

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-**

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COMMISSION CLERK

**DATE:** FEBRUARY 5, 2004

**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK  
ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (M. WATTS) *Watts*  
DIVISION OF CONSUMER AFFAIRS (LOWERY) *Lowery*  
OFFICE OF THE GENERAL COUNSEL (ROJAS) *Rojas*

**RE:** DOCKET NO. 031105-TX - COMPLIANCE INVESTIGATION OF TALK  
UNLIMITED NOW, INC. FOR APPARENT VIOLATION OF RULES 25-  
22.032(5)(A), F.A.C., CUSTOMER COMPLAINTS, AND 25-24.835,  
F.A.C., RULES INCORPORATED.

**AGENDA:** 02/17/04 - REGULAR AGENDA - PROPOSED AGENCY ACTION -  
INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\031105.RCM

**CASE BACKGROUND**

- July 8, 2002 - Talk Unlimited Now, Inc. (TUNI) obtained Florida Public Service Commission (Commission) competitive local exchange telecommunications company (CLEC) certificate number 8126.
- March 7, 2003, through April 24, 2003 - The Commission received six consumer complaints against TUNI. Five of these complaints, listed in Table 1-1 of the Staff Analysis for Issue 1, remain unresolved to date.

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- March 10, 2003 - TUNI provided a partial response to Request No. 521067T. However, it was not sufficient for staff to resolve the complaint.
- March 11, 2003 - TUNI provided a partial response to Request No. 521294T. However, it was not sufficient for staff to resolve the complaint.
- March 21, 2003, through July 23, 2003 - Staff attempted to contact TUNI several times during this period via telephone (disconnected), facsimile (disconnected) and United States Postal Service (U.S.P.S.), but did not receive a response from the company.
- July 9, 2003 - TUNI reported that it received no intrastate operating revenue for the year 2002.
- July 16, 2003 - Staff mailed TUNI a delinquent penalty and interest (P&I) notice informing it that it owes \$15.50 in statutory P&I for failure to pay its 2002 Regulatory Assessment Fees (RAFs) by January 30, 2003.
- August 12, 2003 - Staff called TUNI using an alternate cellular telephone number obtained from another state's regulatory agency. Staff spoke with a person who would not identify himself or admit being associated with the company. However, this person stated that the company does not provide telecommunications service.
- December 15, 2003 - Staff opened this docket to address TUNI's apparent violations of Rule 25-22.032 (5)(a), Florida Administrative Code, and 25-24.835, Florida Administrative Code.
- December 24, 2003 - Staff notified the complainants of this proceeding and informed them that any settlement would include the resolution of their complaints.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285 and 364.337, Florida Statutes. Further, staff's recommended penalties are consistent with penalties imposed upon other telecommunications companies by the Commission in previous dockets for similar types of apparent

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rule violations. Accordingly, staff believes the following recommendations are appropriate.

DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission impose a penalty on Talk Unlimited Now, Inc. of \$10,000 per apparent violation, for a total of \$50,000, for the five apparent violations of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order?

**RECOMMENDATION:** Yes. If Talk Unlimited Now, Inc. fails to timely protest the Commission's Order and fails to pay the \$50,000 penalty within fourteen calendar days after the issuance of the Consummating Order, Certificate No. 8126 should be canceled and the company should be required to immediately cease and desist providing competitive local exchange telecommunications services in Florida. (M. Watts/Rojas/Lowery)

**STAFF ANALYSIS:** Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, 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.

In two of the consumer complaints listed in Table 1-1, the company provided partial responses in March 2003, but never provided the supplemental responses required by staff to resolve the complaints. In the other three consumer complaints listed in Table 1-1, the company has not responded at all.

Staff believes that TUNI's failure to provide the required responses to consumer complaints is a "willful violation" of Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, in the sense intended by Section 364.285, Florida Statutes.

Table 1-1 Talk Unlimited Now, Inc. Consumer Complaints				
Request No.	Received	Response Due	Response Received	Supplemental Response Due
521067T	3/7/03	3/28/03	3/10/03	7/30/03
521294T	3/10/03	3/31/03	3/11/03	7/30/03
523763T	3/21/03	4/11/03	None received	N/A
527531T	4/14/03	5/5/03	None received	N/A
529492T	4/24/03	5/15/03	None received	N/A

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, or revoke any certificate issued by it for any such violation.

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. 1<sup>st</sup> 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. 1<sup>st</sup> 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 TUNI to provide staff with written responses to 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. 3<sup>rd</sup> DCA 2000) (ignorance of the law is never a defense). Moreover, in the context of this docket, all telecommunication companies, like TUNI, 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).

Thus, staff recommends that the Commission find that TUNI has, by its actions and inactions, willfully violated Rule 25-22.032(5)(a), Florida Administrative Code, Customer Complaints, and impose a penalty of \$10,000 per apparent violation, for a total of \$50,000, on the company to be paid to the Florida Public Service Commission.

**ISSUE 2:** Should the Commission impose a \$500 penalty on Talk Unlimited Now, Inc. for apparent violation of Rules 25-24.835 and 25-24.480, Florida Administrative Code, to be paid to the Florida Public Service Commission within fourteen calendar days after the issuance of the Consummating Order?

**RECOMMENDATION:** Yes. If Talk Unlimited Now, Inc. fails to timely protest the Commission's Order and fails to pay the \$500 penalty within fourteen calendar days after the issuance of the Consummating Order, Certificate No. 8126 should be canceled and the company should also be required to immediately cease and desist providing competitive local exchange telecommunications services in Florida. (M. Watts/Rojas)

**STAFF ANALYSIS:** Rule 25-24.480, Florida Administrative Code, Records and Reports; Rules Incorporated, incorporated by reference into Rule 25-24.835, Florida Administrative Code, Rules Incorporated, requires that a company update its contact information with the Commission within 10 days of a change. Since March 21, 2003, staff attempted to contact TUNI many times concerning the five consumer complaints listed in Table 1-1, but was unable to do so. Its telephone and facsimile numbers are disconnected and the company has not responded to letters sent through the U.S.P.S. In August 2003, staff obtained a cellular telephone number from another state's regulatory agency that it had listed as an alternate number for TUNI. Staff called the number, but the person who answered at that number would not confirm his identity. However, he did state that TUNI no longer provides telecommunications service in Florida. To date, TUNI has not updated its contact information with the Commission.

Staff believes that TUNI's apparent violation of Rule 25-24.835, Florida Administrative Code, Rules Incorporated, has been "willful" in the sense intended by Section 364.285, Florida Statutes, as discussed in Issue 1.

Accordingly, staff recommends that the Commission find that TUNI has, by its actions and inactions, willfully violated Rule 25-24.835, Florida Administrative Code, Rules Incorporated, and impose a \$500 penalty on the company to be paid to the Florida Public Service Commission.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested, this docket should be closed upon receipt of the payment of the penalties or the cancellation of the company's certificate.  
(Rojas)

STAFF ANALYSIS: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. If the Commission's Order is not protested, this docket should be closed upon receipt of the payment of the penalties or the cancellation of the company's certificate.