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State of Florida



# Public Service Commission

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

## -M-E-M-O-R-A-N-D-U-M-

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RECORDS AND REPORTING

**DATE:** March 22, 2001

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (BANKS) *FRB ML*  
DIVISION OF COMPETITIVE SERVICES (BUYS) *BB*

**RE:** DOCKET NO. 010245-TI - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST OLS, INC. FOR APPARENT VIOLATIONS OF RULE 25-4.118, F.A.C., LOCAL, LOCAL TOLL, OR TOLL PROVIDER SELECTION, AND FINE ASSESSMENT FOR VIOLATION OF RULE 25-4.0161, F.A.C., REGULATORY ASSESSMENT FEES; TELECOMMUNICATIONS COMPANIES

**AGENDA:** 04/03/01 - REGULAR AGENDA - ISSUE 1 - SHOW CAUSE - ISSUE 2 - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\010245.RCM

### CASE BACKGROUND

- October 7, 1997 - OLS, Inc. (OLS) was granted Certificate No. 5224 to provide interexchange telecommunications services within the State of Florida.
- January 21, 2000 - OLS reported intrastate operating revenue of \$348,139.00 for the period 01/01/1999 through 12/31/1999.
- September 28, 2000 - Staff determined there were twenty-two (22) complaints filed with the Florida Public Service Commission (Commission) against OLS that have been closed as apparent unauthorized carrier change (slamming) infractions.

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FPSC-RECORDS/REPORTING

- October 11, 2000 - Staff sent a certified letter to OLS requesting the company investigate the reason(s) for the slamming violations and initiate corrective actions to eliminate the apparent slamming problem. Staff requested that OLS submit a response detailing its plan to correct the problems.
- November 1, 2000 - Staff received OLS' initial response to staff's inquiry. OLS attributed the reason for the slamming instances to telemarketing and provided staff with its plan to reduce the number of slamming complaints.
- November 6, 2000 - Staff requested that OLS provide further explanation of the method it will use to eliminate slamming instances in the future, and answer questions pertaining to its telemarketing practices.
- November 22, 2000 - OLS submitted its response to staff's second inquiry in which it stated that, "OLS believes that the corrective actions it has taken will result in a decrease of complaints filed against OLS."
- December 12, 2001 - The Division of Administration mailed the 2000 Regulatory Assessment Fee (RAF) notice. Payment was due by January 30, 2001.
- February 16, 2001 - Staff determined that the number of slamming complaints against OLS has increased significantly since December 1 2000. Also, an additional twenty-one (21) complaints have been closed as apparent slamming violations since September 28, 2000.
- February 19, 2001 - Staff opened this docket to initiate show cause proceedings against OLS for apparent violation of Rule 24-4.118, Florida Administrative Code, Toll, Local Toll, or Toll Provider Selection.
- February 21, 2001 - The Division of Administration mailed a delinquent notice for the 2000 Regulatory Assessment Fees. RAF payments are overdue. As of March 20, 2001, OLS has not paid its RAFS for the calendar year 2000.

**As of March 09, 2001:**

1. The Commission has received 282 complaints against OLS since July 15, 1999, initially categorized as slamming. One-hundred and eighty-three (183) of those slamming complaints have been received since December 1, 2000.
2. Staff has closed 49 of the slamming complaints as apparent rule violations.
3. There are 132 slamming complaints still open pending a response from OLS and staff analysis.

The Florida Public Service Commission is vested with jurisdiction over these matters pursuant to Sections 364.01, 364.183, and 364.285, 364.336, 364.603, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

**ISSUE 1:** Should the Commission order OLS to show cause why it should not be fined \$10,000 per apparent violation, for a total of \$490,000, or have Certificate No. 5224 canceled for apparent violations of Rule 25-4.118, Florida Administrative Code, Toll, Local Toll, or Toll Provider Selection?

**RECOMMENDATION:** Yes. The Commission should order OLS to show cause in writing within 21 days of the Commission's order why it should not be fined \$10,000 per violation, totaling \$490,000, for apparent violations of Rule 25-4.118, Florida Administrative Code, Toll, Local Toll, or Toll Provider Selection. The company's response should contain specific allegations of fact and law. If OLS fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts shall be deemed admitted, the right to a hearing waived, and the fine shall be deemed assessed. If OLS pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate No. 5224 shall be canceled administratively. **(BANKS, BUYS)**

**STAFF ANALYSIS:** On September 28, 2000, staff determined that twenty-two (22) slamming complaints against OLS have been closed as rule violations. Staff reviewed the case files of the slamming complaints and concluded that all of the violations result from OLS's failure to provide the appropriate documentation to prove that the service provider changes were authorized by the customer pursuant to Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. Under the rule, OLS is required to have authorization from the customer to change the customer's service provider, and the company must maintain the authorization, either a Letter of Agency (LOA), or Third Party Verification (TPV), for a period of one year.

In these cases, OLS used telemarketers to solicit its services and recorded the verification process as proof of the customer's authorization for the company to change providers. The copies of the recorded verification process that OLS sent to the Commission's staff did not contain the necessary information for verification and/or authorization as required by Rule 25-4.118(2)(C), Florida Administrative Code. Under this rule, an interexchange carrier shall submit a change request only if it has first certified to the LEC that a firm that is independent and unaffiliated with the provider claiming the subscriber has verified the customer's

requested change by obtaining, (1) the customer's consent to record the requested change or the customer has been notified that the call will be recorded, and (2) an audio recording of the following information:

1. Customer's billing name, address, and each telephone number to be changed;
2. Statement clearly identifying the certificated name of the provider and the service to which the customer wishes to subscribe, whether or not it uses the facilities of another company;
3. Statement that the person requesting the change is authorized to request the change;
4. 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;
5. Statement that the LEC may charge a fee for each provider change.

Subsequently, staff sent OLS a certified letter requesting that the company investigate the apparent slamming violations and provide staff with a reply explaining the reason for the slamming complaints and detailing the company's plan to eliminate slamming instances in the future. OLS responded through a letter signed by Mr. Roger Canuel, dated October 31, 2000. In his letter, Mr. Canuel stated the following:

- ▶ The slamming instances were a result of telemarketing firms contracted by OLS to market its services.
- ▶ OLS has recently taken proactive steps in an effort to protect potential customers.
- ▶ OLS has created a program where the company monitors telemarketing firms from the OLS corporate office.
- ▶ OLS is currently reviewing the verification process of the third party verifiers whose services OLS uses and will implement the necessary changes to ensure that it is in full compliance of all rules and regulations.

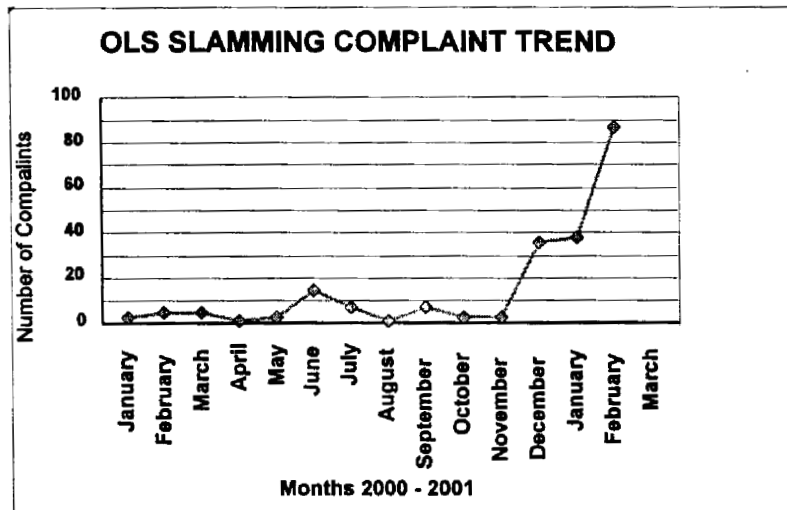
In a subsequent letter dated November 6, 2000, staff requested that Mr. Canuel elaborate on the methods OLS will use to eliminate slamming instances in the future, and provide staff with the results of the company's review of the TPV process used by OLS.

Mr. Canuel responded on November 21, 2000, and included the following statements in his letter:

- ▶ As of two weeks ago, OLS brought its telemarketing process "in-house" in an effort to have more control over the process.
- ▶ The OLS Monitoring Department is located at the OLS Corporate office. Its sole function is to monitor the telemarketing companies OLS has contracted with. The members of this unit are able to randomly "dial-into" individual telemarketing calls and listen to these calls.
- ▶ OLS has directed the independent TPV companies it uses to change their procedures to ensure that they are in full compliance with Florida rules and regulations.
- ▶ OLS believes that the corrective actions it has taken will result in a decrease of complaints filed against OLS; we are committed to total consumer satisfaction.

Staff sent OLS a third letter, dated December 4, 2000, confirming receipt of Mr. Canuel's second response and informing OLS that further action may be taken should the corrective actions implemented by OLS fail to significantly reduce unauthorized carrier changes in the future.

On February 16, 2001, staff determined that the number of slamming complaints filed against OLS increased significantly during the months of December, January, and February (SEE THE FOLLOWING CHART), and an additional twenty-one slamming complaints have been closed as rule violations.



Furthermore, staff confirmed that a significant number of the consumers who filed a complaint during the past three months had been switched from their preferred carrier to OLS after December 1, 2000. Apparently, the corrective actions taken by OLS did not reduce the number of slamming complaints filed against the company, nor did they resolve the problem with their telemarketers. Consequently, staff opened this docket to initiate show cause proceedings.

Staff's investigation into OLS' telemarketing methods has revealed some extremely egregious conduct. Staff has personally called and talked to fifty of the people who have recently filed a slamming complaint against OLS. A significant number of the fifty complainants reported that the telemarketers who called them misrepresented themselves as Verizon representatives.

After talking to some of the complainants and reviewing the cases, staff has learned that OLS telemarketers apparently have several fraudulent approaches they employ to persuade consumers to change providers to OLS and go through its verification process. First, the telemarketer may tell the consumer that due to Verizon's merger with GTE they will not have a long distance carrier and need to choose a new one. Second, the telemarketer may tell the consumer that they are with Verizon and need to verify the customer's information as a result of merging with GTE. Third, some complainants have stated that they were led to believe that OLS (OLS is an acronym for On Line Services) was a long distance program offered by Verizon.

Rule 25-4.118(10), Florida Administrative Code, states, "During telemarketing and verification, no misleading or deceptive references shall be made while soliciting for subscribers." Staff contends that in most of these complaints, OLS has obtained the customers' authorization to change their long distance carrier using deceptive practices and are therefore unauthorized carrier changes.

Furthermore, staff has determined that a large percentage of the people filing complaints are seniors living in Verizon's local exchange territory. Forty-five of the fifty complainants staff has contacted by phone stated that they were over the age of sixty. Staff has also confirmed that ninety-seven percent of the complaints the Commission has received against OLS are from consumers located in Verizon's local exchange territory.

Based on these statistics, it appears that OLS is actively targeting seniors that live in Verizon's local exchange territory. Staff believes that OLS has targeted this demographic group of consumers anticipating that they may be easily confused about the implications of GTE's merger with Verizon. It appears that OLS has apparently taken advantage of this situation and developed a deceptive marketing scheme to persuade elderly customers to change their long distance carrier to OLS.

Staff believes the apparent violation of Commission Rule 25-4.118, Florida Administrative Code, has been "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule." Thus, any intentional act, such as OLS's conduct at issue here, would meet the standard for a "willful violation."

By Section 364.285, 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 offense, 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. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t 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).

Based on the aforementioned, staff recommends that the Commission should order OLS to show cause in writing within 21 days of the issuance of the Commission's order why it should not be fined \$10,000 per violation, totaling \$490,000, for apparent violations of Rule 25-4.118, Florida Administrative Code, Toll, Local Toll, or Toll Provider Selection. The company's response should contain specific allegations of fact and law. If OLS fails to respond to the show cause order or request a hearing pursuant to Section 120.57, Florida Statutes, within the 21-day response period, the facts shall be deemed admitted, the right to a hearing waived, and the fine shall be deemed assessed. If OLS pays the fine, it should be remitted by the Commission to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida



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Statutes. If the company fails to respond to the Order to Show Cause, and the fine is not paid within ten business days after the expiration of the show cause response period, Certificate No. 5224 shall be canceled administratively.

**ISSUE 2:** Should the Commission fine OLS \$500 for apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies?

**RECOMMENDATION:** Yes. The Commission should impose a \$500 fine for failure to comply with Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies. The fine should be remitted within ten business days after the issuance of the Consummating Order and forwarded to the Office of the Comptroller for deposit in the State Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested within 21 days and the fine, statutory penalty, and interest charges, are not received by the Commission within ten business days after the issuance of the Consummating Order, they should be forwarded to the Office of the Comptroller for collection. (**BANKS, BUYS**)

**STAFF ANALYSIS:** Rule 25-4.0161, Florida Administrative Code, which implements Section 364.336, Florida Statutes, requires the payment of regulatory assessment fees by January 30 of the subsequent year for telecommunications companies, and provides for penalties and interest as outlined in Section 350.113, Florida Statutes, for any delinquent amounts.

The Division of Administration's records show that OLS has not paid its 2000 RAF, plus statutory penalty and interest charges. RAFs for the calendar year 2000 were due by January 30, 2001. Consequently, it appears that OLS has not complied with Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies.

Staff believes that OLS' apparent violation of Rule 25-4.0161, Florida Administrative Code, has been "willful" in the sense intended by Section 364.285, Florida Statutes, and pursuant to Section 364.285, Florida Statutes, the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not

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more than \$25,000 for each offense, if such entity is found to have refused to comply with any lawful rule of the Commission.

Accordingly, staff recommends that the Commission impose a \$500 fine for failure to comply with Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies. The fine should be remitted within ten business days after the issuance of the Consummating Order and forwarded to the Office of the Comptroller for deposit in the State Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested within 21 days and the fine, statutory penalty, and interest charges, are not received by the Commission within ten business days after the issuance of the Consummating Order, they should be forwarded to the Office of the Comptroller for collection.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. If staff's recommendation in Issue 1 is approved, OLS will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed or have its certificate canceled. If OLS timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceedings and to process any protest to Issue 2 that may be filed within 21 days of the issuance of the Order by a person whose substantial interests are affected by the Commission's Proposed Agency Action.

If OLS fails to respond to the Commission's show cause order and the fine is not received within ten business days after the expiration of the 21-day show cause response period, the company's certificate should be canceled administratively. If no timely protest is filed in response to the Proposed Agency Action in Issue 2, the fine imposed in Issue 2, including statutory penalty and interest charges, should be forwarded to the Comptroller's Office for Collection. This docket may then be closed administratively.

**(BANKS)**

**STAFF ANALYSIS:** If staff's recommendation in Issue 1 is approved, OLS will have 21 days from the issuance of the Commission's show cause order to respond in writing why it should not be fined in the amount proposed or have its certificate canceled. If OLS timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceedings and to process any protest to Issue 2 that may be filed within 21 days of the issuance of the Order by a person whose substantial interests are affected by the Commission's Proposed Agency Action.

If OLS fails to respond to the Commission's show cause order and the fine is not received within ten business days after the expiration of the 21-day show cause response period, the company's certificate should be canceled administratively. If no timely protest is filed in response to the Proposed Agency Action in Issue 2, the fine imposed in Issue 2, including statutory penalty and interest charges, should be forwarded to the Comptroller's Office for Collection. This docket may then be closed administratively.