

State of Florida



Public Service Commission  
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION CLERK

**DATE:** April 8, 2004

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

**FROM:** Division of Competitive Markets & Enforcement (M. Watts) *mw*  
 Division of Auditing & Safety (Vandiver) *W*  
 Office of the General Counsel (Rojas) *JR*

**RE:** Docket No. 040217-TC – Compliance investigation of SOBE Communications Corp. for apparent violation of Rule 25-4.019, F.A.C., Records and Reports in General.

**AGENDA:** 04/20/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\040217.RCM.DOC

Discussion of Issues

**Issue 1:** Should the Commission impose a penalty upon SOBE Communications Corp. in the amount of \$10,000 for apparent violation of Rule 25-4.019, Florida Administrative Code, Records and Reports in General, and order the company to submit the required documentation listed in Attachment A to the Division of Auditing and Safety?

**Recommendation:** Yes. (M. Watts, Vandiver, Rojas)

**Staff Analysis:** Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with the Commission's rules. Rule 25-24.505(1), Florida Administrative Code, Scope, incorporates Rule 25-4.019, Florida Administrative Code (Attachment B), by reference into rules applicable to pay telephone service

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companies. Rule 25-4.019(1), Florida Administrative Code, Records and Reports in General, states:

Each utility shall furnish to the Commission at such times and in such form as the Commission may require the results of any required tests and summaries of any required records. The utility shall also furnish the Commission with any information concerning the utility's facilities or operations which the Commission may reasonably request and require. All such data, unless otherwise specified, shall be consistent with and reconcilable with the utility's annual report to the Commission.

SOBE Communications Corp. (SOBE) is a certificated pay telephone service provider based in Aventura, Florida. The company reported to the Commission on its Regulatory Assessment Fee (RAF) Return for calendar year 2002 that it had no intrastate revenues and paid the minimum RAF of \$50.00. On September 5, 2003, staff notified SOBE, via first class mail, that the company had been randomly selected for a RAF audit of its 2002 RAF Return. Between December 1, 2003, and February 3, 2004, staff requested several times, via telephone, facsimile, first class mail, and certified mail, that SOBE provide documentation substantiating the intrastate revenues reported to the Commission on its 2002 Pay Telephone Service Provider RAF Return. The minimum documentation that SOBE was required to submit is listed in Attachment A.

Staff received signed certified mail receipts indicating that SOBE received both the December 23, 2003, certified letter requesting it contact staff concerning the audit and the February 3, 2004, certified letter requesting the documentation listed in Attachment A. As of the date of filing this recommendation, SOBE has refused to furnish staff with the requested documentation necessary to perform the RAF audit, which is in apparent violation of Rule 25-4.019, Florida Administrative Code. Therefore, staff believes that the company has been adequately notified of its obligation to provide staff with the requested documentation and has been given sufficient time to do so.

Staff believes that SOBE's failure to provide the requested documentation needed to complete the RAF audit to Commission staff is a "willful violation" of Rule 25-4.019, Florida Administrative Code, in the sense intended by Section 364.285, Florida Statutes.

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. 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, SOBE's failure to provide staff with the requested documentation needed to complete the RAF audit meets the standard for a "refusal to comply" and "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 intrastate pay telephone companies, like SOBE 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 these matters pursuant to Sections 364.183 and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other pay telephone companies in previous dockets for similar apparent violations. Therefore, staff recommends that the Commission impose a penalty upon SOBE Communications Corp. in the amount of \$10,000 for apparent violation of Rule 25-4.019, Florida Administrative Code, Records and Reports in

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General, and order the company to submit the required documentation listed in Attachment A to the Division of Auditing and Safety.

**Issue 2:** Should this docket be closed?

**Recommendation:** The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the 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 SOBE 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 penalty should be deemed assessed. If SOBE fails to pay the penalty and submit the required documentation within fourteen (14) calendar days after the issuance of the Consummating Order, Pay Telephone Certificate No. 7601 should be cancelled and the company should be required to immediately cease and desist providing pay telephone services in Florida. This docket should be closed administratively upon either the receipt of the payment of the penalty and the required documentation, or upon cancellation of Pay Telephone Certificate No. 7601. **(Rojas)**

**Staff Analysis:** The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the 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 SOBE 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 penalty should be deemed assessed. If SOBE fails to pay the penalty and submit the required documentation within fourteen (14) calendar days after the issuance of the Consummating Order, Pay Telephone Certificate No. 7601 should be cancelled and the company should be required to immediately cease and desist providing pay telephone services in Florida. This docket should be closed administratively upon either the receipt of the payment of the penalty and the required documentation, or upon cancellation of Pay Telephone Certificate No. 7601.

**SOBE Communications Corp.  
RAF Compliance Audit 03-245-3-3  
Minimum Documentation Required**

**REVENUES**

1. 2002 General ledger indicating total telecommunications revenues.

OR

2. Cash deposit slips indicating 2002 revenues.

OR

3. Other financial evidence detailing source of revenue and completeness of revenue, (i.e. receipt books, billing statements, etc.)

**EXPENSES**

1. Invoices from other telecommunication companies indicating amounts paid for the use of the intrastate telecommunications network.

**25-4.019 Records and Reports in General.**

(1) Each utility shall furnish to the Commission at such times and in such form as the Commission may require, the results of any required tests and summaries of any required records. The utility shall also furnish the Commission with any information concerning the utility's facilities or operations which the Commission may reasonably request and require. All such data, unless otherwise specified, shall be consistent with and reconcilable with the utility's annual report to the Commission.

(2) Where a telephone company is operated with another enterprise, records must be separated in such manner that the results of the telephone operation may be determined at any time.

(3) Upon notification to the utility, members may, at reasonable times, make personal visits to the company offices or other places of business within or without the State and may inspect any accounts, books, records, and papers of the company which may be necessary in the discharge of Commission duties. Commission staff members will present Commission identification cards as the written authority to inspect records. During such visits the company shall provide the staff member(s) with adequate and comfortable working and filing space, consistent with the prevailing conditions and climate, and comparable with the accommodations provided the company's outside auditors.

*Specific Authority 350.127(2) FS. Law Implemented 364.18, 364.183, 364.386 FS. History—Revised 12-1-68, Amended 5-4-81, Formerly 25-4.19.*