

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-**

DATE: June 17, 2004

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

FROM: Division of Competitive Markets & Enforcement (Buys)
Office of the General Counsel (Fordham, Rojas, Teitzman)
Office of Standards Control & Reporting (Lowery)

RE: Docket No. 031031-TI – Compliance investigation of Miko Telephone Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

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

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Place on agenda item list adjacent to Docket Nos. 040062-TI and 020645-TI.

FILE NAME AND LOCATION: S:\PSC\CMP\WP\031031.REV2.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission penalize Miko Telephone Communications, Inc. \$10,000 per apparent violation, for a total of \$1,540,000 for 154 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

Recommendation: Yes. (Buys, L. Fordham, Rojas, Teitzman)

Staff Analysis: Miko Telephone Communications, Inc. (Miko) is a reseller of interexchange telecommunications services located in Birmingham, Alabama. The president and sole share holder of Miko is Ms. Margaret Currie. In discussions with Charles H. Helein of The Helein Law Group, LLP, staff learned that Miko is purportedly no longer in business. However, Miko has not informed the Commission that it has ceased providing interexchange telecommunications service in Florida, nor has the company requested that its tariff be cancelled and that its name be

removed from the register. Further, in replies to slamming complaints filed with the Commission against New Century Telecom, Inc. (New Century), New Century indicated that it had acquired Miko's customer base. Staff is also addressing alleged slamming infractions against New Century in Docket No. 040062-TI.

Section 364.603, Florida Statutes, states:

The commission shall adopt rules to prevent the unauthorized changing of a subscriber's telecommunications service. Such rules shall be consistent with the Telecommunications Act of 1996, provide for specific verification methodologies, provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge, allow for a subscriber's change to be considered valid if verification was performed consistent with the commission's rules, provide for remedies for violations of the rules, and allow for the imposition of other penalties available in this chapter.

To implement Section 364.603, Florida Statutes, the Commission adopted Rule 25-4.118, Florida Administrative Code, to govern carrier change procedures (Attachment A).

From July 31, 2002, through October 31, 2003, the Commission received a total of 159 slamming complaints against Miko. On February 20, 2003, staff sent Miko a letter via certified U.S. Mail (Attachment B) informing Miko that the company's TPVs do not meet all the requirements set forth in Rule 25-4.118, Florida Administrative Code. In its letter, staff requested that Miko investigate the slamming complaints and provide staff with a written response.

In its response (Attachment C), Miko stated that (1) it is not at fault for slamming if the consumer does not remember the telemarketing call, (2) it has verifications on all customers, and therefore, has no slamming complaints, and (3) it has stopped marketing in the state of Florida at the present time. The company also provided staff with a revised verification script.

From March 6, 2003, through August 19, 2003, staff monitored and evaluated the slamming complaints the Commission received against Miko to determine if the company was still marketing its service in Florida. Staff selected random complaints and requested preferred interexchange carrier (PIC) histories for the customers' service from BellSouth and Verizon. The PIC history provided by BellSouth shows that Miko switched a complainant's long distance service on April 18, 2003, and the PIC history from Verizon shows that Miko switched a complainant's InterLATA and IntraLATA services on June 13, 2003. Miko previously indicated to staff that it stopped marketing in Florida as of February 26, 2003. Hence, it appears that Miko may not have ceased marketing in Florida as it previously indicated to staff.

Moreover, it appears that Miko's telemarketing and verification processes are egregious and misleading in nature. In many of the complaints, the customers claim that Miko altered the TPV recording to make it appear that they authorized the carrier change. In the seven complaints listed below, the customers submitted letters or emails explaining the circumstances of their slamming incidents.

1. Ms. Grace Calvani states in her letters (Attachment D) that she never authorized service and the TPV Miko obtained was a recording of her mother confirming Ms. Calvani's information.
2. Rev. Manacio G. Dias states in his letter (Attachment E) that he was offered "a gift of one free 100 minute long distance calling card for a trial." Rev. Dias explains that he was told to say "yes," followed by his name and phone number after a recorded message to confirm the acceptance of the free trial phone card.
3. Ms. Ivelise Velez states in her email (Attachment F) that, "this company is making telemarketing phone calls and then using the information they are collecting to slam. . . . I called the company and they are playing the information back in pieces so that it sounds like the person was answering the questions when in fact the information was requested as part of a different conversation."
4. Mr. Luis Ahumada states in his email (Attachment G) that, "the tape sounds very funny and overlaid. As if the questions that were asked were tailored to overlay a conversation about accepting the change in long distance."
5. Ms. Alicia Figureoa states in her letter (Attachment H) that she received a phone call from a person requesting verification of her name, address, date of birth, and some additional personal information. She states she refused to give out the information and hung up. On her next phone bill, she was informed her long distance carrier was switched to Miko. She further states that, "she strongly objects to the deceptive questionable tactics used to switch her telephone service."
6. Mrs. Jessy Wollstencroft states in her letter (Attachment I) that she received an unsolicited phone call and was asked some questions by a personable solicitor. Later she realized her phone service was slammed. She states in her letter to Miko that, ". . . at no time did your solicitor tell me he was recording the conversation. I NEVER accepted to be switched by your company. The only thing I can assume is that you created the voice recording that my husband heard by editing the conversation you recorded without my permission."
7. Mr. Orlando Cabeza states in his email (Attachment J) that his wife received an unsolicited phone call from a long distance company offering a promotional free long distance card with 1200 free minutes and at no time did the telemarketer advise his wife that by agreeing to accept the free calling card she was also agreeing to switch long distance service. Mr. Cabeza states that he never received the free long distance card as promised, but his long distance service was switched to Miko. Mr. Cabeza further explains that the telemarketer that called his wife had a male voice and when he heard the recording of the TPV that Miko played for him, that, "the portion of the recording which purportedly indicates that we are authorizing a change to Miko is in a female voice and it cuts in and out between her and the male 'pitch-man' who placed the call as if the recording has been altered or modified."

To summarize, Miko markets its services to Florida consumers through telemarketers who apparently employ a variety of sales pitches to persuade the customers to provide their name, address, telephone number, and date of birth or mother's maiden name. Some of Miko's sales tactics involve soliciting a free long distance calling card to try Miko's service without any obligation, offering customers a promotional check, or conducting a survey regarding long

distance service or telephone companies. After reviewing the complaints, staff found no evidence that Miko's telemarketers advised the customers that the purpose of the call was to solicit a change of the service provider of the customer as required by Rule 25-4.118(9)(b), Florida Administrative Code. Most importantly, it appears that Miko's telemarketers made misleading and deceptive references during telemarketing and verification while soliciting for subscribers in apparent violation of Rule 25-4.118 (10), Florida Administrative Code.

Upon review of the 159 slamming complaints received against Miko, staff determined that 154 are apparent slamming violations, in part, because the company failed to comply with the specific verification methodologies required by the Commission's slamming rules. Miko markets its services in Florida through its own telemarketers and purportedly employs a third party verification process to verify the subscriber authorized the company to change service providers.

Staff determined that in 24 cases, listed in Attachment K, Miko failed to provide proof in the form of a TPV recording that the customer authorized Miko to change service providers in accordance with Rule 25-4.118(1) and (2), Florida Administrative Code.

In the remaining 130 cases listed in Attachment L, the TPVs submitted by Miko did not contain all the specific verification information required by Rule 25-4.118(2)(c), Florida Administrative Code, listed in subsection (3)(a) 1. through 5.

Staff determined that in all but a few of cases, the TPVs submitted by Miko were missing the following statements:

- The 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.
- The statement that the Local Exchange Carrier (LEC) may charge a fee for each provider change.

In some of the TPVs staff reviewed, the telemarketer stays on the line during the verification process and prompts the customer to answer verification questions; meaning the TPV is not performed by an independent third party as required by Rule 25-4.118(2)(c), Florida Administrative Code. Hence, all of the TPVs the company submitted to the Commission as proof the customers authorized Miko to change their service providers are not considered valid. In addition, when resolving the slamming complaints, Miko did not refund the charges within 45 days of notification to the company by the customer pursuant to Rule 25-4.118(8), Florida Administrative Code.

Miko indicated to staff in its letter (Attachment C) that FVC is the company that performs its TPVs. Rodney Harrison is the sole owner of Federal Verification Corporation, Inc. (FVC) located at 230 Judson Way, Alpharetta, Georgia, 30022. FVC was incorporated in Georgia on February 16, 2001. Rodney Harrison appears to have notarized Miko's Application for a Certificate of Public Convenience and Necessity to Offer Long Distance Telecommunications Service by a Reseller in North Carolina (Attachment M, page 45). The

application was signed by Margaret Currie and dated July 9, 2001. Hence, it appears that FVC is apparently affiliated in some capacity with Miko and does not appear to be unaffiliated from Miko as required by Rule 25-4.118(2)(c), Florida Administrative Code. Further, based on consumer complaints, it appears that Miko submitted TPVs recordings that were not genuine verifications. Therefore, staff believes that all of the TPVs submitted by Miko should be considered suspect.

In most of the complaints, Miko re-rated its charges for the customers' calls to 7¢ per minute or the rates of the customers' preferred carrier instead of refunding all of the charges for the first 30 days as required by Rule 25-4.118(8), Florida Administrative Code. Further, in most cases, Miko did not refund the Federal Tax and Florida Communications Tax assessed on the company's charges.

In addition, Rule 25-4.118(13)(b), Florida Administrative Code, states that in determining whether fines or other remedies are appropriate for a slamming infraction, the Commission shall consider among other actions, the actions taken by the company to mitigate or undo the effects of the unauthorized change. These actions include but are not limited to whether the company, including its agents and contractors followed the procedures required under subsection (2) with respect to the person requesting the change in good faith, complied with the credit procedures of subsection (8), took prompt action in response to the unauthorized change, and took other corrective action to remedy the unauthorized change appropriate under the circumstances.

Based on the requirements of Rule 25-4.118(13)(a), Florida Administrative Code, Miko appears to have committed 154 unauthorized carrier changes. First, Miko did not follow the procedures required under Rule 25-4.118(2), Florida Administrative Code. Second, Miko did not comply with the credit procedures required under Rule 25-4.118(8), Florida Administrative Code. Third, staff informed Miko that its TPVs were not in compliance with the Commission's slamming rules and the company failed to take the corrective actions to remedy its verification process, and fourth, it appears that Miko's telemarketers made misleading and deceptive references during telemarketing and verification in apparent violation of Rule 25-4.118(10), Florida Administrative Code, and fifth, it appears Miko submitted fraudulent TPVs to the Commission.

Based on the aforementioned, staff believes that Miko's apparent slamming infractions and marketing techniques are "willful violations" of Rule 25-4.118, 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, 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 intentional acts by Miko of failing to comply with Rule 25-4.118, Florida Administrative Code, 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 Miko, 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 this matter pursuant to Sections 364.02(13), 364.04, 364.285 and 364.603, Florida Statutes. The amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other IXCs that were determined to be slamming subscribers. Thus, staff recommends that the Commission should find that Miko has, by its actions, willfully violated Rule 25-4.118, Florida Administrative Code and impose a \$1,540,000 penalty on the company to be paid to the Florida Public Service Commission.

Issue 2: If, as a result of failing to pay the penalty or contest the Commission's Order resulting from this recommendation, Miko Telephone Communications, Inc. is ordered to cease and desist providing intrastate interexchange telecommunications services in Florida, should the Commission also order any company that is providing billing services or underlying carrier services for Miko Telephone Communications, Inc. to stop providing service for it in Florida?

Recommendation: Yes. (Buys, L. Fordham, Rojas, Teitzman)

Staff Analysis: Due to the egregious nature of Miko's business practices and alleged violations addressed in this recommendation, staff believes that additional measures may be necessary to prevent further improper conduct in the event Miko is required to cease and desist providing interexchange service in Florida. Therefore, staff recommends that the Commission also direct all companies that are providing billing services or underlying carrier services for Miko to stop providing those services for said company if it is ultimately required to cease and desist providing interexchange services in Florida. Staff believes this additional action is warranted, because it appears that any ability Miko 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 a Commission 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, if Miko is ordered to cease and desist providing interexchange telecommunications services in Florida, customers will no longer be ordering services from said company. Thus, any bills sent to a Florida customer for interexchange services provided by Miko would inherently be for services that were either not ordered or could not be provided. All telecommunications companies in Florida, as well as intrastate interexchange companies (IXCs), 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 IXCs from providing telecommunications services to unregistered resellers. In the event Miko is required to cease and desist providing interexchange service in Florida, then registered IXCs are no longer authorized to provide telecommunications services to Miko for resale in Florida.

In addition, staff believes that the Commission has the authority to take this additional action, 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 IXCs, are subject to these statutes.

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Commission take action as set forth in the following Staff Analysis. **(L. Fordham, Rojas, Teitzman)**

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 Miko 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 Miko fails to pay the penalty within fourteen (14) calendar days after issuance of the Consummating Order, the company's tariff should be cancelled and Registration No. TJ561 should be removed from the register. If Miko's tariff is cancelled and Registration No. TJ561 is removed from the register in accordance with the Commission's Order from this recommendation, 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 or upon the removal of the company's registration number from the register and cancellation of the company's tariff. If Miko subsequently decides to reapply for registration as an intrastate interexchange company, it should be required to first pay any outstanding penalties assessed by the Commission. Any action by the Commission, including but not limited to any settlement, should not preempt, preclude, or resolve any matters under review by any other Florida Agencies or Departments.