

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Tiburon Telecom, Inc. for apparent violations of Rules 25-22.032, F.A.C., Customer Complaints, and 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies.

DOCKET NO. 050181-TX
ORDER NO. PSC-05-0548-PAA-TX
ISSUED: May 20, 2005

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING PENALTIES

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.

Tiburon Telecom, Inc. is a certificated competitive local exchange telecommunications company (CLEC) and a registered intrastate interexchange telecommunications company (IXC) located in Tallahassee, Florida. On January 17, 2003, we granted the company CLEC Certificate No. 8234.

Apparent violation of Rule 25-22.032, Florida Administrative Code

On November 22, 2004, we received a consumer complaint concerning local telephone service against Tiburon Telecom, Inc. Our staff forwarded the complaint to the company with a response due by December 15, 2004. The company did not respond to the consumer complaint, so our staff sent an overdue notice to the company on January 11, 2005. We were subsequently notified by Sprint-Florida, Incorporated (Sprint) that it had disconnected all of the company's lines in Sprint's territory for nonpayment on January 12, 2005. The company has not responded to date.

Rule 25-22.032(6)(b), Florida Administrative Code, states in pertinent part that the company shall respond to Commission staff in writing within 15 days after the Commission staff sends the complaint to the company.

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FPSC-COMMISSION CLERK

We find that Tiburon Telecom, Inc.'s failure to respond to the consumer complaint is a "willful violation" of Section 364.336, Florida Statutes.

Pursuant to Section 364.285(1), Florida Statutes, we are authorized to impose upon any entity subject to our 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 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 this Commission's orders or rules. 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 Smith 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 Tiburon Telecom, Inc. to respond to a consumer complaint within 15 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.

"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 competitive local exchange telecommunications companies, like Tiburon Telecom, Inc., are subject to the rules published in

the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Apparent first violation of Rule 25-4.0161, Florida Administrative Code

Rule 25-24.835, Florida Administrative Code, Rules Incorporated, incorporates by reference, Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees, which applies to CLECs such as Tiburon Telecom, Inc.

Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee (RAF) of \$50 if the certificate was active during any portion of the calendar year. Pursuant to Rule 25-4.0161(2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with Commission rules.

On December 15, 2004, the Division of the Commission Clerk & Administrative Services mailed the 2004 RAF return notice to Tiburon Telecom, Inc. On February 18, 2005, the Office of General Counsel mailed a delinquent notice via certified mail to the company for nonpayment of its 2004 RAF. Tiburon Telecom, Inc. has not paid the RAF required by Rule 25-4.0161, Florida Administrative Code, for 2004. Also, accrued statutory late payment charges required by Section 350.113(4), Florida Statutes, have not been paid.

Decision

We are vested with jurisdiction over this matter pursuant to Sections 350.113, 364.0252, 364.336, 364.337 and 364.285, Florida Statutes. Further the amount of the proposed penalties is consistent with penalties we have previously imposed upon other competitive local exchange telecommunications companies for similar violations. Therefore, we hereby impose a penalty of \$10,000, on Tiburon Telecom, Inc. for its apparent violation of Rule 25-22.032, Florida Administrative Code, and a penalty and cost of collection, together totaling \$500, on Tiburon Telecom, Inc. for apparent violation of Section 364.336, Florida Statutes.

This Order shall become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this 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 for this docket. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute shall be deemed stipulated. If Tiburon Telecom, Inc. fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts shall be deemed admitted and the right to a hearing waived. If the company fails to pay the imposed penalties within fourteen (14) calendar days after the issuance of the Consummating Order, CLEC Certificate No. 8234 shall be canceled administratively and the collection of the past due Regulatory Assessment Fees, including statutory late payment charges, shall be referred to the Florida Department of Financial Services for further collection efforts.

For any payment received applicable to the penalty, including cost of collection, for the apparent violation of Section 364.336, Florida Statutes, the cost of collection shall be subtracted from the amount received and shall be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. Any monetary amount exceeding the cost of collection shall be remitted to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. If the company's CLEC certificate is canceled in accordance with this Order, the company shall be required to immediately cease and desist providing competitive local exchange services in Florida. This docket shall be closed administratively either upon receipt of the payment of the penalties and cost of collection, and Regulatory Assessment Fees, including statutory late payment charges, or upon cancellation of the company's certificate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tiburon Telecom, Inc. shall pay a penalty and a cost of collection, together totaling \$500 for apparent violation of Section 364.336, Florida Statutes. It is further

ORDERED that Tiburon Telecom, Inc. shall pay a penalty of \$10,000 for apparent violation of Rule 25-22.032, Florida Administrative Code.

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 should Tiburon Telecom, Inc. fail to timely protest this Order, the facts shall be deemed admitted, the right to a hearing waived, and the penalties shall be deemed assessed. It is further

ORDERED that any protest must identify with specificity the issues in dispute. In accordance with Section 120.80(13)(b), Florida Statutes, issues not in dispute will be deemed stipulated. It is further

ORDERED that should Tiburon Telecom, Inc. fail to timely protest this Order, payment of the penalties must be received within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that any payment received applicable to the penalty, including cost of collection, for the apparent violation of Section 364.336, Florida Statutes, the cost of collection shall be subtracted from the amount received and shall be deposited in the Florida Public Service Regulatory Trust Fund, pursuant to Section 350.113, Florida Statutes. Any monetary amount exceeding the cost of collection shall be remitted to the Florida Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes. It is further

ORDERED that if this Order is not protested and the penalties are not received within fourteen calendar days of the issuance of the Consummating Order, the penalty shall be referred to the Department of Financial Services for further collection efforts and the company shall be required to cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that this docket shall be closed administratively either upon receipt of the payment of the penalties and cost of collection, and Regulatory Assessment Fees, including statutory late payment charges, or upon cancellation of the company's certificate.

By ORDER of the Florida Public Service Commission this 20th day of May, 2005.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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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 June 10, 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.