

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of NCOM  
Networks, LLC for apparent violation of Rule  
25-24.470, F.A.C., Registration Required.

DOCKET NO. 070711-TI  
ORDER NO. PSC-08-0082-PAA-TI  
ISSUED: February 12, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

NOTICE OF PROPOSED AGENCY ACTION  
ORDER IMPOSING A PENALTY FOR APPARENT VIOLATION OF  
RULE 25-24.470, FLORIDA ADMINISTRATIVE CODE

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.

**I. Case Background**

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

On June 5, 2007, a representative from NCOM contacted our staff. During the telephone conversation, our staff informed the representative of the customer complaint and of the company's requirement to register as an IXC and file a tariff with this Commission. The company's representative assured our staff that he would quickly resolve the matter and requested that our staff fax him a copy of the customer complaint. The complaint, along with an IXC Registration form and a copy of our rules governing prepaid calling services, was immediately faxed to the company. The deadline for the company to respond was June 8, 2007.

DOCUMENT NUMBER-DATE

01089 FEB 12 08

FPSC-COMMISSION CLERK

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, our staff called NCOM several times and left numerous voicemail messages, but the company never returned staff's calls. On September 13, 2007, our 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, our staff obtained additional contact information for NCOM and sent a certified letter to the company. It was requested that the company respond by October 2, 2007. On September 28, 2007, we received the signed certified mail receipt indicating that NCOM did receive the letter. To date, the company has not responded.

This order 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.

We are vested with jurisdiction over these matters pursuant to Sections 364.02, 364.04, and 364.285, Florida Statutes (F.S.).

## **II. 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, several attempts were made to contact the company via telephone, facsimile, and certified mail. Each time the company was contacted, our staff requested that NCOM resolve the customer complaint, register as an IXC, and file a tariff with the Commission. To date, NCOM has failed to comply with these requests. We believe that the company has been adequately notified of its requirements and has been provided with sufficient time to meet those requirements.

We hereby find that NCOM's failure to register and file a tariff with this Commission is a "willful violation" of Rule 25-24.470, F.A.C., Registration Required, in the sense intended by Section 364.285, F.S.

Pursuant to Section 364.285(1), F.S., 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), F.S., 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. 1<sup>st</sup> 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. 1<sup>st</sup> 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 this Commission meets the standard for a “refusal to comply” and a “willful violation” as contemplated by the Legislature when enacting Section 364.285, F.S.

“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. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunication companies, like NCOM, by virtue of their IXC registration, 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 we have previously imposed upon intrastate interexchange telecommunications companies that were providing intrastate interexchange services within the state that failed to register and to file a tariff.

### **III. Decision**

Therefore, we find it appropriate to 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.

This Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by our decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, F.A.C., within 21 days of the issuance of this Order. As provided by Section 120.80(13) (b), F.S., any issues not in dispute shall be deemed stipulated. If NCOM fails to timely file a protest and request a Section 120.57, F.S., hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall 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 shall be referred to the Department of Financial Services for collection and the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket shall 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that we hereby impose a penalty upon NCOM Networks, LLC, in the amount of \$25,000, for the apparent violation of Rule 25-24.470, F.A.C. 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, F.A.C., is received by the Office of Commission Clerk, 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 the company fails to timely file a protest and request a Section 120.57, F.S., hearing, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that if payment of the penalty is not received within fourteen (14) calendar days after the issuance of the Consummating Order the penalty shall be referred to the Department of Financial Services for collection and the company shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that this docket shall be closed 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.

By ORDER of the Florida Public Service Commission this 12th day of February, 2008.

  
\_\_\_\_\_  
ANN COLE  
Commission Clerk

( S E A L )

CCP

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 Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 4, 2008.

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.