

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance investigation
of Bigredwire for apparent
violation of Rule 25-24.470,
F.A.C., Certificate of Public
Convenience and Necessity
Required, and Rule 25-4.043,
F.A.C., Response to Commission
Staff Inquiries.

DOCKET NO. 020664-TI
ORDER NO. PSC-02-1285-PAA-TI
ISSUED: September 20, 2002

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

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.

I. CASE BACKGROUND

On March 27, 2002, we received a complaint from a Florida
consumer (customer) regarding the unauthorized switch of his local
long distance provider to a company known as bigredwire.com
(Bigredwire). Bigredwire has not obtained a Certificate of Public
Convenience and Necessity (certificate). On April 11, 2002, our
staff determined that Qwest is the underlying service provider for

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Bigredwire, and at our staff's request, Qwest provided us with the contact information for Bigredwire.

On April 12, 2002, our staff sent an email to Mr. Brad Weinstock at bweinstock@hermes.bigredwire.com requesting that the company investigate the customer complaint and provide us with a reply by April 26, 2002. We also requested that Bigredwire submit an application for a certificate no later than May 3, 2002. On May 10, 2002, our staff called Mr. Weinstock at (805) 560-8900 and left him a voice mail message requesting that Mr. Weinstock return the call.

On May 23, 2002, our staff sent Bigredwire a certified letter addressed to Mr. Brad Weinstock via U.S. Postal Service requesting a written reply to the customer's complaint and the certification. The company's reply was due on June 10, 2002.

On May 28, 2002, our staff sent a facsimile of its May 23, 2002, letter to Bigredwire at (805) 560-8901. On June 3, 2002, we received the U.S. Postal Service "green card" receipt indicating that staff's May 23, 2002, letter was received by Bigredwire on May 29, 2002.

Because no responses have been forthcoming, on July 9, 2002, this docket was opened to address Bigredwire's apparent violation of Rule Nos. 25-24.470 and 25-4.043, Florida Administrative Code.

We are vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285, and 364.337, Florida Statutes. Further, the penalty assessed is consistent with penalties imposed upon other interexchange companies by us in previous dockets for the same apparent rule violations.

II. ANALYSIS

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

(1) No person shall provide intrastate interexchange 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. . . .

During the course of our investigation into a slamming complaint received by a Florida consumer against Bigredwire, we determined that the company has not obtained a certificate. We believe that Bigredwire is providing intrastate IXC telephone service in Florida based on the customer complaint and the information on the company's website, www.bigredwire.com. The complainant, a Broward County resident, claims to be a former customer of Bigredwire for all long distance telecommunications service, including IntraLATA (local toll). The customer indicated in his complaint that Bigredwire was utilizing Qwest as its underlying carrier. In addition, the company's website indicates that Bigredwire utilizes first tier carriers to provide service, not the internet. Further, Bigredwire's membership agreement posted on its website states:

. . . by joining Bigredwire you are selecting us or our assignee as your provider for international, long distance (inter-lata), and local long distance (intra-lata) calls.

The provision of local long distance is an intrastate telecommunications service that Bigredwire is apparently providing to customers in Florida. Bigredwire solicits its service through the Internet on its website and bills its customers through credit card deductions. Our records show that Bigredwire has not obtained a certificate. We sent Bigredwire notice of this fact via certified letter, facsimile, and email. Bigredwire has not replied to our inquiries, nor has the company submitted its application for a certificate.

We find that Bigredwire's apparent violation of Rule 25-24.470, Florida Administrative Code, is "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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." Thus, any intentional act, such as Bigredwire's conduct at issue here, would meet the standard for a "willful violation."

By Section 364.285, Florida Statutes, we are authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 per day for each offense, 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. Utilities are charged with knowledge of the 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).

Accordingly, we find that a \$25,000 penalty shall be imposed on Bigredwire for apparent violation of Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. The penalty shall be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the PAA Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty shall be referred to the Office of the Comptroller. Further, if Bigredwire fails to timely protest the PAA Order, and fails to obtain an IXC Certificate of Public Convenience and Necessity, the company shall be required to immediately cease and desist providing interexchange telecommunications services in Florida upon issuance of the Consummating Order until the company obtains an IXC Certificate of Convenience and Necessity.

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In addition, Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, states:

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.

We sent Bigredwire three separate inquiries regarding a customer's slamming complaint and the company's certification, and attempted to call the company. As of August 14, 2002, neither Bigredwire nor Mr. Weinstock have responded to our inquiries. We believe that Bigredwire and Mr. Weinstock are aware of our inquiries and that the company has been given sufficient opportunity to reply.

We find that Bigredwire's apparent violation of Rule 25-4.043, Florida Administrative Code, is "willful" in the sense intended by Section 364.285, Florida Statutes. As stated previously, Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, 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., we found that the company had not intended to violate the rule; nevertheless, we 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 Bigredwire's conduct at issue here, would meet the standard for a "willful violation."

By Section 364.285, Florida Statutes, we are authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 per day for each offense, 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. Utilities are charged with knowledge of the Commission's 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).

Accordingly, we find that a \$10,000 penalty shall be imposed on Bigredwire for apparent violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries. The penalty shall be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the PAA Order is not protested and the payment of the penalty is not received within fourteen calendar days after the issuance of the Consummating Order, the collection of the penalty shall be referred to the Office of the Comptroller.

This Order shall become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Order files a protest within 21 days of the issuance of the Proposed Agency Action Order. This docket shall be closed administratively upon either receipt of the payment of the penalties, or upon referral of the penalties to the Office of the Comptroller for collection if the penalties are not paid within fourteen calendar days after issuance of the Consummating Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bigredwire is hereby penalized in the amount of \$25,000 for failure to comply with Rule 25-24.470, Florida Administrative Code, Certificate of Public Convenience and Necessity Required. It is further

ORDERED that Bigredwire is hereby penalized in the amount of \$10,000 for failure to comply with Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries. It is further

ORDERED that the provisions of this order be issued as a proposed agency action and 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

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ORDERED that if the penalties are not received within 14 calendar days after issuance of the Consummating Order, the amount shall be forwarded to the Office of the Comptroller for collection. It is further

ORDERED that if Bigredwire fails to timely protest the Commission's Order, or fails to obtain an IXC Certificate of Public Convenience and Necessity, upon issuance of the Consummating Order, the company will be required to immediately cease and desist providing interexchange telecommunications services in Florida until it obtains an IXC Certificate of Convenience and Necessity.

ORDERED that this docket be closed administratively upon either the receipt of the payment of the penalties, or upon referral of the penalties to the Office of the Comptroller for collection.

By ORDER of the Florida Public Service Commission this 20th day of September, 2002.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(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.

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 October 11, 2002.

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.