

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of Kevin M. Brown d/b/a Miracle Communications for apparent violation of Rules 25-22.032, F.A.C., Customer Complaints, and 25-24.835, F.A.C., Rules Incorporated.

DOCKET NO. 031106-TX
ORDER NO. PSC-04-0296-PAA-TX
ISSUED: March 17, 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 FOR VIOLATIONS OF RULE 25-22.032(5)(a) AND RULE 25-24.480

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.

This Commission received a customer complaint filed against Kevin M. Brown d/b/a Miracle Communications. Our staff made several attempts to obtain a response from the company. Miracle Communications has yet to respond to the customer complaint, which is in apparent violation of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints.

Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, states:

The staff member will notify the company of the complaint and request a response. The company shall provide its response to the complaint within fifteen (15) working days. The response shall explain the company's actions in the disputed matter and the extent to which those actions were consistent with applicable statutes and regulations. The response shall also describe all attempts to resolve the customer's complaint.

DOCUMENT NUMBER-DATE

03564 MAR 17 8

FPSC-COMMISSION CLERK

We find that Miracle Communications's failure to provide the required response to the customer's complaint is a "willful violation" of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, 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, 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 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, the failure of Miracle Communications to provide our staff a written response to the customer's complaint within fifteen working days meets the standard for a "refusal to comply" and 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 telecommunication companies, like Miracle Communications, by virtue of their Certificate of Public Convenience and Necessity, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Thus, this Commission finds that Miracle Communications has, by its actions and inactions, willfully violated Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, and impose a \$10,000 penalty on the company to be paid to the Florida Public Service Commission.

Rule 25-24.480, Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by reference into Rule 25-24.835, Florida Administrative Code, Rules Incorporated, requires that a company update its contact information with the Commission within 10 days of a change. On September 30, 2003, when our staff attempted to contact Miracle Communications using the contact information in the Master Commission Directory, they found that the telephone numbers listed were no longer in service. To date, the company has not updated its contact information with this Commission.

Based on the foregoing, we find that Miracle Communication's apparent violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated, has been "willful" in the sense intended by Sections 364.285, Florida Statutes, and pursuant to Sections 364.285, 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 offense, if such entity is found to have refused to comply with any lawful rule of this Commission.

Accordingly, we find that Miracle Communications has, by its actions and inactions, willfully violated Rule 25-24.835, Florida Administrative Code, Rules Incorporated, and do hereby impose a penalty of \$500 upon the company to be paid to the Florida Public Service Commission. If Miracle Communications fails to protest this Commission's Order and fails to pay the proposed penalty within 14 days of the issuance of a Consummating Order, then we hold that the company's certificate shall be canceled, and it shall be required to immediately cease and desist providing competitive local exchange telecommunications services in Florida.

It is therefore

ORDERED that the Florida Public Service Commission imposes a \$10,000 penalty on Kevin M. Brown d/b/a Miracle Communications to be paid to the Florida Public Service Commission within 14 days of the issuance of the Consummating Order. It is further

ORDER NO. PSC-04-0296-PAA-TX
DOCKET NO. 031106-TX
PAGE 4

ORDERED that the Florida Public Service Commission imposes a \$500 penalty on Kevin M. Brown d/b/a Miracle Communications to be paid to the Florida Public Service Commission within 14 days of the issuance of the Consummating Order. It is further

ORDERED that if Kevin M. Brown d/b/a Miracle Communications fails to timely protest this Commission's Order and fails to pay the proposed penalties, then the company's certificate shall be canceled and the company shall be required to immediately cease and desist providing competitive local exchange telecommunications services in Florida. 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 this docket shall be closed administratively upon receipt of the payment of the penalties or the cancellation of Certificate No. 7254.

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 17th day of March, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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 April 7, 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.