

REVISÉ
Bane *YMB*
Melson *ROM*

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-

COMMISSION
CLERK

JUN 17 AM 11:05

RECEIVED-PSC

DATE: June 17, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (M. Watts) *MTA*
Office of the General Counsel (Fordham, Rojas, Teitzman) *CRF*
Office of Standards Control & Reporting (Lowery) *PLI*

RE: Docket No. 020645-TI – Compliance investigation of UKI Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection.

AGENDA: 06/29/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Place adjacent to Docket Nos. 031031-TI and 040062-TI on the Agenda.

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020645ov.RCM.DOC

Case Background

Staff's recommendations for Docket Nos. 020645-TI, 031031-TI, 040062-TI, and 040289-TI were initially combined in one memorandum to demonstrate apparent relationships between Miko Telephone Communications, Inc. (Miko), New Century Telecom, Inc. (New Century), Optical Telephone Corporation (Optical), and UKI Communications, Inc. (UKI). Miko, New Century, and Optical are charged with apparent violations of Rule 25-4.118, Florida Administrative Code (F.A.C.), Local, Local Toll, or Toll Provider Selection, also referred to as slamming. UKI is charged with failing to comply with Proposed Agency Action Order PSC-03-0990-PAA-TI, issued September 3, 2003, Docket Number 020645-TI, Compliance investigation of UKI Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection, made final and effective by Consummating Order PSC-03-1078-CO-TI, issued September 30, 2003, in which the company's offer to settle apparent slamming violations and pay regulatory assessment fees was approved by the Commission. Upon receiving

DOCUMENT NUMBER-DATE

06712 JUN 17 04

FPSC-COMMISSION CLERK

communications from representatives of two of the companies, including an offer of settlement in one docket, staff decided to present its recommendations to the Commission in separate memoranda. However, staff believes that certain information filed in its May 6, 2004, recommendation, document number 05295-04 (the Prior Recommendation), available in the Docket No. 020645-TI case file and on the Commission's website, is pertinent to staff's recommendation and is repeated below.

In addition to the companies named above, staff discusses other interexchange telecommunications companies (IXCs) that have been or are currently under investigation by staff for slamming. The companies are Sonic Communications, Inc. (Sonic), America's Tele-Network Corp. (ATN), WebNet Communications, Inc. (WebNet), World Communications Satellite Systems, Inc. (WCSS), America's Digital Satellite Telephone, Inc. (ADST), and OLS, Inc. (OLS). Sonic, ATN, WebNet, WCSS, and ADST appear to have a current or past relationship with the companies that are subjects of the recommendations presented herein.

During its investigation of the companies named above, staff obtained various documents and information that suggest some of the companies may be linked through financial, managerial, and operational associations. These documents are included as attachments to the prior recommendation as previously described. All of the companies are switchless resellers of long distance service and have been or are currently under investigation by staff for slamming.

The following is a list of key persons associated with each company and the status of each company's registration with the Commission:

Sonic – Mr. John S. Buffa, President: Sonic paid \$70,000 in Docket No. 930261-TI, Initiation of show cause proceedings against SONIC COMMUNICATIONS, INC. for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection, to settle apparent slamming violations. Its registration and tariff were involuntarily canceled in Docket No. 951066-TI, Cancellation by Florida Public Service Commission of Interexchange Telecommunications Certificate No. 3144 issued to Sonic Communications, Inc. for violation of Rule 25-24.480, F.A.C., Records and Reports; Rules Incorporated, for apparent failure to pay its Regulatory Assessment Fees. Mr. Giuseppe Vitale was the president of the company when it filed its initial incorporation papers in the State of Georgia in 1991.

ATN – Mr. John W. Little, President: ATN's IXC registration and tariff and CLEC certificate were involuntarily cancelled by the Commission as part of a settlement offer to resolve the company's apparent slamming violations in Docket Nos. 001066-TI, Initiation of show cause proceedings against America's Tele-Network Corp. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection, and 001813-TX, Initiation of show cause proceedings against America's Tele-Network Corp. for apparent violation of Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries, (Order No. PSC-01-1035-AS-TP, issued April 27, 2001). Mr. Little is a former employee of Sonic.

WebNet – Mr. Marc Howard Lewis, President: WebNet's IXC registration and tariff were involuntarily cancelled by the Commission, effective February 8, 2002, as part of a settlement to resolve the company's apparent slamming violations in Docket No. 001109-TI, Initiation of show cause proceedings against WebNet Communications, Inc. for apparent violation of Rule

Docket No. 020645-TI
Date: June 17, 2004

25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection, (Order No. PSC-01-2432-PAA-TI, issued December 13, 2001). Mr. Lewis is a former employee of Sonic.

WCSS – Ms. Caterina Bergeron, President: WCSS's IXC registration and tariff became effective on October 8, 2001, and is still current. Ms. Bergeron is a former employee of Sonic.

ADST – Mr. Damian Cipriani, President: ADST requested voluntary cancellation of its IXC registration and tariff in a letter addressed to the Commission dated December 15, 2003. In Docket No. 040298-TI, Acknowledgment of cancellation of IXC Registration No. TJ554 by America's Digital Satellite Telephone, Inc. d/b/a ADST, Inc., effective 12/16/03, the company's cancellation request was acknowledged on April 5, 2004, and the company's IXC registration was cancelled with an effective date of December 16, 2003. Mr. Cipriani is a former employee of Sonic.

Optical – Mr. Mark Frost, President: Optical's IXC registration and tariff became effective on September 14, 2001, and is still current. Mr. Frost is a former employee of UKI.

OLS – Ms. Geri Eubanks (formerly Buffa, then Clary), President: OLS's IXC registration and tariff became effective on October 7, 1997, and is still current. Ms. Eubanks is either a former employee of Sonic or had a business relationship with Sonic.

Miko – Ms. Margaret Currie, President: Miko's IXC registration and tariff became effective on September 26, 2001, and is still current.

New Century – Ms. Karyn Bartel, President: New Century's IXC registration and tariff became effective on March 20, 1996, and is still current. Ms. Bartel is a former employee of UKI.

UKI – Mr. Giuseppe Vitale, President: UKI's IXC registration and tariff was cancelled by the Commission effective December 1, 2003, in Docket No. 020645-TI (Order No. PSC-03-0990-PAA-TI). Mr. Vitale is the former president of Sonic.

In its prior recommendation, staff demonstrated that the above-named companies appear to have a close managerial, financial and operational association. Staff also demonstrated that, as staff would begin to investigate slamming complaints against one company, its slamming activity would decline and another's slamming activity would increase. At first, staff was unaware of any unusual connection between the companies and pursued separate investigations. After noting compelling similarities in the companies it had investigated, staff began an in-depth investigation of several companies and found substantial evidence of an apparent syndicate-like organization. Given that the first company to engage in slamming and come under the Commission's sanctions for it was Sonic (1993), and given that several of the presidents of the later-formed companies listed above were former employees of Sonic and were fully aware of the seriousness of slamming and of the Commission's rules, it appears that these companies purposely engaged in slamming to generate a quick cash flow while defrauding various state and federal government agencies.

Discussion of Issues

Issue 1: Should the Commission penalize UKI Communications, Inc. \$250,000 for apparent violation of Proposed Agency Action Order No. PSC-03-0990-PAA-TI, issued on September 3, 2003, made final and effective by Consummating Order No. PSC-03-1078-CO-TI, issued on September 30, 2003?

Recommendation: Yes. (M. Watts, Fordham, Teitzman, Rojas)

Staff Analysis: From January 1, 2001, to July 28, 2003, the Commission received 319 slamming complaints against UKI. Staff determined that 203 of the 319 slamming complaints received by the Commission appear to be violations of Rule 25-4.118, F.A.C. On July 29, 2003, UKI submitted its proposal to settle Docket No. 020645-TI, and on September 30, 2003, the Commission issued Consummating Order No. PSC-03-1078-CO-TI, making PAA Order No. PSC-03-0990-PAA-TI, final and effective; establishing the following schedule for UKI's compliance with the terms of the PAA Order:

- December 1, 2003 – Cancellation of UKI's tariff and registration.
- December 29, 2003 – Pay all outstanding RAFs with statutory penalty and interest.
- January 28, 2004 – Submit final report detailing how UKI complied with the terms of the settlement offer and the Order, including resolution of all unresolved consumer complaints.

On January 28, 2004, staff determined that UKI did not comply with any of the terms of its settlement offer and Order No. PSC-03-1078-CO-TI. Subsequently, on February 2, 2004, UKI attempted to effect a voluntary cancellation of its registration by submitting an unsigned request to cancel its "Certificate of Authority to transact business in the state of Florida."

Section 364.285, Florida Statutes, authorizes the Commission to impose upon any entity subject to its jurisdiction which is found to have refused to comply with any lawful order of the Commission a penalty for each offense of not more than \$25,000; and each day that such refusal continues constitutes a separate offense. At the time of filing this recommendation, one hundred forty-one (141) days have elapsed since the date the company should have complied with the Commission's Order. Hence, the Commission could impose a penalty of \$3,525,000; however, staff believes that a penalty that large would be excessive. Conversely, staff believes that a penalty less than \$250,000 is not sufficient in this case due to the nature of the company's apparent business practices as stated in the Case Background and of the apparent slamming violations that are the subject of this docket. Staff is unaware of any company with similar circumstances being imposed a penalty previously. The company has yet to resolve at least thirty-five (35) complaints and make the customers whole through refunds for charges related to its apparent slamming activities.

Based on the aforementioned, staff believes that UKI's failure to comply with PAA Order No. PSC-03-0990-PAA-TI, made final and effective by Consummating Order No. PSC-03-1078-

Docket No. 020645-TI
Date: June 17, 2004

CO-TI, is a "willful violation" of PAA Order No. PSC-03-0990-PAA-TI, in the sense intended by Section 364.285, 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 UKI to comply with PAA Order No. PSC-03-0990-PAA-TI 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 UKI, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Based on the aforementioned, staff believes that UKI's failure to comply with the Commission's lawful Orders in Docket No. 020645-TI is a "willful violation" of said Orders, in the sense intended by Section 364.285, Florida Statutes, and thus, staff recommends that the Commission find that UKI has, by its inactions, willfully violated Order Nos. PSC-03-0990-PAA-TI and PSC-03-1078-CO-TI, and impose a \$250,000 penalty on the company to be paid to the Florida Public Service Commission.

Issue 2: Should the Commission order companies that provide billing services or underlying carrier services for UKI Communications, Inc. to stop providing service for it in Florida?

Recommendation: Yes. (M. Watts, L. Fordham, Rojas, Teitzman)

Staff Analysis: Due to the egregious nature of the UKI's business practices and alleged violations addressed in this recommendation, staff believes that additional measures may be necessary to prevent further improper conduct since UKI was removed from the Commission's register and its tariff canceled in Order No. PSC-03-0990-PAA-TI, issued in this docket on September 3, 2003. Consequently, UKI is not authorized to provide interexchange service in Florida. Therefore, staff recommends that the Commission also direct all companies that are providing billing services or underlying carrier services for UKI to stop providing those services for said company. Staff believes this additional action is warranted, because it appears that any ability UKI has to continue billing through another company and providing resold services through an underlying carrier may serve as incentive to the company to continue operating in violation of the Commission's Order to the detriment of Florida consumers.

Pursuant to Section 364.604(2), Florida Statutes, a customer shall not be liable for any charges to telecommunications or information services that the customer did not order or that were not provided to the customer. Clearly, since UKI is not authorized to provide interexchange telecommunications services in Florida, customers are no longer ordering services from said company. Thus, any bills sent to a Florida customer for interexchange services provided by UKI would inherently be for services that were either not ordered or could not be provided. All telecommunications companies in Florida, as well as IXC's, are subject to the statutory provision. As such, staff believes that the Commission is authorized to take this action.

Likewise, Rule 25-24.4701, Florida Administrative Code, prohibits registered IXC's from providing telecommunications services to unregistered resellers. Since UKI is no longer authorized to provide service in Florida, then registered IXC's are no longer authorized to provide telecommunications services to UKI for resale in Florida.

In addition, staff believes that the Commission has the authority to take these additional actions, because any company that continues to bill for or provide underlying carrier services to the penalized company will, in effect, be contributing to the ongoing violations of the company. Ultimately, the billing company and underlying carrier will be aiding and abetting in either a "slam" in violation of Section 364.603, Florida Statutes, or an improper billing in violation of Section 364.604, Florida Statutes. All telecommunications companies, as well as IXC's, are subject to these statutes.

Docket No. 020645-TI

Date: June 17, 2004

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Commission take action as set forth in the following Staff Analysis. **(Fordham, Teitzman, 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 UKI 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 the company fails to pay the amount of the penalty, plus the Regulatory Assessment Fees with statutory penalty and interest it was ordered to pay in PAA Order No. PSC-03-0990-PAA-TI, within fourteen calendar days after issuance of the Consummating Order, the collection of the penalty and the Regulatory Assessment Fees with statutory penalty and interest should be referred to the Department of Financial Services and the company should be required to immediately cease and desist providing interexchange telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalty and the Regulatory Assessment Fees with statutory penalty and interest or upon their referral to the Department of Financial Services. If UKI subsequently decides to reapply for registration as an intrastate interexchange company, it should be required to first pay any outstanding Regulatory Assessment Fees, including statutory late payment charges, any penalties assessed by the Commission, and resolve any outstanding issues from its July 29, 2003, settlement offer in Docket No. 020645-TI.