

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Optrix
Telecommunication, Inc. for apparent violation
of Sections 364.02 and 364.04, Florida
Statutes.

DOCKET NO. 031077-TI
ORDER NO. PSC-04-0116-PAA-TI
ISSUED: January 30, 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 ON OPTRIX TELECOMMUNICATIONS, INC. FOR
VIOLATION OF SECTIONS 364.02 AND 364.04, FLORIDA STATUTES

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.

After receiving a complaint, our staff determined that Optrix Telecommunication, Inc. (O.T.I.) was providing intrastate interexchange telecommunications services within the state and had not obtained a certificate. Our staff then notified O.T.I., via certified mail, of its requirement to obtain a certificate; however, the letter was returned by the United States Post Office. The postal markings on the envelope indicated that the company moved and left no forwarding address. Our staff later obtained another address for O.T.I. and mailed a second letter to the company. The second letter was mailed after the passage of the Tele-Competition Innovation and Infrastructure Enhancement Act (Tele-Competition Act) and informed the company of its requirement to file a tariff and to provide this Commission with the company's current contact information. After not receiving a response from the company, our staff mailed a third certified letter to the company informing the company again of its requirement to file a tariff and to provide this Commission with the company's current contact information.

Our staff later received an email response from Mr. Gary Lau of O.T.I. According to Mr. Lau, O.T.I. was no longer providing prepaid calling services in Florida. The response also stated that Mr. Lau's business partner had tried to contact the customer, but was unsuccessful. When

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our staff attempted to reply to Mr. Lau's email response, the email was returned because of an invalid email address. Our staff later located a home telephone number for Mr. Lau and attempted to contact him, but was unsuccessful. As a result, our staff mailed a fourth letter to Mr. Lau, requesting that he provide a telephone number where he could be reached to discuss the matter further.

Mr. Lau has not responded and O.T.I. has not filed a tariff or provided the Commission with the company's current contact information, which are violations of Sections 364.02(13) and 364.04, Florida Statutes. This Commission finds that the company has been adequately notified of its requirements and has been provided with sufficient time to meet those requirements. Section 364.02(13), Florida Statutes, requires each IXC to provide this Commission with information to contact and communicate with the company. Section 364.02(13), Florida Statutes, states in pertinent part:

Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a), and (d), 364.285, 364.163, 364.501, 364.603, and 364.604, shall provide the commission with such current information as the commission deems necessary to contact and communicate with the company....

Section 364.04(1), Florida Statutes, states:

Upon order of the commission, every telecommunications company shall file with the commission, and shall print and keep open to public inspection, schedules showing the rates, tolls, rentals, contracts, and charges that a company for service to be performed within the state.

We find that O.T.I.'s failure to provide this Commission with current contact information and file a tariff are "willful violations" of Sections 364.02 (13) and 364.04, Florida Statutes, 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, 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. 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 O.T.I. to provide this Commission with current contact information and file a tariff meets the standard for a “refusal to comply” and a “willful violation” as contemplated by the Legislature when enacting Section 364.285, Florida Statutes.

Nor could O.T.I. claim that it did not know that it had the duty to provide the Commission with current contact information and file a tariff. “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 O.T.I. are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

This Commission finds that O.T.I. has, by its actions and inactions, willfully violated Sections 364.02(13) and 364.04, Florida Statutes, and imposes a \$25,000 penalty on the company to be paid to the Florida Public Service Commission.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Optrix Telecommunication, Inc. shall be required to pay a \$25,000 penalty for violations of Sections 364.02(13) and 364.04, Florida Statutes. It is further

ORDERED that Optrix Telecommunication, Inc. shall be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida upon issuance of the Consummating Order until the company pays the penalty, files a tariff and provides this Commission with current contact information. It is further

ORDERED that if this Commission's Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty should be referred to the Department of Financial Services. It is further

ORDERED that this docket should be closed administratively upon receipt of 1)the company's tariff, and 2)the company's current contact information, and 3)the 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 30th day of January, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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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 February 20, 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.