Rule 25-24.470, Florida Administrative Code, Registration Required, 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, NCOM's failure to register and file a tariff with the Commission meets the standard for a "refusal to comply" and 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. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunications companies, like NCOM, are subject to the rules published in the Florida Administrative Code. 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 intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to register and to file a tariff with the Commission. Therefore, staff recommends that the Commission impose a penalty upon NCOM in the amount of \$25,000 for the company's apparent violation of Rule 25-24.470, F.A.C.

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 NCOM fails to timely file a protest and 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 payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty should be referred to the Department of Financial Services for collection and the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon receipt of the company's current contact information, tariff, and payment of the penalty, or upon the referral of the penalty to the Department of Financial Services. **(Poblete)**

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