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FPSC - Records/Reporting

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

MARCH 12, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (COX) *NB for WPC*
DIVISION OF COMMUNICATIONS (HAWKINS) *BSSH W/OKANT*
DIVISION OF CONSUMER AFFAIRS (C.PENA) *erp* *BA*

RE: DOCKET NO. ~~980181~~-TI - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST BFM INTERNATIONAL FOR VIOLATION OF RULE 25-24.470, FLORIDA ADMINISTRATIVE CODE, CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY REQUIRED.

AGENDA: 03/24/98 - REGULAR AGENDA - ISSUE 1 - SHOW CAUSE - ISSUE 2 - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\CMU\WP\980181.RCM

CASE BACKGROUND

On October 1, 1997, staff received information that BFM International (BFM) may be providing debit card services without a certificate from this Commission. In addition, staff received a complaint from Steven Wiener of Telecard Dispensing Corp. (TDC), a prepaid card distributor, against BFM International (BFM.) (Attachment A, Page 7.) Apparently, TDC entered into a contract with BFM and purchased over 500,000 prepaid debit 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, 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 to the complaint. (See Attachment B, Pages 8, 9 & 10). From this letter, staff has 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.

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According to information received by phone January 5, 1998, from 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 debit 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 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 OF ISSUES

ISSUE 1: Should the Commission order BFM International to show cause in writing why it should not be fined \$25,000 for apparent violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required?

RECOMMENDATION: Yes. The Commission should order BFM International to show cause in writing within 20 days of the effective date of the order why it should not be fined \$25,000 for violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. If BFM fails to respond to the show cause order, the fine will be deemed assessed. If the fine is not paid after reasonable collection efforts by the Commission, it should be forwarded to the Office of the Comptroller for collection. BFM should be required to pay the fine within five working days of the issuance of the Commission's order. Upon payment, the fine should be forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. (COX, HAWKINS)

STAFF ANALYSIS: On October 1, 1997, staff received a complaint from TDC explaining that, with only a day's warning, BFM was going to

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disconnect service on all cards as of October 1, 1997. (See Attachment A, Page 7.) On October 3, 1997, staff mailed a certified letter to Mr. Michael Padres of BFM requesting answers to questions regarding the prepaid cards that were purchased by TDC. Staff received a letter dated October 21, 1997, in response to the questions. (See Attachment B, Pages 8, 9, and 10.)

Staff received a copy of the prepaid debit card from TDC with the name BFM International printed on it (Attachment C, Page 11); therefore, it appears that BFM violated Rule 25-24.470, Florida Administrative Code, by offering telecommunications service without a certificate. 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." Staff believes that BFM should be assessed a fine of \$25,000 because it was operating without a certificate and did not give TDC ample notice before discontinuing the service on the prepaid debit cards.

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, 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, or revoke any certificate issued by it for any such violation. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person,

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either civilly or criminally," Barlow v. United States, 32 U.S. 404, 411 (1833).

Staff believes 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, the Commission 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." Thus, any intentional act, such as BFM's conduct at issue here, would meet the standard for a "willful violation."

In previous dockets involving companies operating without a certificate, fines have ranged up to \$30,000. In this case, staff believes 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 debit cards so that customers did not receive the service for which they paid. Staff called Mr. Steven Wiener of TDC and was told that customers who purchased non-working prepaid debit cards from TDC have been reimbursed. Accordingly, staff believes there is sufficient cause to order BFM to show cause in writing within 20 days of the effective date of the order why it should not be fined \$25,000 for apparent violation of Rule 25-24.470, Florida Administrative Code.

ISSUE 2: Should the Commission order all certificated interexchange companies (IXCs) to discontinue providing interexchange telecommunications service to BFM, pursuant to Rule 25-24.4701(3), Florida Administrative Code?

RECOMMENDATION: Yes. At the conclusion of the show cause, the interexchange companies will be notified to disconnect the service if appropriate.

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STAFF ANALYSIS: Rule 25-24.4701 (3), Florida Administrative Code Provision of Regulated Telecommunications Service to Uncertified Resellers Prohibited, states:

(3) 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 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.

It appears that BFM was operating in Florida without a certificate. Accordingly, staff recommends that the Commission order all certificated IXCs to discontinue providing intrastate long distance service for resale to this company at the conclusion of the show cause proceeding. If the company was simply operating as a distributor, it would not have ordered 800 number network access; therefore the actions here requiring carriers to discontinue the provision of service for resell will not affect a distributor's business. At the conclusion of the show cause, the interexchange companies will be notified to disconnect the service if appropriate.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: If staff's recommendation in Issue 1 is approved, an Order to Show Cause will be issued. If BFM timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceeding. The docket should also remain open to process any protest to Issue 2 that may be filed within 21 days of the issuance of the Order by a person whose substantial interests are affected by the Commission's Proposed Agency Action. If BFM does not respond to the Commission's Order

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to Show Cause, the fine should be assessed, and the company will have five (5) business days from the end of the show cause response period to pay the fine. If no timely protest to Issue 2 is filed and BFM fails to respond to the Proposed Agency Action to Show Cause, this docket may be closed. (COX)

STAFF ANALYSIS: If staff's recommendation in Issue 1 is approved, an Order to Show Cause will be issued. If BFM timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceeding. The docket should also remain open pending the resolution of any protest to Issue 2 that may be filed within 21 days of the issuance of the Order by a person whose substantial interests are affected by the Commission's Proposed Agency Action. If BFM does not respond to the Commission's Order to Show Cause within 20 days of the issuance of the show cause order the fine should be assessed, and the fine shall be paid within five business days of the show cause response period. If no timely protest of Issue 2 is filed and BFM fails to respond to the Proposed Agency Action to Show Cause, this docket may be closed.

**Telecard Dispensing Corp.®**

TO: Rick Moses
FROM: Steven Wiener *SW*
SUBJ: BFM International prepaid cards
DATE: October 01, 1997

Per our phone conversation this morning, I am faxing a copy of the front and back of the BFM prepaid card for your review. As I explained, this carrier has sold Telecard Dispensing Corporation 600,000 prepaid cards in the last 90 days. These cards have a retail street value of over \$5,000,000.00. BFM notified us yesterday, September 30th, 1997 that they intend to disconnect service on all cards as of October 01st, 1997 (tomorrow).

Telecard Dispensing has paid in full for all these cards, and this action will certainly cause a hardship for the consumers in possession of these cards.

Due to the urgency of the situation, I would appreciate your prompt response regarding this matter. You may reach me at my direct line 1 (954) 927-7770. Thank you.

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REPLY TO: MIAMI

October 21, 1997

Kelly Biegalski
Regulatory Analyst II
Bureau of Service Evaluation
Florida Public Service Commission
Division of Communications
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

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CMU

Re: BFM International

Dear Ms. Biegalski:

Thank you for your letter of October 3, 1997, regarding BFM International. That letter has been routed to me for a response as counsel for BFM International.

The information you received regarding BFM International is incorrect. BFM International did not issue any pre-paid phone cards to consumers; rather, BFM International contractually agreed to provide network services to Telecard Dispensing Corp. ("TDC") who intended to issue phone cards in its name. While I have not personally seen any of the phone cards so issued, it is my understanding that TDC's name is prominently displayed on the face of these cards.

BFM International subsequently ascertained that a Certificate of Public Convenience and Necessity might be required by BFM International. More importantly, BFM International determined that such a Certificate was required for TDC. Based upon the foregoing, BFM International immediately discontinued providing network services to TDC. BFM International made the in-bound (800) numbers available for use by TDC with another carrier who was willing to provide service to this uncertificated entity.

Regarding the questions in your letter, many must be posed directly to TDC as the card issuer and distributor. Responding as much as possible given its limited knowledge of the business activities of TDC, BFM International submits the following responses to

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your questions:

1. "On what date did BFM begin providing prepaid calling card service?" BFM did not provide prepaid calling card service per se; rather, it provided service to TCD who resold this as calling card service. This service commenced in late July 1997.

2. "How many cards are currently on the market with BFM International as the service provider?" BFM International does not know how many cards were issued and distributed by TDC. This information is in the sole possession of TDC as distributor/issuer.

3. "Are these cards active? If not, what remedy is being offered to make consumers whole?" BFM International made the (800) numbers available to TDC for use by a certificated carrier and/or for resale to a certificated calling card company. To the best of BFM International's knowledge, TDC has elected to keep consumer revenues from the sale of the calling cards and has not activated the cards with another carrier. BFM International has no knowledge of what remedies, if any, are being offered by TDC to consumers. BFM International's sole customer, TDC, will receive a credit by BFM International equal to unused network services; however, at this time BFM International does not believe it will have the financial ability to remit this credit to TDC due to the cessation of business by BFM International.

4. "How much is subject to refund and what method will be used to issue the refunds?" This information depends upon the number of cards actually sold and distributed by TDC, information which is not in the possession of BFM International.

5. "What date will BFM International apply for certification?" BFM International has ceased operations and does not anticipate applying for certification.

6. "Has the switch been shut down? If so, on what date." BFM International ceased supplying network services to TDC on October 2, 1997. BFM International has no direct knowledge of subsequent remedial measures taken by TDC to have its cards honored by another carrier or to issue credits to its customers.

7. "Has the switch been reactivated? If so, on what date." Not by BFM International. BFM International has no direct knowledge of whether TDC has secured another carrier to provide network services for TDC's calling cards.

It is BFM International's belief that this dispute is not consumer driven. When TDC learned that BFM International was going to refuse to provide network services to TDC, it contacted the Florida Public Service Commission. Since this is a contractual dispute between BFM international and TDC, perhaps the best course of action at this time is to

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wait and see if this situation generates consumer complaints or whether TDC will issue credits or replacement cards to its customers.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Marlowe", with a vertical line drawn through the middle of the signature.

Ronald J. Marlowe

Oct-01-97 11:21A Access America

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P.03

Artwork for the back is supplied by BFM

27 Domestic Minutes **BFM International**
Scratch-off/PIN: 289 1911 3991

<p>1. Dial 1-800-580-5857 Listen and follow the instructions.</p> <p>2. When prompted, enter the PIN number located above * 2</p> <p>3. Domestic Calls: Dial 1 • Area Code • Telephone Number • 2 International Calls: Dial 011 • Country Code • City Code • Local Number • 2</p>	<p>1. Appeler 1-800-580-5278 Écouter et agir les instructions.</p> <p>2. Lorsque demandé, entrer le numéro PIN situé au-dessus de * 2</p> <p>3. Appels Internationaux: Composer et 1 • Code du pays • et Numéro de Téléphone • 2 Appels Internationaux: Composer 011 • Code du pays • et Code de la ville • et Numéro de Téléphone Local • 2</p>
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Controlle Clientel 1-800-580-3304
Customer Service/Service à Client: 1-800-580-3304
* 9.99 minutes les appels par appel • Supplément de 10¢ par appel
The cost varies by month from the date of last use. Bitte beachten: je nach Monat können die Gebühren für ein Gespräch variieren.

*Artwork for the front of the
card is supplied by Telcard Advertising Corp*

