

State of Florida



Public Service Commission

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DATE: March 18, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Buys)
Division of Consumer Affairs (Lowery)
Office of the General Counsel (Susac)

RE: Docket No. 040158-TX – Compliance Investigation of EZ Talk Communications, L.L.C. for apparent violation of Rule 25-22.032, F.A.C., Consumer Complaints.

AGENDA: 03/30/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040158.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty on EZ Talk Communications, L.L.C. of \$10,000 per apparent violation, for a total of \$20,000, for two apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, or cancel EZ Talk Communications, L.L.C.'s competitive local exchange company (CLEC) Certificate No. 5530 and require the company to immediately cease and desist providing CLEC services in Florida, if the company fails to timely protest the Commission's Order and fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order?

Recommendation: Yes. (Buys, Lowery, Susac)

Staff Analysis: Rule 25-22.032(5)(a), Florida Administrative Code, 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

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

EZ Talk Communications, L.L.C. (EZ Talk) is a certificated CLEC based in Stafford, Texas that provides local exchange telephone service in Florida. The Division of Consumer Affairs (CAF) received two consumer complaints regarding local exchange service provided by EZ Talk. The first complaint, Request No. 562381T, was received on October 13, 2003, and the second complaint, Request No. 563111T, was received on October 16, 2003. In both complaints, the customers claim that their service was disconnected without cause or notice. On January 14, 2004, the Commission's General Counsel sent EZ Talk a certified letter notifying the company that the Commission has not received a response to the consumer complaints, and if the Commission does not receive a response within 10 business days from the date of the letter, EZ Talk is potentially at risk of being penalized and/or having its certificate cancelled. The certified mail receipt indicates that the company received the letter on February 3, 2004, at a location in Naperville, Illinois. Apparently, the letter was forwarded from Stafford, Texas to a new mailing address in Naperville, Illinois. Subsequently, staff attempted to contact the company via telephone using the telephone numbers listed in the Master Commission Directory and listed on EZ Talk's website, however, none of the telephone numbers were working. As of the filing date of this recommendation, EZ Talk has not provided a response to the consumer complaints in apparent willful violation of Rule 25-22.032(5)(a), Florida Administrative Code, Consumer Complaints.

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.

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, the failure of EZ Talk to provide staff with written responses to the 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. 3rd DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunication companies, like EZ Talk, 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).

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285, and 364.337, Florida Statutes. Accordingly, staff recommends that the Commission should impose a penalty of \$20,000 on EZ Talk for two apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, or cancel EZ Talk's CLEC certificate and require the company to immediately cease and desist providing CLEC services in Florida, if the company fails to timely protest the Commission's Order and fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order. The amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other CLECs that have failed to respond to consumer complaints.

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Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. The docket should then be closed administratively upon receipt of the payment of the penalty or upon cancellation of the company's CLEC certificate. **(Susac)**

Staff Analysis: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. The docket should then be closed administratively upon receipt of the payment of the penalty or upon cancellation of the company's CLEC certificate.