

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of SOBE
Communications Corp. for apparent violation
of Rule 25-4.019, F.A.C., Records and Reports
in General.

DOCKET NO. 040217-TC
ORDER NO. PSC-04-0487-PAA-TC
ISSUED: May 11, 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, OR CANCELING
INTEREXCHANGE TELECOMMUNICATIONS CERTIFICATE

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.

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

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

SOBE Communications Corp. (SOBE) is a certificated pay telephone service provider based in Aventura, Florida. The company reported to this 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, our 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, our staff requested several times, via telephone, facsimile, first class mail, and certified mail, that SOBE provide documentation substantiating the intrastate revenues reported to this Commission on its 2002 Pay Telephone Service Provider RAF Return.

Therefore, we find that the company has been adequately notified of its obligation to provide our staff with the requested documentation and has been given sufficient time to do so.

Further, this Commission finds that SOBE's failure to provide the requested documentation needed to complete the RAF audit 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, 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.

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, SOBE's failure to provide our 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. 3rd 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).

This 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 we have previously imposed upon other pay telephone companies in dockets for similar apparent violations. Therefore, this Commission imposes 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 referenced in the Staff recommendation pursuant to this docket.

This Order will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this 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 shall be deemed stipulated. If SOBE fails to timely file a protest and to request a Section 120.57, Florida Statutes hearing, the facts shall 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 shall 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.

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Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that SOBE Communications Corp. is hereby assessed a penalty of \$10,000 for apparent violation of Rule 25-4.019, Florida Administrative Code. 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

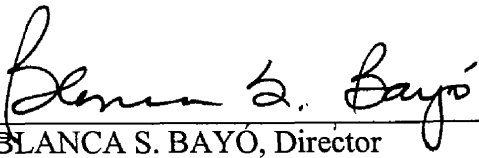
ORDERED that should SOBE Communications Corp. fail to timely protest this Order, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that any protest must identify with specificity the issues in dispute. In accordance with Section 120.80(13)(b), Florida Statutes, issues not in dispute will be deemed stipulated. It is further

ORDERED that should SOBE Communications Corp. fail to timely protest this Order, pay the \$10,000 penalty and submit the requested documentation within fourteen calendar days after the issuance of the Consummating Order, Pay Telephone Certificate No. 7601 shall be cancelled and the company shall be required to immediately cease and desist providing pay telephone services in Florida. The company shall be required to cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that if this Order is not timely protested, this Docket shall be closed administratively upon: 1) receipt of the company's tariff; 2) receipt of the company's current contact information; and 3) receipt of the \$10,000 penalty payment.

By ORDER of the Florida Public Service Commission this 11th day of May, 2004.



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

(S E A L)

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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 June 1, 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.