

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Optical Telephone Corporation for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.	DOCKET NO. 040289-TI ORDER NO. PSC-04-1036-PAA-TI ISSUED: October 25, 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 PENALTIES

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.

Case Background

Optical Telephone Corporation (OTC) is a switchless reseller of interexchange telecommunications services headquartered in Huntsville, Alabama. OTC's interexchange company (IXC) registration and tariff became effective on September 14, 2001.

From September 28, 2001, through January 1, 2003, this Commission received 234 slamming complaints against OTC from Florida consumers. In a meeting with our staff on June 27, 2002, OTC indicated it would implement the necessary changes to its telemarketing and verification processes to eliminate slamming. The company appears to have taken some action to reduce the number of slamming complaints received since that time; however, recent complaints reference telemarketing and verification practices similar to those the company was utilizing prior to discussions with our staff in June of 2002.

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From January 3, 2003, through March 12, 2004, this Commission received forty (40) slamming complaints against OTC from Florida consumers. In its initial evaluation of the slamming complaints, our staff determined that in five cases, listed in Table 1, OTC failed to provide proof in the form of a TPV recording that the customer authorized OTC to change service providers in accordance with Rule 25-4.118(1) and (2), F.A.C.

CATS Request Number	Customer Name
511035	Frank Ferrer
511708	Antonio Coro
538658	Librada Barrero
544491	Robert Marco
547960	Alejandro Dumas

In four cases, listed in Table 2, the TPVs submitted by OTC did not contain all the specific verification information required by Rule 25-4.118(2)(c), F.A.C., listed in subsection (3)(a) 1. through 5. Our staff determined that the TPVs submitted by OTC were missing the following statements and information:

- The statement that the customer's change request will apply only to the number on the request and there must only be one presubscribed local, one presubscribed local toll, and one presubscribed toll provider for each number.
- The statement that the Local Exchange Carrier (LEC) may charge a fee for each provider change.
- Three of the four TPVs submitted were missing the billing name and telephone number.

Table 2

CATS Request Number	Customer Name
510088	Gayle Smith
513391	Julissa Rosa
554215	Oscar & Ana Dominguez
563069	Jose Cascante

A recommendation was filed in this docket on May 6, 2004; it was deferred from the May 18, 2004 Agenda Conference, to provide the company with an opportunity to respond to the apparent slamming infractions. On May 14, 2004, our staff and a representative from OTC met to discuss the issues in the docket. As a result, on June 10, 2004, through its legal counsel, OTC provided our staff with a written explanation of the forty slamming complaints received from January 3, 2003, through March 12, 2004. OTC explained that most of the alleged slams

occurred in May 2002 and submits that the company has done nothing to warrant the allegations contained in our staff's May 6, 2004 recommendation. That recommendation cited thirty-four (34) apparent slamming complaints.

Upon review of the information provide by OTC and the preferred interexchange carrier (PIC) change histories provided by the customers' local service providers, our staff determined that nine of the slamming instances occurred after July 2002. Our staff's previous investigation included all complaints with slamming instances occurring prior to July 2002. In addition, fourteen of the forty complaints received since January 3, 2003, appear to be cramming violations as opposed to slamming violations.

In its letter dated August 5, 2004, our staff provided OTC with its findings and requested that the company provide staff with an explanation for the apparent cramming instances and schedule a meeting to discuss a possible resolution to this docket. OTC's legal counsel has been in contact with our staff, but the company has not responded to our staff's request. In its letter dated September 10, 2004, our staff informed OTC's legal counsel that it would file a recommendation in this docket if the company did not schedule a meeting by September 16, 2004, to discuss a possible settlement. OTC's legal counsel informed our staff that a monetary settlement might not be possible due to the company's financial situation.

Analysis

Based on the aforementioned, we find that OTC's failure to comply with the requirements of Rule 25-4.118, F.A.C. is a "willful violation" of Sections 364.603, 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.

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, it is commonly understood that a “willful violation of law” is an act of purposefulness. As the First District Court of Appeal stated, relying on Black’s Law Dictionary:

An act or omission is ‘willfully’ done, if done voluntarily and intentionally and within 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 OTC to comply with Rule 25-4.118, F.A.C., meets the standard for 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 intrastate interexchange telecommunication companies, like OTC, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Therefore, we find it appropriate to penalize OTC \$10,000 per apparent violation, for a total of \$90,000, for 9 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. This Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.285 and 364.603, Florida Statutes

In addition, from January 3, 2003, through March 12, 2004, this Commission received forty (40) slamming complaints against OTC from Florida consumers. Upon review of the slamming complaints, the information provided by OTC in its letter dated June 10, 2004, and the preferred interexchange carrier (PIC) change histories provided by the customers’ local service providers, our staff determined 14 of the slamming complaints to be violations of Section 364.604, Florida Statutes. Based on the PIC histories, the customers’ long distance service does not appear to have been switched, but the customers’ were billed by OTC for services and/or calls they did not order or receive, a practice know as cramming. Most of the cramming instances occurred in March and April 2003 and the customers were billed in the amount of \$20.77 for a Long Distance Connection Fee and a Monthly Service Fee, plus applicable taxes.

In a letter dated August 5, 2004, our staff provided OTC with its findings and requested that the company provide an explanation for the apparent cramming instances and schedule a

meeting to discuss a possible resolution to this docket. OTC's legal counsel has been in contact with our staff, but the company has not responded to staff's request.

Section 364.604(2), Florida Statutes states, "A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer."

Based on the aforementioned and the legal basis discussed above, we find that OTC's failure to comply with the requirements of Section 364.604(2), Florida Statutes, is a "willful violation" 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.

Therefore, we find it appropriate to penalize OTC \$10,000 per apparent violation, for a total of \$140,000, for 14 apparent violations of Section 364.604(2), Florida Statutes. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285, Florida Statutes.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that Optical Telephone Corporation shall be penalized \$10,000 per apparent violation, for a total of \$90,000, for nine (9) apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. It is further,

ORDERED that Optical Telephone Corporation shall be penalized \$10,000 per apparent violation, for a total of \$140,000, for fourteen (14) apparent violations of Section 364.604(2), Florida Statutes.

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 Optical Telephone Corporation, Inc. 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

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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 Optical Telephone Corporation, Inc. fail to timely protest this Order, payment of the \$230,000 in penalties 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 penalties are not received within fourteen calendar days of the issuance of the Consummating Order, the company's tariff shall be cancelled, Registration TJ551 removed from the Commission's registry and 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 \$230,000 penalties payment; or 2) upon cancellation of Registration No. TJ551 with its associated tariff. It is further

ORDERED that if OTC subsequently decides to reapply for registration as an intrastate interexchange company, it shall be required to first pay any outstanding penalties assessed by this Commission. Furthermore any action by the Commission, including but not limited to any settlement, should not preempt, preclude, or resolve any matters under review by any other Florida Agencies or Departments.

By ORDER of the Florida Public Service Commission this 25th day of October, 2004.



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

(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 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 November 15, 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.