

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 17, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Curry)
Office of the General Counsel (Gray)

RE: Docket No. 040427-TI – Compliance investigation of Foxtel, Inc. for apparent violation of Sections 364.02 and 364.336, Florida Statutes.

AGENDA: 06/29/04 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\040427.RCM.DOC

Discussion of Issues

Issue 1: Should the Commission impose a penalty in the amount of \$10,000 against Foxtel, Inc. for its apparent violation of Section 364.02, Florida Statutes?

Recommendation: Yes. (Curry, Gray)

Staff Analysis: 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 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.

As of the date of filing this recommendation, 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 against Foxtel, Inc. for its apparent violation.

Issue 2: Should the Commission impose a \$500 penalty upon Foxtel for its apparent violation of Section 364.336, Florida Statutes, Regulatory Assessment Fees?

Recommendation: Yes. (Curry, Gray)

Staff Analysis: 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, for its apparent violation of Section 364.336, Florida Statutes.

Issue 3: Should this docket be closed?

Recommendation: Staff recommends that the Commission take action as set forth in the following Staff Analysis. **(Gray)**

Staff Analysis: The Order issued from this recommendation will become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of the Proposed Agency Action Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute should be deemed stipulated. If Foxtel fails to timely file a protest and to request a Section 120.57, Florida Statutes, hearing, the facts should be deemed admitted, the right to a hearing waived, and the penalty should be deemed assessed. If Foxtel fails to pay the penalties and Regulatory Assessment Fees, including statutory late payment charges, within fourteen (14) calendar days after the issuance of the Consummating Order, the company's tariff should be cancelled and Registration No. TJ039 should be removed from the register and the collection of the past due fees should be referred to the Department of Financial Services for further collection efforts. If Foxtel's tariff is cancelled and Registration No. TJ039 is removed from the register in accordance with the Commission's Order from this recommendation, the company should be required to immediately cease and desist providing intrastate interexchange telecommunications services in Florida. This docket should be closed administratively upon either receipt of the payment of the penalties and Regulatory Assessment Fees, with statutory penalty and interest, or upon the cancellation of the company's tariff and the removal of the company's registration number from the register. If the company has its tariff cancelled and registration number removed from the register, and subsequently decides to reapply for registration as an intrastate interexchange telecommunications company, Foxtel should be required to first pay any outstanding penalties and Regulatory Assessment Fees, including statutory late payment charges.