

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of UKI Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection.

DOCKET NO. 020645-TI
ORDER NO. PSC-04-0676-PAA-TI
ISSUED: July 13, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING PENALTIES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

UKI Communications, Inc. (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 that Order, the company's offer to settle apparent slamming violations and pay regulatory assessment fees was approved by this Commission.

From January 1, 2001, to July 28, 2003, this Commission received 319 slamming complaints against UKI. It was determined that 203 of the 319 slamming complaints received 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, we 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:

- o December 1, 2003 – Cancellation of UKI's tariff and registration.

DOCUMENT NUMBER-DATE

07595 JUL 13 2004

FPSC-COMMISSION CLERK

- 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, we 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 the filing of the June 17, 2004, recommendation, one hundred forty-one (141) days had 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, we believe that a penalty that large would be excessive. Conversely, we believe that a penalty less than \$250,000 is not sufficient in this case due to the nature of the company’s apparent business practices and of the apparent slamming violations that are the subject of this docket. 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, we believe 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-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, we find that UKI’s failure to comply with this 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 find that UKI has, by its actions and 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.

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.

Due to the egregious nature of UKI’s business practices and alleged violations addressed herein, we find 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, we also direct all companies that are providing billing services or underlying carrier services for UKI to stop providing those services for said company. 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 this 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. Accordingly, we are 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, we have 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.

We are vested with jurisdiction over these matters pursuant to Sections 350.117, 364.02, 364.04 and 364.285, Florida Statutes. Further, the amount of the proposed penalty is justified under the unique circumstances of this Docket. Thus, we find that UKI has, by its actions and inactions willfully violated 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, and impose a \$250,000 penalty on the company to be paid to the Florida Public Service Commission.

It is therefore

ORDERED by the Florida Public Service Commission that UKI Communications, Inc. is hereby assessed a penalty of \$250,000 for its apparent violations 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. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that should UKI Communications, Inc. fail to timely protest this Order, the facts shall be deemed admitted, the right to a hearing waived, and the penalty shall be deemed assessed. It is further

ORDERED that any protest must identify with specificity the issues in dispute. In accordance with Section 120.80(13)(b), Florida Statutes, issues not in dispute will be deemed stipulated. It is further

ORDERED that should UKI Communications, Inc. fail to timely protest this Order, payment of the \$250,000 penalty must be received within fourteen calendar days after the issuance of the Consummating Order. It is further

ORDERED that if this Order is not protested and the penalty is not received within fourteen calendar days of the issuance of the Consummating Order, the penalty shall be referred to the Department of Financial Services for further collection efforts and the company shall be required to cease and desist providing intrastate interexchange telecommunications services in Florida. It is further

ORDERED that if this Order is not timely protested, this Docket shall be closed administratively upon: 1) receipt of the \$250,000 penalty payment; or 2) upon referral of the penalty to the Department of Financial Services. It is further

ORDERED that all companies that are providing billing services or underlying carrier services for UKI Communications, Inc. stop providing those services for said company if it is ultimately required to cease and desist providing interexchange services in Florida.

ORDER NO. PSC-04-0676-PAA-TI
DOCKET NO. 020645-TI
PAGE 6

By ORDER of the Florida Public Service Commission this 13th day of July, 2004.


BLANCA S. BAYO, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

LF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 3, 2004.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.