

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Talk Unlimited Now, Inc. for apparent violation of Rules 25-22.032(5)(a), F.A.C., Customer Complaints, and 25-24.835, F.A.C., Rules Incorporated.

DOCKET NO. 031105-TX  
ORDER NO. PSC-04-0297-PAA-TX  
ISSUED: March 17, 2004

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION ORDER IMPOSING PENALTY FOR VIOLATIONS OF RULE 25-22.032(5)(a) AND RULE 25-24.480

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.

The Florida Public Service Commission finds that Talk Unlimited Now, Inc.'s failure to provide the required responses to consumer complaints is a "willful violation" of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, in the sense intended by Section 364.285, Florida Statutes.

In two of the consumer complaints listed in Table 1-1, the company provided partial responses in March 2003, but never provided the supplemental responses required by our staff to resolve the complaints. In the other three consumer complaints listed in Table 1-1, the company has not responded at all.

Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, states:

The staff member will notify the company of the complaint and request a response. The company shall provide its response to the complaint within fifteen (15) working days. The response shall explain the company's actions in the disputed matter and the extent to which those actions were consistent with

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applicable statutes and regulations. The response shall also describe all attempts to resolve the customer's complaint.

Table 1-1 Talk Unlimited Now, Inc. Consumer Complaints				
Request No.	Received	Response Due	Response Received	Supplemental Response Due
521067T	3/7/03	3/28/03	3/10/03	7/30/03
521294T	3/10/03	3/31/03	3/11/03	7/30/03
523763T	3/21/03	4/11/03	None received	N/A
527531T	4/14/03	5/5/03	None received	N/A
529492T	4/24/03	5/15/03	None received	N/A

Pursuant to Section 364.285(1), Florida Statutes, this 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 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 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, the failure of TUNI to provide our staff with written responses to consumer 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.

"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 TUNI, 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).

Thus, we find that TUNI has, by its actions and inactions, willfully violated Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, and impose a penalty of \$10,000 per apparent violation, for a total of \$50,000, on the company to be paid to the Florida Public Service Commission.

Rule 25-24.480, Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by reference into Rule 25-24.835, Florida Administrative Code, Rules Incorporated, requires that a company update its contact information with the Commission within 10 days of a change. Since March 21, 2003, our staff has attempted to contact TUNI many times concerning the five consumer complaints listed in Table 1-1, but was unable to do so. Its telephone and facsimile numbers are disconnected and the company has not responded to letters sent through the U.S.P.S. In August 2003, our staff obtained a cellular telephone number from another state's regulatory agency that it had listed as an alternate number for TUNI. Our staff called the number, but the person who answered at that number would not confirm his identity. However,

he did state that TUNI no longer provides telecommunications service in Florida. To date, TUNI has not updated its contact information with this Commission.

Accordingly, we find that TUNI has, by its actions and inactions, willfully violated Rule 25-24.835, Florida Administrative Code, Rules Incorporated, and impose a \$500 penalty on the company to be paid to the Florida Public Service Commission.

ORDERED that the Florida Public Service Commission imposes a \$50,000 penalty on Talk Unlimited Now, Inc. to be paid to the Florida Public Service Commission within 14 days of the issuance of the Consummating Order. It is further

ORDERED that the Florida Public Service Commission imposes a \$500 penalty on Talk Unlimited Now, Inc. to be paid to the Florida Public Service Commission within 14 days of the issuance of the Consummating Order. It is further

ORDERED that if Talk Unlimited Now, Inc. fails to timely protest this Commission's Order and fails to pay the proposed penalties, the company's certificate shall be canceled and that the company shall be required to immediately cease and desist providing competitive local exchange telecommunications services in Florida. 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 this docket shall be closed administratively upon receipt of the payment of the penalties or the cancellation of Certificate No. 8126.

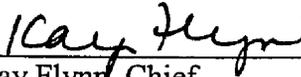
ORDERED that in the event this Order becomes final, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 17th day of March, 2004.

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

By:



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.

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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 April 7, 2004.

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.