

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of U.S. Paytel Optima, L.L.C. for apparent violation of Rule 25-4.019, F.A.C., Records and Reports in General.	DOCKET NO. 040215-TC ORDER NO. PSC-04-0496-PAA-TC ISSUED: May 12, 2004
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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 FINE, OR CANCELING PAY TELEPHONE 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.

U.S. Paytel Optima, L.L.C. (U.S. Paytel) is a certificated pay telephone service provider based in Omaha, Nebraska that provides pay telephone services in Florida. The company

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reported to this Commission a gross intrastate revenue of \$201,246.47 on its Regulatory Assessment Fee (RAF) Return for the calendar year 2002 and paid a RAF in the amount of \$168.94. On September 5, 2003, our staff notified U.S. Paytel, 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 U.S. Paytel provide documentation substantiating the intrastate revenues reported to this Commission on its 2002 Pay Telephone Service Provider RAF Return.

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.

We further find that U.S. Paytel'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, 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 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, U.S. Paytel'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 violations" 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 interexchange telecommunication companies, like U.S. Paytel 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. Therefore, we hereby impose a penalty upon U.S. Paytel Optima, L.L.C. in the amount of \$10,000, for its 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 the staff recommendation pursuant to this docket, to the Division of Auditing and Safety.

This Order 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 U.S. Paytel 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 U.S. Paytel fails to pay the penalty and submit the required documentation within fourteen (14) calendar days after the issuance of the Consummating Order, the company shall be required to immediately cease and desist providing pay telephone services in Florida and Pay Telephone Certificate No. 5860 shall be cancelled. 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. 5860.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that U.S. Paytel Optima, L.L.C. is hereby assessed a penalty of \$10,000 for apparent violation of Sections 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 U.S. Paytel Optima, L.L.C. 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 U.S. Paytel Optima, L.L.C. fail to timely protest this Order, payment of the \$10,000 penalty must be received within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that if this Order is not protested and the penalty is not received and the required documentation submitted within fourteen calendar days of the issuance of the Consummating Order, the company shall be required to cease and desist providing pay telephone services in Florida. It is further


ORDERED that if this Order is not timely protested, 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. 5860.

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By ORDER of the Florida Public Service Commission this 12th day of May, 2004.

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

By:



Kay Flynn, Chief
Bureau of Records

(S E A L)

JPR

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

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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 2, 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.