

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against BFM International for violation of Rule 25-24.470, F.A.C., Certificate of Public Convenience and Necessity Required.

DOCKET NO. 980181-TI
ORDER NO. PSC-98-0494-SC-TI
ISSUED: April 9, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER TO SHOW CAUSE AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER REQUIRING DISCONTINUANCE OF SERVICE

BY THE COMMISSION:

BACKGROUND

On October 1, 1997, we received information that BFM International (BFM) may be providing prepaid calling card services without a certificate from this Commission. In addition, we received a complaint from Steven Wiener of Telecard Dispensing Corp. (TDC), a prepaid calling card distributor, against BFM. Apparently, TDC entered into a contract with BFM and purchased over 500,000 prepaid calling cards that had a street value of over \$5,000,000.00. BFM, according to TDC, informed TDC that as of October 1, 1997, it was going to disconnect service on all cards. On October 3, 1997, our staff mailed a certified letter to Mr. Michael Pardes of BFM requesting answers to questions regarding the complaint filed by TDC. Staff received a letter dated October 21, 1997 from Mr. Ronald J. Marlowe, legal counsel for BFM, responding

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PRC RE-RECORDING

to the complaint. From this letter, we have learned that BFM provided interexchange service to TDC beginning in July, 1997, that BFM intends to credit TDC for the non-working cards, and that BFM has ceased operation.

According to information received by phone January 5, 1998, from BFM's legal counsel, Mr. Ronald J. Marlowe, BFM disconnected the service for the following reasons: BFM found out that it needed to be certified by the Commission as a pre-paid calling card provider in Florida; there was misrepresentation by TDC; TDC's customer traffic included too much international traffic; and BFM was not making any money from the cards issued to TDC.

Since that time, TDC has informed our staff that all customers affected by the non-working cards have been reimbursed. Since TDC is a prepaid card distributor, it is not required to be certified by this Commission.

DISCUSSION

On October 1, 1997, our staff received a complaint from TDC explaining that, with only a day's warning, BFM was going to disconnect service on all cards as of October 1, 1997. On October 3, 1997, staff mailed a certified letter to Mr. Michael Padres of BFM requesting answers to questions regarding the prepaid calling cards that were purchased by TDC. Staff received a letter dated October 21, 1997, in response to the questions. Those responses indicated that BFM was providing intrastate interexchange telecommunications service through the instrument of prepaid calling cards. Staff also received a copy of the prepaid calling card from TDC with the name BFM International printed on it; therefore, based on the responses and the card, it appears that BFM violated Rule 25-24.470, Florida Administrative Code, by offering telecommunications service without a certificate. Subsequently, staff dialed BFM's 800 access number, and the recording states, "the toll free number is unassigned or can not be accessed from your calling area."

Rule 25-24.470, Florida Administrative Code, states:

No person shall provide intrastate telephone 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 of equipment and facilities, advertising 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 never be granted.

Under Section 364.285, Florida Statutes, we are authorized to impose upon any entity subject to our 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 this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate that we have issued for any such violation. Utilities are charged with knowledge of our rules and statutes. Additionally, "[i]t is 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).

We believe that BFM's apparent conduct in operating without a certificate has 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, Florida Administrative Code, 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 the company 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." Thus, any intentional act, such as BFM's conduct at issue here, would meet the standard for a "willful violation."

CONCLUSION

In previous dockets involving companies operating without a certificate, fines have ranged up to \$30,000. In this case, we believe that a fine of \$25,000 for operating without a certificate is appropriate. Based on the complaint by TDC, it appears that BFM was providing service without a certificate and disconnected service for prepaid calling cards so that customers did not receive

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the service for which they paid.¹ Accordingly, we find that there is sufficient cause to order BFM to show cause in writing within 20 days of the issuance of this order why it should not be fined \$25,000 for apparent violation of Rule 25-24.470, Florida Administrative Code.

Since it appears that BFM was operating in Florida without a certificate, we hereby order, in accordance with Rule 25-24.470(3), Florida Administrative Code, Provision of Regulated Telecommunications Service to Uncertified Resellers Prohibited, that all certificated IXCs must discontinue providing intrastate long distance service for resale to this company at the conclusion of the show cause proceeding. At the conclusion of the show cause, the interexchange companies will be notified to disconnect the service, if appropriate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BFM International shall show cause, in writing, within 20 days of the issuance of this Order why it should not be fined \$25,000 for apparent violation of Rule 25-24.470, Florida Administrative Code, Certification of Public Convenience and Necessity Required. It is further

ORDERED that BFM International's response shall contain specific allegations of fact and law. It is further

ORDERED that if BFM International fails to respond to this Order within 20 days of its issuance date, the fine shall be deemed assessed, and the company will have five (5) business days from the end of the show cause response period to pay the fine. It is further

ORDERED that in the event BFM International is fined, the monies shall be forwarded to the Office of the Comptroller for deposit in the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. It is further

¹ Mr. Steven Wiener of TDC has confirmed that customers who purchased non-working prepaid calling cards from TDC have been reimbursed.

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ORDERED that if BFM files a timely response to the Show Cause Order, this docket shall remain open pending resolution of the show cause proceeding. It is further

ORDERED that all certificated IXCs must discontinue providing intrastate long distance service for resale to BFM International at the conclusion of the show cause proceeding if appropriate. It is further

ORDERED that the provision of this Order requiring IXCs to discontinue providing service to BFM is issued as a Proposed Agency Action and shall become final and effective 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

ORDERED that this docket shall remain open to process any protest regarding the Proposed Agency Action that may be filed. It is further

ORDERED that if no timely protest to the Proposed Agency Action is filed, and BFM fails to respond to the Order to Show Cause or fails to pay the fine, this docket may be closed.

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By ORDER of the Florida Public Service Commission this 9th
day of April, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

WPC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

As identified in the body of this order, our action ordering all interexchange carriers to discontinue the provision of service to BFM International in this case, if appropriate, 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 April 30, 1998. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

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Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it 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.

The Commission's order to show cause in this docket is preliminary, procedural or intermediate in nature. 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 25-22.037(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 April 29, 1998.

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.