

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: September 23, 2004

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

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

RE: Docket No. 040289-TI – Compliance investigation of Optical Telephone Corporation for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

AGENDA: 10/05/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040289.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission penalize Optical Telephone Corporation \$10,000 per apparent violation, for a total of \$90,000, for nine (9) apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

Recommendation: Yes. (Buys, Rojas)

Staff Analysis: Optical Telephone Corporation (OTC) is a switchless reseller of interexchange telecommunications services headquartered in Huntsville, Alabama. OTC's interexchange company (IXC) registration and tariff became effective on September 14, 2001.

From September 28, 2001, through January 1, 2003, the Commission received 234 slamming complaints against OTC from Florida consumers. In a meeting with staff on June 27, 2002, OTC indicated it would implement the necessary changes to its telemarketing and verification processes to eliminate slamming. The company appears to have taken some action to reduce the number of slamming complaints received since that time; however, recent complaints reference telemarketing and verification practices similar to those the company was utilizing prior to discussions with staff in June of 2002.

From January 3, 2003, through March 12, 2004, the Commission received forty (40) slamming complaints against OTC from Florida consumers. In its initial evaluation of the slamming complaints, staff determined that in five cases, listed in Table 1, OTC failed to provide proof in the form of a TPV recording that the customer authorized OTC to change service providers in accordance with Rule 25-4.118(1) and (2), F.A.C.

Table 1

CATS Request Number	Customer Name
511035	Frank Ferrer
511708	Antonio Coro
538658	Librada Barrero
544491	Robert Marco
547960	Alejandro Dumas

In four cases, listed in Table 2, the TPVs submitted by OTC did not contain all the specific verification information required by Rule 25-4.118(2)(c), F.A.C., listed in subsection (3)(a) 1. through 5. Staff determined that the TPVs submitted by OTC were missing the following statements and information:

- 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.
- Three of the four TPVs submitted were missing the billing name and telephone number.

Table 2

CATS Request Number	Customer Name
510088	Gayle Smith
513391	Julissa Rosa
554215	Oscar & Ana Dominguez
563069	Jose Cascante

Staff filed a recommendation in this docket on May 6, 2004; it was deferred from the May 18, 2004 Agenda Conference, to provide the company with an opportunity to respond to the apparent slamming infractions. On May 14, 2004, staff and a representative from OTC met to discuss the issues in the docket. As a result, on June 10, 2004, through its legal counsel, OTC provided staff with a written explanation of the forty slamming complaints received from January 3, 2003, through March 12, 2004. OTC explained that most of the alleged slams occurred in May 2002 and submits that the company has done nothing to warrant the allegations contained in staff's recommendation of May 6, 2004. That recommendation cited thirty-four (34) apparent slamming complaints.

Upon review of the information provide by OTC and the preferred interexchange carrier (PIC) change histories provided by the customers' local service providers, staff determined that nine of the slamming instances occurred after July 2002. Staff's previous investigation included all complaints with slamming instances occurring prior to July 2002. In addition, fourteen of the forty complaints received since January 3, 2003, appear to be cramming violations as opposed to slamming violations. The apparent cramming violations are discussed in Issue 2.

In its letter dated August 5, 2004, staff provided OTC with its findings and requested that the company provide staff with an explanation for the apparent cramming instances and schedule a meeting to discuss a possible resolution to this docket. OTC's legal counsel has been in contact with staff, but the company has not responded to staff's request. In its letter dated September 10, 2004, staff informed OTC's legal counsel that it would file a recommendation in this docket if the company did not schedule a meeting by September 16, 2004, to discuss a possible settlement. OTC's legal counsel informed staff that a monetary settlement might not be possible due to the company's financial situation.

Based on the aforementioned, staff believes that OTC's failure to comply with the requirements of Rule 25-4.118, F.A.C. is a "willful violation" of Sections 364.603, 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, 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 OTC to comply with Rule 25-4.118, F.A.C., 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 OTC, are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

Therefore, staff recommends that the Commission should penalize OTC \$10,000 per apparent violation, for a total of \$90,000, for 9 apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.285 and 364.603, Florida Statutes.

Issue 2: Should the Commission penalize Optical Telephone Corporation \$10,000 per apparent violation, for a total of \$140,000, for fourteen (14) apparent violations of Section 364.604(2), Florida Statutes?

Recommendation: Yes. **(Buys, Rojas)**

Staff Analysis: Section 364.604(2), Florida Statutes states, "A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer."

From January 3, 2003, through March 12, 2004, the Commission received forty (40) slamming complaints against OTC from Florida consumers. Upon review of the slamming complaints, the information provided by OTC in its letter dated June 10, 2004, and the preferred interexchange carrier (PIC) change histories provided by the customers' local service providers, staff determined that 14 of the slamming complaints listed in Table 3 appear to be violations of Section 364.604, Florida Statutes. Based on the PIC histories, the customers' long distance service does not appear to have been switched, but the customers' were billed by OTC for services and/or calls they did not order or receive, a practice known as cramming. Most of the cramming instances occurred in March and April 2003 and the customers were billed in the amount of \$20.77 for a Long Distance Connection Fee and a Monthly Service Fee, plus applicable taxes.

In a letter dated August 5, 2004, staff provided OTC with its findings and requested that the company provide staff with an explanation for the apparent cramming instances and schedule a meeting to discuss a possible resolution to this docket. OTC's legal counsel has been in contact with staff, but the company has not responded to staff's request.

Based on the aforementioned and the legal basis discussed in Issue 1, staff believes that OTC's failure to comply with the requirements of Section 364.604(2) Florida Statutes is a "willful violation" 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.

Therefore, staff recommends that the Commission should penalize OTC \$10,000 per apparent violation, for a total of \$140,000, for 14 apparent violations of Section 364.604(2), Florida Statutes. The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13), 364.04, and 364.285, Florida Statutes.

Table 3

CATS Request Number	Customer Name
526438	Nelson Pay
528156	Robert Busto
528318	Santiago Rodriguez
528652	Oscar Ferreira
528696	Louis Lotufo
529367	Blanca Mena
529932	Kevin Robinson
530151	Ino Velazquez
530774	Zoe Martinez
531892	Sonia Medrano
540233	Hugo Portilla
542312	Isabel Garcia
550026	Leonard Ferrer
559332	Victor Pineiro

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 OTC 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 OTC 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. TJ551 should be removed from the register. If OTC tariff is cancelled and Registration No. TJ551 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 OTC 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. **(Rojas)**

Staff Analysis: Staff recommends that the Commission take action as set forth in its recommendation.