

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause) DOCKET NO. 961233-TI
proceedings against Fox Fiber) ORDER NO. PSC-97-0511-FOF-TI
Optics for violation of Rules) ISSUED: May 5, 1997
25-24.470, F.A.C., Certificate)
of Public Convenience and)
Necessity Required, and 25-)
4.043, F.A.C., Response to)
Commission Staff Inquiries.)

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER TO SHOW CAUSE
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER TO DISCONTINUE INTEREXCHANGE CARRIER SERVICES

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein concerning the discontinuation of services to Fox Fiber Optics by interexchange carriers 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.

BACKGROUND

On May 28, 1996, the Commission staff received a communication from United Telephone of Florida suggesting that Fox Fiber Optics was providing telecommunications services without a certificate. On May 31, 1996, our staff informed Fox Fiber Optics by certified mail of its responsibility to obtain a certificate as an interexchange telecommunications company. Our staff enclosed an application with the letter, and specified a return date of June 28, 1996. The certified receipt was signed and returned to staff and indicates that Fox Fiber Optics received the mailing on June 5, 1996.

DOCUMENT NUMBER-DATE

04408 MAY-96

FPSC-RECORDS/REPORTING

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Fox Fiber Optics failed to respond by the specified time. Our staff then sent another certified letter to the company on July 18, 1996. This time, our staff advised that it would recommend that we order all certificated interexchange carriers (IXCs) to discontinue providing intrastate long distance service to the company if the company did not respond to the May 31, 1996, letter. The certified receipt was signed and returned to staff and indicates that Fox Fiber Optics received the second mailing on July 26, 1996. As of April 2, 1997, our staff had not received Fox Fiber Optics' response.

On November 21, 1996, Connie Wightman, Technologies Management, Inc., a consultant to the company, wrote to advise that all customer services sold by Fox Fiber Optics were provided by WATS/800 d/b/a Information & Telephone Services. She stated that Fox Fiber Optics is an authorized agent of WATS/800.

On February 2, 1997, the Division of Consumer Affairs received a complaint from Richard G. Chosid of Fort Lauderdale. Mr. Chosid included a copy of his response to the company's disconnect notice and copies of his bills for November and December 1996.

SHOW CAUSE ORDER

Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required, states that:

No person shall provide intrastate interexchange service without first obtaining a certificate of public convenience and necessity from the Commission. Services may not be provided, nor may deposits or payment for services be collected, until the effective date of a certificate, if granted. However, acquisition and other promotional activities may begin prior to the effective date of the certificate at the applicant's risk that it may not be granted. In any customer contacts or advertisements prior to certification, the applicant must advise the customer that certification has not and may not be granted.

The bills included with the Chosid complaint bear the Fox Fiber Optics logo and directions that checks be made payable to Fox Fiber Optics. The call detail records also indicate that Fox Fiber Optics provides intrastate interexchange services. Fox Fiber Optics, however, is not certificated to provide interexchange

services. Neither has it come forward with an application for certification as instructed by our staff. Accordingly, we find that Fox Fiber Optics provides intrastate telecommunications service without a certificate and is in violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required.

We also find that Fox Fiber Optics is in apparent violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries. This rule requires that:

The necessary replies to inquiries propounded by the Commission's staff concerning service or other complaints received by the Commission shall be furnished in writing within fifteen (15) days from the date of the Commission inquiry.

As noted above, the company failed twice to respond to staff communications calling the company's attention to the need to apply for certification.

We are authorized by Section 364.285, Florida Statutes, to impose upon any entity subject to our jurisdiction a penalty of not more than \$25,000 per day for each violation, if such entity is found to have refused to comply with or to have willfully violated any of our rules or orders, or any provision of Chapter 364, Florida Statutes. Utilities are charged with knowledge of our rules and statutes. Additionally, "[i]t 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). Thus, any intentional act, such as FOX Fiber Optics' conduct in issue here, would meet the standard for a "willful violation."

We find that Fox Fiber Optics' apparent provisioning of intrastate interexchange telecommunications services without certification to do so and its failure to respond to staff inquiries in this matter have been "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., having found that the company had not intended to violate the rule, we nevertheless found it appropriate to order it to show cause why it should not be fined, stating that, "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule."

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We find that Fox Fiber Optics' apparent violations of Rules 25-24.470 and 25-4.043, Florida Administrative Code, warrant the issuance of a show cause order. Therefore, we order Fox Fiber Optics to show cause in writing within 20 days of our Order why, pursuant to Section 364.285, Florida Statutes, it should not be fined \$100,000 for violation of Rule 25-24.470, Florida Administrative Code, and \$25,000 for violation of Rule 25-4.043, Florida Administrative Code. If levied, the fines shall be forwarded to the Office of the Comptroller upon payment for deposit in the General Fund, pursuant to Section 364.285, Florida Statutes.

DISCONTINUATION OF UNDERLYING SERVICE

As we have found, it appears that Fox Fiber Optics is operating in Florida as an interexchange carrier without a certificate. Rule 25-24.4701(3), Florida Administrative Code, Provision of Regulated Telecommunications Service to Uncertificated Resellers Prohibited, provides that:

The Commission, upon making a determination that a customer of an interexchange company is unlawfully reselling or rebilling intrastate interexchange service may issue an order that directs the customer to cease and desist reselling or rebilling such service and simultaneously directs the interexchange company to discontinue providing such service to such customer and/or to cease providing service to such customer at additional locations within Florida, provided that such discontinuance or limitation of service is technically feasible within the context of existing facilities and technology.

Accordingly, we find it appropriate to order all certificated IXCs to discontinue providing intrastate long distance service to Fox Fiber Optics.

This docket shall remain open pending resolution of this show cause order and any timely protest of the portion of this order requiring IXCs to discontinue service to Fox Fiber Optics.

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Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Fox Fiber Optics shall show cause in writing why it should not be fined \$100,000 for violation of Rule 25-24.470, Florida Administrative Code, and \$25,000 for violation of Rule 25-4.043, Florida Administrative Code. It is further

ORDERED that any response filed by Fox Fiber Optics to the order to show cause shall contain specific allegations of fact and law. It is further

ORDERED that any response to the order to show cause shall be filed with the Director of the Division of Records and Reporting within 20 days of this Order. It is further

ORDERED that upon receipt of Fox Fiber Optics' response, and upon its request for a hearing, further proceedings will be scheduled by the Commission, at which time Fox Fiber Optics will have an opportunity to contest the allegations in the body of this Order. It is further

ORDERED that if Fox Fiber Optics fails to file a timely response, such failure shall constitute an admission of the facts alleged in the body of this Order and a waiver of any right to a hearing. It is further

ORDERED that if Fox Fiber Optics responds to the order to show cause by remitting payment of the fines as proposed in the body of this Order, and if the time expires for filing a protest, this docket shall be closed after verification of payment. It is further

ORDERED that, if levied, the fines shall be forwarded to the Office of the Comptroller upon payment to be deposited in the General Fund. It is further

ORDERED that the provision of this Order issued as proposed agency action shall become final and effective if the order to show cause has been resolved, unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

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ORDERED that in the event this Order becomes final, this docket shall remain open pending resolution of the order to show cause.

By ORDER of the Florida Public Service Commission, this 5th day of May, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Lynn
Chief, Bureau of Records

(S E A L)

CJP

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

The order to show cause is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the order to show cause may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a)

The order to show cause is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the order to show cause may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 27, 1997. If such a petition is filed, 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.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

As identified in the body of this order, our action concerning the discontinuation of services to Fox Fiber Optics by interexchange carriers is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 27, 1997. If such a petition is filed, 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. In the absence of such a petition, this order shall become effective on the date subsequent

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satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.