

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of EZ Talk Communications, L.L.C. for apparent violation of Rule 25-22.032, F.A.C., Consumer Complaints.

DOCKET NO. 040158-TX
ORDER NO. PSC-04-0393-PAA-TX
ISSUED: April 13, 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 IMPOSING A PENALTY ON EZ TALK COMMUNICATIONS, LLC OR CANCELING THEIR CERTIFICATE IN THE ALTERNATIVE

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.

I. Case Background

EZ Talk Communications, L.L.C. (EZ Talk) is a certificated CLEC based in Stafford, Texas that provides local exchange telephone service in Florida. Our Division of Consumer Affairs (CAF) received two consumer complaints regarding local exchange service provided by EZ Talk. Our staff attempted to contact the company via certified mail and telephone, using the contact information listed in our Master Commission Directory as well as numbers listed on EZ Talk's website; however, none of the telephone numbers were working. To date, EZ Talk has not provided a response to the consumer complaints and is in violation of Rule 25-22.032(5)(a), Florida Administrative Code, Consumer Complaints.

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II. Analysis

Rule 25-22.032(5)(a), Florida Administrative Code, 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.

As stated above, our staff received two customer complaints who claimed that their service was disconnected without cause or notice. On January 14, 2004, our General Counsel sent EZ Talk a certified letter notifying the company that this Commission has not received a response to the consumer complaints, and if we do not receive a response within 10 business days from the date of the letter, EZ Talk is potentially at risk of being penalized and/or having its certificate cancelled. The certified mail receipt indicates that the company received the letter on February 3, 2004, at a location in Naperville, Illinois. To date, EZ Talk has not provided a response to the consumer complaints and is in violation of Rule 25-22.032(5)(a), Florida Administrative Code, Consumer Complaints.

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.

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).

III. Conclusion

The failure of EZ Talk to provide our staff with written responses to the consumer complaints 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 EZ Talk, 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).

We are vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285, and 364.337, Florida Statutes. Accordingly, this Commission hereby orders a penalty of \$20,000 on EZ Talk for two apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, or cancel EZ Talk's CLEC certificate and require the company to immediately cease and desist providing CLEC services in Florida, if the company fails to timely protest this Commission's Order and fails to pay the penalty within fourteen (14) calendar days after the issuance of the Consummating Order. The amount of the proposed penalty is consistent with penalties previously imposed by this Commission upon other CLECs that have failed to respond to consumer complaints.

Based on the foregoing, it is hereby

ORDERED by the Florida Public Service Commission that EZ Talk is hereby penalized in the amount of \$20,000 for two apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints. The penalty shall be paid to the Florida Public Service Commission within fourteen (14) calendar days after the issuance of the Consummating Order. It is further

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ORDERED that in the event EZ Talk fails to timely pay the penalty, and fails to protest this Commission's Order within 21 days of its issuance, then EZ Talk's CLEC certificate will be canceled and the company must immediately cease and desist providing CLEC services in Florida. It is further

ORDERED that this docket will be closed administratively upon receipt of the payment of the penalty or upon cancellation of the company's CLEC certificate. 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 in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 13th day of April, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

JLS

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 May 4, 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.