

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: September 9, 2004

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

FROM: Division of Competitive Markets & Enforcement (Howell)
Office of the General Counsel (Scott)
Division of Regulatory Compliance & Consumer Assistance (Vandiver)

RE: Docket No. 040845-TX – Compliance investigation of USA Telephone Inc. d/b/a CHOICE ONE Telecom for apparent violation of Section 364.183(1), F.S., Access to Company Records, and Rule 25-4.0161, FAC, Regulatory Assessment Fees; Telecommunications Companies.

AGENDA: 09/21/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040845.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$10,000 against USA Telephone Inc. d/b/a CHOICE ONE Telecom for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records, and order the company to submit the required information listed in Attachment A to the Division of Regulatory Compliance and Consumer Assistance?

Recommendation: Yes. (Howell/Vandiver/Scott)

Staff Analysis: USA Telephone Inc. d/b/a CHOICE ONE Telecom (USA Telephone) is a certificated competitive local exchange company (CLEC) based in Miami, Florida that provides competitive local telephone services in Florida. The company reported \$1,534,219.99 intrastate revenue on its Regulatory Assessment Fee Return for calendar year 2002, and paid a regulatory

assessment fee (RAF) in the amount of \$687.00. In 2003, staff notified USA Telephone that the company had been randomly selected for an audit of its 2002 RAF Return. As part of a RAF Return audit of randomly selected competitive local exchange companies (CLECs), staff will verify that fees for operation of the Florida Relay Service (FRS) are collected and remitted to the Florida Telecommunications Relay, Inc. (FTRI) as required by Rule 25-4.160, Florida Administrative Code, Operation of Telecommunications Relay Services.

Staff obtained satisfactory information from USA Telephone to complete the audit of the 2002 RAF Return. However, the company failed to provide staff complete information regarding the collection and remittance of the FRS fees. Between February 2 and June 23, 2004, staff made multiple attempts via e-mail, phone calls, and written correspondence to obtain a response from USA Telephone. On June 30, 2004, in a final attempt to obtain information, staff sent correspondence via certified mail and facsimile advising the company that should it not respond, it may be subject to penalties. The certified mail receipt from the United States Post Office was signed by a company representative indicating delivery of staff's letter on July 9, 2004. Staff believes that the company has been adequately notified of its obligation to provide the requested information and has been given sufficient time to do so. As of the date of filing this recommendation, USA Telephone has failed to furnish staff with the requested information.

Staff estimates that USA Telephone may owe approximately \$1800, to the Florida Relay Service. The estimate is based on the per-line surcharge rates for 2002 through August 2004, using the number of lines the company reported serving in 2003.

Staff believes that USA Telephone's failure to provide the requested information regarding the FRS fees is a "willful violation" of Section 364.183(1), Florida Statutes, 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, USA Telephone's failure to provide staff with the requested information 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 competitive local exchange telecommunication companies, like USA Telephone 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 364.183, 364.285, and 427.704, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other CLECs in previous dockets for similar apparent violations. Therefore, staff recommends that the Commission impose a penalty in the amount of \$10,000 against USA Telephone Inc. d/b/a CHOICE ONE Telecom for its apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records, and order the company to submit the required information listed in Attachment A to the Division of Regulatory Compliance and Consumer Assistance.

Docket No. 040845-TX
Date: September 9, 2004

Issue 2: Should the Commission impose a penalty in the amount of \$1,000 against USA Telephone Inc. d/b/a CHOICE ONE Telecom for its apparent repeat violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, for not paying the 2003 Regulatory Assessment Fee?

Recommendation: Yes. (Howell/Scott)

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 or any provision of Chapter 364, Florida Statutes. Rule 25-4.0161, Florida Administrative Code, which implements Section 364.336, Florida Statutes, requires the payment of Regulatory Assessment Fees (RAFs) by January 30 of the subsequent year for telecommunications companies, and provides for late payment charges as outlined in Section 350.113, Florida Statutes, for any delinquent amounts.

On December 12, 2003, the Division of the Commission Clerk & Administrative Services mailed the 2003 RAF return notice to USA Telephone. The company never responded. On February 20, 2004, the Office of General Counsel mailed a delinquent notice for the 2003 RAF via certified mail. As evidenced by the signed certified mail receipt, the company received the General Counsel's letter on February 23, 2004, but never responded. In one final attempt to collect, staff mailed a notice on May 7, 2004, advising the company that if it fails to pay the 2003 RAF, plus statutory penalty and interest charges, it may be subject to further penalties. Again, the company never responded.

This is the second docket established against USA Telephone for the same apparent violation of Rule 25-4.0161, Florida Administrative Code. The Commission issued Order PSC-01-2380-AS-TX, December 10, 2001, Docket No. 011135-TX, In Re: Cancellation by Florida Public Service Commission of Alternative Local Exchange Telecommunications Certificate No. 5647 issued to USA Telephone Inc. for violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies, accepting the company's settlement offer of \$100 to resolve the company's apparent failure to pay RAF.

The Commission is vested with jurisdiction over this matter pursuant to Sections 350.113, 364.285, 364.336, and 364.337, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties imposed by the Commission upon other CLECs in previous dockets for similar apparent repeat violations. Therefore, staff recommends that the Commission impose a penalty in the amount of \$1,000 against USA Telephone Inc. d/b/a CHOICE ONE Telecom for its apparent repeat violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, for not paying the 2003 Regulatory Assessment Fee.

Issue 3: 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 USA Telephone 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 USA Telephone fails to submit the required information, and pay the penalties and Regulatory Assessment Fees, including statutory late payment charges, within fourteen (14) calendar days after the issuance of the Consummating Order, the company's CLEC Certificate No. 5647 should be cancelled and the collection of the Regulatory Assessment Fees, plus statutory late payment charges, should be referred to the Department of Financial Services for further collection efforts. If USA Telephone's certificate is cancelled in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing competitive local exchange services in Florida. This docket should be closed administratively upon either receipt of the required information, and the payment of the penalties and Regulatory Assessment Fees, including statutory late payment charges, or upon the cancellation of the company's CLEC Certificate No. 5647. **(Scott)**

Staff Analysis: Staff recommends that the Commission take action as set forth in the Recommendation above.

Required Information
USA Telephone Inc. d/b/a CHOICE ONE Telecom

1. List of underlying carriers from which the company obtains wholesale local exchange services, e.g., BellSouth, Sprint, Verizon, etc., identified by year beginning January 1, 2002, to the current date.
2. List of the types of wholesale services acquired from each underlying carrier, e.g., resale, UNE-P, etc., and the date when wholesale services were switched from resale to UNE-P, if applicable for the period January 1, 2002, to the current date.
3. Statements (billing statements or correspondence from the underlying carrier) showing that each underlying carrier collected relay surcharge payments from the company and submitted payment to the Florida Telecommunications Relay, Inc. (FTRI) on behalf of the company. Billing statements or correspondence are required for the period January 1, 2002, to the current date.
4. List of dates when the underlying carrier(s) stopped collecting relay surcharges from the company.
5. Copies of checks paid to the FTRI beginning January 1, 2002, to the current date.
6. Copies of returns submitting surcharges to the FTRI beginning January 1, 2002, to the current date.
7. Billing data indicating the number of subscribers served by the company for each January 1 and July 1, 2002 through 2004.