



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

RECORDS AND REPORTING

00 APR - 6 AM 10:23

RECEIVED-FPSC

**DATE:** APRIL 6, 2000

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

**FROM:** DIVISION OF TELECOMMUNICATIONS (ISLER) *Pji*  
DIVISION OF LEGAL SERVICES (K. PEÑA; B. KEATING) *MP*

**RE:** DOCKET NO. 991248-TI - CANCELLATION BY FLORIDA PUBLIC SERVICE COMMISSION OF INTEREXCHANGE TELECOMMUNICATIONS CERTIFICATE NO. 5738 ISSUED TO FIRST CALL USA, INCORPORATED FOR VIOLATION OF RULE 25-4.0161, F.A.C., REGULATORY ASSESSMENT FEES; TELECOMMUNICATIONS COMPANIES, AND RULE 25-4.043, F.A.C., RESPONSE TO COMMISSION STAFF INQUIRIES.

**AGENDA:** 04/18/00 - REGULAR AGENDA - ISSUE 1 - PROPOSED AGENCY ACTION - ISSUE 2 - SHOW CAUSE - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMU\WP\991248.RCM

### CASE BACKGROUND

- **12/05/98** - This company was granted IXC Certificate No. 5738.
- **12/10/98** - The 1998 regulatory assessment fee (RAF) notice was mailed. Payment was due by February 1, 1999.
- **03/17/99** - The Division of Administration mailed a delinquent letter to the company.
- **04/16/99** - The Division of Records and Reporting notified staff that First Call advised that the company had been sold.

DOCUMENT NUMBER-DATE

04235 APR-68

FPSC-RECORDS/REPORTING

DATE: APRIL 6, 2000

- **04/21/99** - Staff wrote the current owner and advised that an IXC certificate could not be sold, assigned, or transferred without prior Commission approved and that the current owner and new owner must submit a joint application for the transfer of First Call's certificate. In addition, staff advised that the 1998 regulatory assessment fee had to be paid. Staff requested a response by May 10, 1999.
- **08/30/99** - This docket was opened as the company had not paid the 1998 RAFs or responded to staff's inquiry.
- **01/20/00** - Staff wrote the "new" owner and advised that a docket had been opened for nonpayment of the regulatory assessment fee and not responding to staff inquiries. A response was requested by February 7, 2000.
- **01/26/00** - Mr. Mark Wally, new owner, called staff to discuss the issues. Mr. Wally stated that he would review the situation and respond by February 7, 2000.
- **03/24/00** - As of this date, no response had been received, therefore, staff called Mr. Wally. Mr. Wally advised that he was not going to pursue keeping this certificate active.

Staff believes the following recommendations are appropriate.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission impose a \$500 fine or cancel First Call USA, Incorporated's Interexchange Telecommunications Certificate No. 5738 for apparent violation of Rule 25-4.0161, F.A.C., Regulatory Assessment Fees; Telecommunications Companies?

RECOMMENDATION: Yes. The Commission should impose a \$500 fine or cancel the company's certificate if the fine and the regulatory assessment fees, including statutory penalty and interest charges, are not received by the Commission within five business days after the issuance of the Consummating Order. The fine should be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the fine and regulatory assessment fees, including statutory penalty and interest charges, are not received, the company's Interexchange Telecommunications Certificate No. 5738 should be canceled administratively. (Isler)

STAFF ANALYSIS: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a fine or cancel a certificate if a company refuses to comply with Commission rules. Rule 25-24.474, Florida Administrative Code, establishes the requirements for cancellation of an interexchange telecommunications company certificate. The rule provides for the Commission to cancel a certificate on its own motion for violation of Commission Rules and Orders.

Rule 25-4.0161, Florida Administrative Code, requires the payment of regulatory assessment fees by January 30 of the subsequent year for telecommunications companies, and provides for penalties and interest as outlined in Section 350.113, Florida Statutes, for any delinquent amounts.

The Division of Administration's records show that the company had not paid its 1998 regulatory assessment fee, plus statutory penalty and interest charges. In addition, the 1999 RAF, which was due January 31, 2000, has not been paid. Prior to the docket being opened, the president of First Call USA wrote the Commission and advised that the company had been sold. Staff wrote the company and explained that the Commission could not acknowledge the change in ownership until the regulatory assessment fee, including accrued penalty and interest charges, was paid. Staff requested a response by May 10, 1999. As of March 28, 2000 there has been no further contact from the current owner, Mr. Kaye, and Commission records show that the 1998 and 1999 RAFs remain unpaid. Therefore, it appears the company has failed to comply with Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies and has not requested cancellation of

DOCKET NO. 991248-TI  
DATE: APRIL 6, 2000

its certificate in compliance with Rule 25-24.474, Florida Administrative Code.

Accordingly, staff recommends that the Commission assess a \$500 fine for failure to comply with the Commission rules or cancel the company's certificate if the fine and the regulatory assessment fees, along with statutory penalty and interest charges, are not paid within five business days after the issuance of the Consummating Order. The fine should be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the fine and regulatory assessment fees, including statutory penalty and interest charges, are not received, the company's interexchange telecommunications Certificate No. 5738 should be canceled administratively.

**ISSUE 2:** Should First Call USA, Incorporated be ordered to show cause why a fine of \$10,000 for apparent violation of Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries should not be imposed or Certificate No. 5738 should not be canceled?

**RECOMMENDATION:** Yes. The Commission should order First Call USA to show cause in writing within 21 days of the issuance of the Commission's Order why it should not have Certificate No. 5738 canceled or be fined \$10,000 for apparent violation of Rule 25-4.043, F.A.C. The company's response should contain specific allegations of fact or law. If First Call USA fails to respond to the show cause, and the fine is not paid within 10 business days after the 21 day show cause period, Certificate No. 5738 should be canceled. If the fine is paid, it should be remitted by the Commission to the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. (Isler)

**STAFF ANALYSIS:** Pursuant to Section 364.285, Florida Statutes, the Commission may impose a fine or cancel a certificate if a company refuses to comply with Commission rules. Rule 25-24.474, F.A.C., establishes the requirements for cancellation of an IXC certificate. The rule provides for the Commission to cancel a certificate on its own motion for violation of Commission Rules and Orders.

Rule 25-24.480, F.A.C., Records & Reports; Rules Incorporated, incorporates Rule 25-4.043, F.A.C., which 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.

In response to the Division of Records and Reporting's request for updated reporting requirements, Mr. Brett Kaye, President, advised that First Call USA had been sold to Mr. Mark Wally, at a different address. On April 21, 1999, staff wrote Mr. Kaye and explained that Rule 25-24.472, F.A.C., prohibits an IXC certificate from being sold, assigned, or transferred without prior Commission approval. Staff also advised that Rule 25-24.473, F.A.C., provides that the current and new owner must submit a joint application for the transfer of an IXC certificate. A new application was mailed to the company. In addition, staff advised Mr. Kaye that the Department of State, Division of Corporations' records showed that Mr. Kaye was still President and that Mr. Wally was not listed as an officer. Staff requested a response by May 10, 1999.

On January 20, 2000, staff wrote Mr. Mark Wally, the new owner and provided the same information previously provided to Mr. Kaye,

and requested a response by February 7, 2000. On January 26, Mr. Wally called staff and discussed the issues. Mr. Wally advised that he would hire a consultant to see what the consultant advised and would respond by February 7.

On March 24, 2000, staff called Mr. Wally and requested a response. Mr. Wally stated that since he had not started operations in Florida, he would not pursue a settlement or transfer of certificate since the certificate still showed Mr. Kaye as president.

Although Mr. Wally purchased First Call USA from Mr. Kaye, Mr. Kaye is the president as listed with the Department of State, Division of Corporations. Therefore, staff believes that Mr. Kaye is the responsible party to handle all aspects of IXC Certificate No. 5738.

By 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 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).

Staff believes that First Call USA's conduct in failing to respond to Commission staff's inquiries in apparent violation of Commission Rule 25-4.043, F.A.C., 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 Refunds 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 First Call USA's conduct at issue here, would meet the standard for a "willful violation."

Accordingly, staff recommends that the Commission order First Call USA to show cause in writing within 21 days of the issuance of the Commission's Order why it should not have Certificate No. 5738 canceled or be fined \$10,000 for apparent violation of Rule 25-4.043, F.A.C. The company's response should contain specific allegations of fact or law. If First Call USA fails to respond to the show cause, and the fine is not paid within 10 business days

DOCKET NO. 991248-TI  
DATE: APRIL 6, 2000

after the 21 day show cause period, Certificate No. 5738 should be canceled. If the fine is paid, it should be remitted by the Commission to the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes. If the Commission approves staff's recommendation on Issue 1, this docket should be closed upon issuance of a consummating order and upon receipt of the fine and fees or cancellation of the certificate, unless a person whose substantial interests are affected by the Commission's decision files a protest to the proposed agency action within 21 days of the issuance of the Order.

Furthermore, if the Commission approves staff's recommendation in Issue 2, the company will have 21 days to respond in writing to the Commission's show cause order explaining why it should not have its certificate canceled or be fined in the amount proposed. If the company timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceeding. If the company fails to respond to the show cause order, this docket may be closed upon receipt of the fine and fees or cancellation of the certificate and upon issuance of an order consummating the Commission's proposed agency action in Issue 1. (K. Peña; B. Keating)

**STAFF ANALYSIS:** If the Commission approves staff's recommendation on Issue 1, this docket should be closed upon issuance of a consummating order and upon receipt of the fine and fees or cancellation of the certificate, unless a person whose substantial interests are affected by the Commission's decision files a protest to the proposed agency action within 21 days of the issuance of the Order.

Furthermore, if the Commission approves staff's recommendation in Issue 2, the company will have 21 days to respond in writing to the Commission's show cause order explaining why it should not have its certificate canceled or be fined in the amount proposed. If the company timely responds to the show cause order, this docket should remain open pending resolution of the show cause proceeding. If the company fails to respond to the show cause order, this docket may be closed upon receipt of the fine and fees or cancellation of the certificate and upon issuance of an order consummating the Commission's proposed agency action in Issue 1.