

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Compliance investigation of FoxTel, Inc.
for apparent violation of Sections 364.02 and
364.336, Florida Statutes.

DOCKET NO. 040427-TI
ORDER NO. PSC-04-0662-PAA-TI
ISSUED: July 8, 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.

Foxtel, Inc. (Foxtel) is a registered interexchange telecommunications company based in Reno, Nevada that provides intrastate interexchange telecommunications services in Florida. On July 25, 2003, staff received a complaint against Foxtel. After receiving the complaint, staff made several attempts, including telephone calls and facsimiles, to notify the company of the complaint. On January 14, 2004, staff mailed a certified letter to Foxtel. The letter informed the company that its response to the customer complaint was past due and requested that the company respond within ten (10) business days from the date of the letter. The signed green certified mail receipt was returned on January 22, 2004, indicating that the company had received staff's letter. After not receiving a response to the letter, the complaint was later reassigned to the Division of Competitive Markets and Enforcement. Upon reassignment of the complaint, staff made several telephone calls and learned that Foxtel had apparently sold its assets to another company. However, the representative from the other company was unable to provide any new contact information for Foxtel. On March 23, 2004, staff mailed another letter to the company. Staff requested that the company resolve the complaint and submit a written request to the Commission to voluntarily cancel its registration if the company was no longer

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operating in Florida and did not have a need for its registration. The letter was later returned by the United States Postal Service. The company moved and left no forwarding address.

Foxtel has not communicated with staff or replied to the customer complaint which is in apparent violation of Section 364.02 (13), Florida Statutes. Section 364.02(13), Florida Statutes, states in pertinent part:

. . . Each intrastate interexchange telecommunications company shall continue to be subject to ss. 364.04, 364.10(3)(a) and (d), 364.163, 364.285, 364.501, 364.603, and 364.604, shall provide the commission with such current information as the commission deems necessary to contact and communicate with the company....

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.

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, 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. 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 Foxtel to communicate with Commission staff meets the standard for a "refusal to comply" and "willful violations" 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 Foxtel are subject to the rules published in the Florida Administrative Code. See, Commercial Ventures, Inc. v. Beard, 595 So.2d 47, 48 (Fla. 1992).

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.02(13) and 364.285, Florida Statutes. Further, the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon intrastate interexchange telecommunications companies that have failed to respond to consumer complaints. Therefore, staff recommends that the Commission find that Foxtel has, by its actions and inactions, willfully violated Section 364.02(13), Florida Statutes, and impose a penalty in the amount of \$10,000.00 against Foxtel, Inc. for its apparent violation.

Section 364.336, Florida Statutes, requires the payment of Regulatory Assessment Fees (RAF) by January 30 of the subsequent year for telecommunications companies, and provides for late payment charges as outlined in Section 350.113, Florida Statutes, for any delinquent amounts. On December 12, 2003, the Division of the Commission Clerk & Administrative Services mailed the 2003 RAF return notice to Foxtel. The company's RAF payment was due by January 30, 2004. On February 19, 2004, the Office of General Counsel mailed a delinquent notice via certified mail to the company for nonpayment of its 2003 RAF. The company never responded. Therefore, it appears that Foxtel has failed to comply with Section 364.336, Florida Statutes.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.285 and 364.336, Florida Statutes. Foxtel has failed to pay its 2003 Regulatory Assessment Fees, plus statutory penalty and interest charges, in compliance with Section 364.336. Foxtel has also failed to request the cancellation of its tariff and removal of its registration from the register in compliance with Section 364.02. Pursuant to Section 364.336, Florida Statutes, cancellation of an entity's certificate does not relieve the company's obligation to pay RAFs, including statutory penalty and interest charges, if the certificate was active during any portion of the calendar year,

including the cancellation year. Further the amount of the proposed penalty is consistent with penalties previously imposed by the Commission upon other intrastate interexchange telecommunications companies for similar violations. Therefore, staff recommends that the Commission impose a penalty upon Foxtel in the amount of \$500.00, for its apparent violation of Section 364.336, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Foxtel, Inc. is hereby assessed a penalty of \$10,000.00 for its apparent violation of Sections 364.02(13), Florida Statutes and assessed a penalty of \$500.00 for its apparent violation of Section 364.336, Florida Statutes. 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 Foxtel, 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 Foxtel, Inc. fail to timely protest this Order, payment of the \$10,000 penalty for its apparent violation of Sections 364.02(13), Florida Statutes and payment of the \$500 penalty for its apparent violation of Section 364.336, Florida Statutes, 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 company's tariff; 2) receipt of the company's current

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contact information; and 3) receipt of the \$10,500 total penalty payment; or 4) referral of the penalty to the Department of Financial Services for further collection efforts.

By ORDER of the Florida Public Service Commission this 8th day of July, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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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.

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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 July 29, 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.