

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against Fox Fiber Optics for violation of Rules 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.

DOCKET NO. 961233-TI

In re: Application for transfer of Interexchange Telecommunications Certificate No. 2929 from WATS/800, Inc. d/b/a ITS to ITS Billing, Inc. d/b/a ITS d/b/a Fox Fiber Optics.

DOCKET NO. 970650-TI
ORDER NO. PSC-98-1087-FOF-TI
ISSUED: August 11, 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 APPROVING SETTLEMENT OFFER
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING TRANSFER OF INTEREXCHANGE
TELECOMMUNICATIONS CERTIFICATE

BY THE COMMISSION:

NOTICE IS HEREBY GIVEN by the Florida Public Service Commission that the action discussed herein concerning the transfer of the Interexchange Telecommunications certificate is preliminary in nature and will become final unless a person whose substantial interests are affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

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CASE BACKGROUND

By Order No. PSC-97-0511-FOF-TI, issued On May 5, 1997, in Docket No. 961233-TI, the Commission ordered Fox Fiber Optics (Fox) to show cause 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. On May 27, 1997, Fox filed its Response to Order No. PSC-97-0511-FOF-TI, in which it denied the violations and requested a hearing pursuant to Section 120.57, Florida Statutes. Accordingly, a hearing was set for November 5, 1997.

On May 27, 1997, WATS/800 advised us that it planned use the registered fictitious names "ITS Billing," "ITS," "Information and Telephone Services," and "Fox Fiber Optics" for various product offerings. Docket No. 970650-TI was opened for purposes of processing this certificate name change. On July 11, 1997, ITS Billing, Inc., filed an Application for Authority to Provide Interexchange Telecommunications Service within the State of Florida, seeking transfer of Certificate No. 2929 from WATS/800, Inc., d/b/a ITS, d/b/a ITS Billing, Inc., d/b/a Information and Telephone Services, and d/b/a Fox Fiber Optics to ITS Billing, Inc., d/b/a ITS Billing, Inc., d/b/a ITS, d/b/a Information and Telephone Services, and d/b/a Fox Fiber Optics (ITS). We restyled Docket No. 970650 to reflect that its purpose was to examine the application to transfer WATS/800's certificate to ITS. ITS submitted the required tariffs on August 8, 1997.

SHOW CAUSE

In response to our Order to Show Cause, Order No. 97-0511-FOF-TP, Fox indicated that it did not believe it had to be certificated, but acknowledged that because the principals and management of Fox and WATS/800 are the same, the need for certification may not be clear. Fox also indicated that it had not responded to our inquiries because the inquiries had not been directed to company management.

On June 6, 1997, Fox submitted a settlement proposal where it stated that (1) it is taking steps to make it clear that service is being provided by WATS/800, Inc., (WATS/800), an interexchange carrier operating in Florida (Certificate No. 2929), under the fictitious name and service mark "Fox Fiber Optics;" (2) Fox and WATS/800 have retained counsel as the primary contact to ensure

timely response to our inquiries; and (3) Fox is prepared to pay \$10,000 in lieu of a fine in settlement of all potential sanctions. Our staff was, however, concerned with certain portions of Fox's proposal. In view of these concerns, the company and our staff had further discussions regarding this matter.

On July 25, 1997, Fox submitted a revised settlement proposal. Therein, it proposed to make a payment in lieu of a fine in the amount of \$20,000. The settlement proposal is attached and incorporated herein as Attachment A. The company emphasized, however, that the transfer of certificate from WATS/800 to ITS is an essential part of the settlement, because WATS/800 has declared bankruptcy, and its assets have been assigned to ITS pursuant to a creditors' agreement approved by the court. The company further stated that ITS will provide telecommunications services as a switchless rebiller upon transfer of Certificate No. 2929.

Upon consideration, we hereby accept the settlement offer proposed by Fox. The \$20,000 payment shall be remitted to the Florida Public Service Commission within five business days from the issuance of this Order. The \$20,000 payment shall be forwarded to the Office of the Comptroller for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285(1), Florida Statutes.

TRANSFER OF CERTIFICATE NO. 2929

On May 27, 1997, WATS/800 and ITS filed a joint request for transfer of Interexchange Telecommunications (IXC) Certificate No. 2929 from WATS/800 to ITS. As noted, the assets of WATS/800 have been assigned to ITS to enable the company to continue operations.

Section 364.337, Florida Statutes, authorizes us to grant a certificate to provide intrastate telecommunications service upon a showing of sufficient technical, financial, and management capability. Section 364.335, Florida Statutes, requires that we act upon applications for certificate and for transfers of certificate in the interest of promoting the competitive provision of telecommunication services, and to apply the same criteria in both cases.

Upon review and consideration of its application, we find that ITS has sufficient financial capability to satisfy the requirements of Section 364.337, Florida Statutes, although ITS provided an

income statement for the period February 7, 1997, to May 31, 1997, reflecting a net loss of \$568,306 on revenues of \$1,337,321, which caused some concerns initially. ITS explained, however, that its losses were largely attributable to high start-up costs incurred in launching a sweepstakes marketing campaign, which included extensive measures designed to avoid unauthorized Primary Interexchange Carrier (PIC) changes. ITS abandoned the campaign after only a few months when it failed to realize the revenues anticipated from it. ITS stated that it believed it was currently operating profitably. Nevertheless, the company added that if we do not approve the transfer of WATS/800's certificate, the company will be placed in severe financial distress.

In subsequent correspondence, ITS indicated that it has been able to reduce expenses, build its customer base, and achieve current profitability since October 1997. It has provided us with summaries of cash receipts and disbursements showing cash flow of \$10,187 on receipts of \$280,872 for March 1998 and \$59,384 on receipts of \$279,032 for April 1998. ITS also provided us with an income statement for the period February 7, 1997, to December 31, 1997, showing a net loss of \$1,089,419 on operating revenues of \$3,369,580. It also included a balance sheet showing assets of \$1,052,882 and shareholders' equity of \$553,750. In addition, ITS asserts that it has provided telecommunications services over the past year to the present without any significant complaints, in spite of its financial problems. Thus, ITS asserts that it has satisfied the criteria of Section 364.337(3), Florida Statutes.

While we have some reservations concerning the financial capability of ITS, we are persuaded by the company's current performance that it is resolving its financial problems. While still substantial, ITS's operating losses in the last six months of 1997 amounted to a lesser percentage of revenues than in the preceding four months. Its current operations reflect positive cash flows. Thus, we believe that ITS has demonstrated sufficient financial capability as required by Section 364.337(3), Florida Statutes. In addition, ITS has provided services since February 1997 to an apparently increasing number of customers without any quality problems of which staff is aware. For these reasons, we find that ITS has demonstrated sufficient technical, financial, and management capability to provide telecommunications services in Florida. We find the transfer is in the public interest, and, hereby, approve the transfer of Certificate No. 2929 from WATS/800 to ITS. IXC Certificate No. 2929 shall be amended to reflect that ITS is the holder of this certificate.

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If this Order becomes final and effective, it shall serve as ITS' certificate. ITS shall, therefore, retain this Order as proof of certification. We emphasize that IXCs are subject to Chapter 25-24, Florida Administrative Code, Part X, Rules Governing Telephone Service Provided by Interexchange Telephone Companies. IXCs are also required to comply with all applicable provisions of Chapter 364, Florida Statutes, and Chapters 25-4, Florida Administrative Code. Further, pursuant to the provisions of Order No. 16804, issued November 4, 1986, IXCs may not construct facilities to bypass a local exchange company without the prior approval of this Commission.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that settlement offer proposed by Fox Fiber Optics, attached and incorporated in this Order as Attachment A, is hereby approved. It is further

ORDERED that Fox Fiber Optics shall remit the \$20,000 payment in settlement to the Florida Public Service Commission within five business days from the issuance of this Order. The \$20,000 payment shall be forwarded to the Office of the Comptroller for deposit in the State of Florida General Revenue Fund. It is further

ORDERED that upon remittance of the \$20,000 payment, Docket No. 961233-TI shall be closed.

ORDERED that the request for transfer of Interexchange Telecommunications Certificate No. 2929 from WATS/800, Inc. d/b/a ITS to ITS Billing, Inc. d/b/a ITS d/b/a Fox Fiber Optics, is hereby approved. It is further

ORDERED that Interexchange Telecommunications Certificate No. 2929 shall be amended to reflect that ITS Billing, Inc. d/b/a ITS d/b/a Fox Fiber Optics, is the holder of this certificate.

ORDERED that ITS Billing, Inc. d/b/a ITS d/b/a Fox Fiber Optics Interexchange Telecommunications service Certificate No. 2929 is subject to the terms and conditions set forth in the body of this Order. It is further

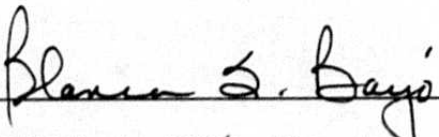
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ORDERED that this Order will serve as ITS Billing, Inc. d/b/a ITS d/b/a Fox Fiber Optics's certificate and that this Order shall be retained as proof of certification. It is further

ORDERED that the provisions of this Order, concerning the transfer of the Interexchange Telecommunications Certificate No. 2929 are issued as proposed agency action, and shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, 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 in the event the portions of this Order pertaining to the transfer of Certificate No. 2929 become final, Docket 970650-TI shall be closed. It is further

By ORDER of the Florida Public Service Commission this 11th day of August, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BK/KMP

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.

Any party adversely affected by the Commission's final action approving the settlement offer proposed by Fox Fiber Optics may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/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 after the issuance 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 transfer of Interexchange Telecommunications Certificate No. 2929 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 Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 1, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

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.

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.

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If this order becomes final and effective on the date described above, any party substantially 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.

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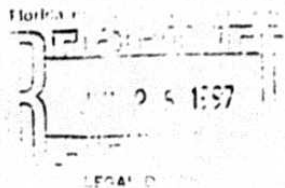
ATTACHMENT A

WIGGINS & VILLACORTA, P.A.

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July 25, 1997



VIA HAND DELIVERY

Mr. Charles Pellegrini
Division of Communications
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: DOCKET NO. 961233-TI: In Re: Initiation of show cause proceedings against Fox Fiber Optics for violation of Rules 25-24.470, F.A.C., Certificate of Public Convenience and Necessity Required, and 25-4.043, Response to Commission Staff Inquiries.

Dear Mr. Pellegrini:

The purpose of this letter is to propose a settlement of the above show cause proceeding against Fox Fiber Optics (Respondent). As such, this communication is privileged and confidential,¹ and nothing herein may be viewed as an admission against interest or in any way used against Respondent if this dispute is not settled.

Allegations

The Show Cause Order alleges two violations by Respondent. First, it alleges that Respondent provided intrastate telecommunications services for hire within the State of Florida without certification to do so. Second, the Show Cause Order alleges that Respondent violated Rule 25-4.043 by knowingly and willfully refusing or failing to timely respond to inquiries propounded by staff.

On May 27, 1997, Respondent filed its Response to the Show Cause Order setting out its defenses to the two allegations, along with an explanation of the circumstances apparently triggering the

¹ Respondent is not claiming protection from disclosure under the Public Records law, but rather protection against use of this communication against it if this matter cannot be settled.

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Commission's enforcement action. These defenses notwithstanding, Respondent's principal concern is to resolve this matter to the Commission's satisfaction and to ensure that its operations are in compliance with applicable Commission requirements. With this objective in mind and without admitting the alleged violations, Respondent would like to (1) recap and supplement its response to the allegations, and (2) state the specific terms of the proposed settlement.

RECAP OF RESPONSE TO ALLEGATIONS

Alleged Uncertificated Provision of Service

With respect to the first allegation, Respondent has explained that its management and principals were also the management and principals of WATS/800, which was doing business as Fox Fiber Optics. WATS/800 previously had been granted IXC authority and is the holder of Certificate Number 2929. All customers allegedly served by Respondent were in fact customers of WATS/800, a certificated interexchange carrier. These customers were assigned to the carrier identification code of WATS/800 and customer service was provided by WATS/800. Respondent's function was to market the services of the certificated carrier and it did so out of the same offices from which WATS/800 operated. In short, Fox Fiber Optics was intended to be a marketing arm of WATS/800, not a separate telecommunications company.

Respondent understands that the business relationship and functions between it and WATS/800 were confusing to the outside observer, and that the facts could support an inference that Respondent had itself become the provider in the eyes of the customer. As an ameliorating factor, however, this is not a case of an entity providing long distance service without regard to need for certification by the Commission. On the contrary, the management and principals of Respondent were the same persons who obtained the requisite certification for WATS/800, the entity for which they believed Respondent was marketing.

Sometimes a marketer of telecommunication services will cross the line between selling and providing and become an uncertificated provider. Although one could conclude that this is what Respondent did, such a conclusion would be a distortion of what actually happened. The better view is that WATS/800 began doing business under a fictitious name, "WATS/800, d/b/a Fox Fiber Optics" without giving notice to the Commission. To reiterate, Fox Fiber Optics had set itself up as an authorized sales agent for WATS/800 and was intended to be a marketing arm for that company. In any event, because this view better reflects the economic relationship between Respondent and WATS/800, the cure is not to have Respondent become

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certificated, but to reflect on Certificate Number 2929 that the holder is doing business under the fictitious name "Fox Fiber Optics."

Alleged Failure to Respond to Staff Inquiries

With respect to the second allegation, Respondent has explained that the notices sent by staff to Respondent were not directed to an officer of the company or any other authorized agent of the company. Rather, these notices were sent by certified mail to an employee, who is no longer with the company, Mr. Dennis Marshall. Mr. Damien Freeman, the chief executive officer for both Respondent and WATS/800, is personally frustrated that Respondent is viewed as non-responsive when neither he nor anyone else in Respondent's management was aware that staff inquiries had been received by an employee of the company.

If one views the response of WATS/800 to staff inquiries over the past two years, one does not find the company non-responsive. Thus, the regulatory history of WATS/800 supports Mr. Freeman's contention that the company did not fail to respond to any inquiry of which it was aware.

PROPOSED SETTLEMENT

Although this is a complicated case in some respects, the objective here is straightforward: to resolve to the Commission's satisfaction the show cause proceeding and to insure that the holder of Certificate Number 2929 provides service only under names on file with the Commission and reflected on the certificate. Our proposed plan for achieving this resolution and result involves only two steps, although the second step is not typical.

Step 1: \$20,000 Payment

First, Respondent proposes to make a \$20,000 payment to the State of Florida in lieu of a fine in settlement of all potential sanctions that might be imposed as a result of the violations alleged the Show Cause Order. This amount appears consistent with the emerging trend of Commission fines and settlements given the context of the alleged violations.

Step 2: Certificate Transfer

Second, Respondent proposes that Certificate Number 2929 be transferred from "WATS/800 d/b/a ITS Billing" to "ITS Billing, Inc. and d/b/a Information and Telephone Services and d/b/a ITS and d/b/a Fox Fiber Optics" ("ITS Billing"). ITS Billing involves the same principals as WATS/800. This transfer, with the appropriate

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recognition of the fictitious names, would ensure that the marketing activities of Respondent would not place it in jeopardy of being viewed as providing telecommunications services while avoiding confusion over its relationship to the certificate holder. For example, if a consumer called the Commission with an inquiry about "Fox Fiber Optics," the Commission's records would reflect that ITS Billing Inc. offers services under this fictitious name. ITS Billing has already applied for this transfer, and the request has been assigned Docket Number 970650-TI - Request for name change on Interexchange Telecommunications Certificate No. 2929 from WATS/800, Inc. d/b/a ITS Billing to ITS and d/b/a ITS Billing and d/b/a Information and Telephone Services and d/b/a Fox Fiber Optics.

Typically in resolving a show cause action for uncertificated provision of service the second step would involve a simple grant of a certificate to the respondent so that future provision of service is authorized and complies with all applicable regulations. In this case, however, Respondent has no desire to be a telecommunications company but rather would simply market for the certificate holder. Moreover, a transfer of the certificate is necessary because WATS/800, the current certificate holder, has been declared bankrupt (Chapter 7) and pursuant to a settlement agreement among the creditors and approved by the Bankruptcy Court, its assets have been assigned to ITS Billing Inc., which will provide intrastate service upon transfer of the certificate.

Although this second step involves two entities other than Respondent, it is an essential part of the settlement. With this transfer, customers can continue to receive bills under the service mark "Fox Fiber Optics" without Respondent being viewed as providing uncertificated service. Also, with this transfer, a new, financially solvent entity can ensure continuity of service to customers while expanding its operations. Moreover, the continuation of the business by ITS Billing is a critical factor in the ability of Fox Fiber Optics to pay the proffered \$20,000.

FINANCIAL, TECHNICAL AND MANAGERIAL FITNESS OF ITS BILLING

I have avoided a discussion of how WATS/800 became financially distressed because it is not germane and because this is the subject of a lawsuit brought by WATS/800 against its underlying carrier and others. It might be useful, however, to make two observations. First, although WATS/800's financial condition was precarious during the time Respondent was marketing its services, neither WATS/800 nor Respondent resorted to "slamming schemes" to generate needed traffic and revenue. Indeed, the show cause action here focuses on unauthorized provision of service and failure to respond to staff inquiries, not customer deception. The level of

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customer complaints against WATS/800 is within industry norms; in short, one would not suspect from the customer complaint activity that WATS/800 was in financial distress. I believe this supports the view that the management of WATS/800 and Fox Fiber Optics conducted their activities in good faith.

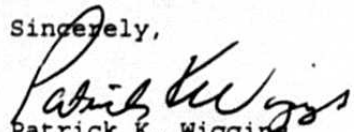
Second, the corporate reorganization decision to transfer assets from WATS/800 to ITS Billing Inc. was hammered out by creditors and effected by order of the bankruptcy court. Because of this and because the management of WATS/800 provided quality service during a period of distress, I believe it reasonable to conclude that ITS Billing, as an applicant for authority under the same basic management, is financially, technically, and managerially fit to provide telecommunications service in the State of Florida.

Conclusion

In conclusion, Respondent regrets any confusion that has occurred as a result of the dual use of the name and service mark "Fox Fiber Optics." Respondent also regrets that internal miscommunication concerning staff inquiries has resulted in inconvenience to the Commission. Respondent and its principals reaffirm their commitment to full compliance with all applicable Commission regulations. Thus, we are hopeful that staff and the Commission will find this good faith offer of settlement acceptable and in the public interest.

Please contact me if any additional information is required.

Sincerely,


Patrick K. Wiggins

cc: Tom Williams