

State of Florida



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

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COMMISSION CLERK

DATE: April 8, 2004
TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)
FROM: Division of Competitive Markets & Enforcement (Curry) *KLC*
Division of Auditing & Safety (Vandiver) *AV*
Office of the General Counsel (Rojas) *JR*
RE: Docket No. 040215-TC – 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.
AGENDA: 04/20/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate
CRITICAL DATES: None
SPECIAL INSTRUCTIONS: None
FILE NAME AND LOCATION: S:\PSC\CMP\WP\040215.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission 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 Attachment A to the Division of Auditing and Safety?

Recommendation: Yes. (Curry, Vandiver, Rojas)

Staff Analysis: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty or cancel a certificate if a company refuses to comply with the Commission's rules. Rule 25-24.505(1), Florida Administrative Code, Scope, incorporates Rule 25-4.019, Florida Administrative Code (Attachment B), by reference into rules applicable to pay telephone service companies. Rule 25-4.019(1), Florida Administrative Code, Records and Reports in General, states:

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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 reported to the 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, 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, 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 the Commission on its 2002 Pay Telephone Service Provider RAF Return. The minimum documentation that U.S. Paytel was required to submit is listed in Attachment A.

According to the Facsimile Transmission Verification Report, the facsimile that was faxed to U.S. Paytel requesting the documentation listed in Attachment A was transmitted successfully. Staff also received a signed green certified mail receipt indicating that the certified letter that was sent to the company requesting the documentation was also received. Staff believes that the company has been adequately notified of its obligation to provide staff with the requested documentation and has been given sufficient time to do. As of the date of filing this recommendation, U.S. Paytel has refused to furnish staff with the requested documentation necessary to perform the RAF audit.

Staff believes 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, 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, 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 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).

The 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 previously imposed by the Commission upon other pay telephone companies in previous dockets for similar apparent violations. Therefore, staff recommends that the Commission 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 Attachment A to the Division of Auditing and Safety.

Issue 2: Should this docket be closed?

Recommendation: The Order issued from this recommendation 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 should 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 should 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. **(Rojas)**

Staff Analysis: The Order issued from this recommendation 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 should 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 should 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.

**U.S. Paytel Optima, L.L.C.
RAF Compliance Audit 03-246-2-2
Minimum Documentation Required**

REVENUES

1. 2002 General ledger indicating total telecommunications revenues of \$214,091.99.
2. Work sheets indicating allocation between interstate and intrastate.
3. Description of basis for allocation between interstate and intrastate expense.

EXPENSES

1. Invoices from other telecommunication companies indicating amounts paid for the use of the intrastate telecommunications network. The RAF return indicates \$88,618.91.
2. Work sheets indicating total invoices and allocation between interstate and intrastate.
3. Description of basis for allocation between interstate and intrastate expense.

25-4.019 Records and Reports in General.

(1) 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.

(2) Where a telephone company is operated with another enterprise, records must be separated in such manner that the results of the telephone operation may be determined at any time.

(3) Upon notification to the utility, members may, at reasonable times, make personal visits to the company offices or other places of business within or without the State and may inspect any accounts, books, records, and papers of the company which may be necessary in the discharge of Commission duties. Commission staff members will present Commission identification cards as the written authority to inspect records. During such visits the company shall provide the staff member(s) with adequate and comfortable working and filing space, consistent with the prevailing conditions and climate, and comparable with the accommodations provided the company's outside auditors.

Specific Authority 350.127(2) FS. Law Implemented 364.18, 364.183, 364.386 FS. History—Revised 12-1-68, Amended 5-4-81, Formerly 25-4.19.