

BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 041146-TX ORDER NO. PSC-04-1244-PAA-TX ISSUED: December 16, 2004
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The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER PENALIZING TELECONEX, INC. D/B/A TELECONEX
FOR VIOLATION OF RULE 25-22.032(6)(b)

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Discussion of Issues

Pursuant to Section 364.285, Florida Statutes, we may impose a penalty or cancel a certificate if a company refuses to comply with our 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.

In the case at hand, 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, our staff received 121 complaints filed against TeleConex. Our 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. This

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Commission's staff made several attempts to obtain responses to the forty-one unresolved customer complaints. However, as of the date of this Order, TeleConex has yet to respond, and is therefore in apparent violation of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. In addition, TeleConex has failed to pay its underlying carriers for services rendered, and 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.

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, we are 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 this 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 our order(s) or rule(s). 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 TeleConex to provide our 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 our 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 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).

We are vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285, 364.337, Florida Statutes. Therefore, we 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.

Furthermore, 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 us within ten (10) days of a change. On July 26, 2004, when this Commission's staff attempted to contact TeleConex regarding a customer complaint, our staff determined that the fax number that was listed in the Master Commission Directory for the company was no longer in service. When our staff attempted to contact the company by phone, it was also determined that the company's telephone number was not in service. To date, TeleConex has not updated its contact information with this Commission.

In light of the above, we find that TeleConex's failure to provide our 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 this Commission upon other competitive local exchange telecommunications companies for similar violations. Accordingly, we 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.

In conclusion, this Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this 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 this 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.

It should be noted that if TeleConex responds to our Order, the company shall be required 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that TeleConex, Inc. d/b/a TeleConex is penalized in the amount of \$410,000 for forty-one (41) apparent violations of Rule 25-22.032(6)(b), Florida Administrative Code, Customer Complaints. It is further

ORDERED that we impose a penalty of \$500 upon TeleConex, Inc. d/b/a TeleConex for its apparent violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if TeleConex, Inc. d/b/a TeleConex fails to timely file a protest this Order and 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. In addition, if TeleConex fails to timely protest this 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. It is further

By ORDER of the Florida Public Service Commission this 16th day of December, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on January 6, 2005.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.