

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 991248-TI
ORDER NO. PSC-00-0940-SC-TI
ISSUED: May 10, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

NOTICE OF PROPOSED AGENCY ACTION
ORDER IMPOSING FINE AND REQUIRING PAYMENT OF REGULATORY
ASSESSMENT FEES, OR CANCELING INTEREXCHANGE
TELECOMMUNICATIONS CERTIFICATE
AND
ORDER TO SHOW CAUSE

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein concerning non-payment of Regulatory Assessment Fees, 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.

First Call USA, Incorporated (First Call USA) currently holds Certificate of Public Convenience and Necessity No. 5738, issued by the Commission on December 5, 1998, authorizing the provision of

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FPSC-RECORDS/REPORTING

Interexchange Telecommunications service (IXC). This docket was opened to address First Call USA's apparent violations of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies, and Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries.

Proposed Agency Action

Violation of Rule 25-4.0161, Florida Administrative Code

The Division of Administration advised our staff by memorandum that First Call USA had not paid the Regulatory Assessment Fees (RAFs) required by Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, for the year 1998. Also, accrued statutory penalties and interest charges for late RAFs payments for the year 1998 had not been paid. In addition, the 1999 RAFs, due in January 31, 2000, has not been paid yet.

Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual RAF of \$50 if the certificate was active during any portion of the calendar year. Pursuant to Rule 25-4.0161 (2), Florida Administrative Code, the form and applicable fees are due to the Florida Public Service Commission by January 30 of the subsequent year. All entities that apply for certification receive a copy of our rules governing IXC service. All applicants must attest that these rules have been received and understood by the applicant and an affidavit must be attached to the application in order for the application to be processed.

Pursuant to Section 350.113(4), Florida Statutes, the RAFs forms, for the period of January 1, through December 31, are mailed to the entities at least 45 days prior to the date that payment of the fee is due. First Call USA has been given adequate opportunity to pay. As of the date of this decision, First Call USA has not paid the required fees.

For the reason described above, pursuant to Rule 25-24.474(1)(b) and (c), Florida Administrative Code, we find it appropriate to cancel First Call USA's certificate for failure to comply with Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, unless First Call USA pays a \$500 fine and remits all past due RAFs, along with statutory penalties and interest charges, to the Florida Public Service Commission. First Call USA must comply with these requirements within five business days after the issuance of the Consummating Order. The fine will be remitted to the Comptroller for deposit in the State

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of Florida General Revenue Fund, pursuant to Section 364.516, Florida Statutes.

Should First Call USA fail to comply with this Order within five business days after the issuance of the Consummating Order, First Call USA shall have its certificate canceled administratively. The cancellation of the certificate in no way diminishes First Call USA's obligation to pay applicable delinquent RAFs, statutory penalties, and interest charges for the years 1998 and 1999.

Show Cause
Violation of Rule 25-4.043, Florida Administrative Code

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 IXC certificate. The rule provides that we may cancel a certificate on our own motion for violation of Commission Rules and Orders.

Rule 25-24.480, Florida Administrative Code, Records & Reports; Rules Incorporated, incorporates Rule 25-4.043, Florida Administrative Code, 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, our staff wrote Mr. Kaye and explained that Rule 25-24.472, Florida Administrative Code, prohibits an IXC certificate from being sold, assigned, or transferred without prior Commission approval. Our staff also advised that Rule 25-24.473, Florida Administrative Code, 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 First Call USA. In addition, our staff advised Mr. Kaye that the Department of State, Division of Corporations' records showed

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that Mr. Kaye was still President and that Mr. Wally was not listed as an officer. Our staff requested a response by May 10, 1999.

On January 20, 2000, our 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 contacted our 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, our 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, we believe that Mr. Kaye is the responsible party to handle all aspects of IXC Certificate No. 5738.

Pursuant to 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).

We believe that First Call USA's conduct in failing to respond to Commission staff's inquiries in apparent violation of Commission Rule 25-4.043, Florida Administrative Code, 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, we find it appropriate to order First Call USA to show cause in writing within 21 days of the issuance of this Order why it should not have Certificate No. 5738 canceled or be fined \$10,000 for apparent violation of Rule 25-4.043, Florida Administrative Code. First Call USA's response shall contain specific allegations of fact and 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 shall be canceled. If the fine is paid, it shall be remitted by the Commission to the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that First Call USA, Incorporated must pay the past due Regulatory Assessment Fees, statutory penalties, interest charges, and a \$500 fine to the Florida Public Service Commission for failure to comply with Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, within five business days after the issuance of the Consummating Order. The fine will be transmitted to the Comptroller for deposit in the State of Florida General Revenue Fund. It is further

ORDERED that should First Call USA, Incorporated fail to comply with the Proposed Agency Action portions of this Order within five days of the issuance of the Consummating Order, First Call USA, Incorporated's Certificate No. 5738 shall be canceled. It is further

ORDERED that the provisions of this Order concerning the non-payment of Regulatory Assessment Fees, 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 Records and Reporting, 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 First Call USA, Incorporated shall show cause in writing within 21 days of the date of this Order why it should not

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be fined \$10,000 or have its certificate cancelled for apparent violation of Rule 25-4.043, Florida Administrative Code. It is further

ORDERED that any response to the Show Cause portions of this Order filed by First Call USA, Incorporated shall contain specific allegations of fact and law. It is further

ORDERED that failure to respond to the Show Cause portions of this order in the manner and by the date set forth in the "notice of Further Proceedings or Judicial Review," attached hereto, shall constitute an admission of the violations described in the body of this Order, as well as a waiver of the right to a hearing regarding the Show Cause portions of this Order, and will result in the automatic assessment of the fine. It is further

ORDERED that if First Call USA, Incorporated pays the fine, it shall be remitted to the State of Florida General Revenue Fund pursuant to Section 364.285, Florida Statutes. It is further

ORDERED that if First Call USA, Incorporated fails to pay the fine within 10 days of the conclusion of the show cause response period, the company's certificate will be cancelled. It is further

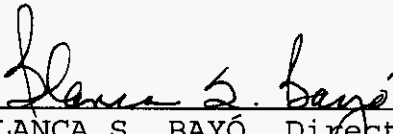
ORDERED that if First Call USA, Incorporated files a timely response to the Proposed Agency Action portion of this Order or to the Show Cause portion of this Order, the Docket shall remain open to address the company's response. It is further

ORDERED that if First Call USA, Incorporated fails to comply with the provisions of this Order, this Docket may be closed administratively upon cancellation of the company's certificate in accordance with the provisions of this Order.

ORDERED that the cancellation of the certificate and the closing of the docket in no way diminishes First Call USA, Incorporated's obligation to pay applicable delinquent Regulatory Assessment Fees, statutory penalties, and interest charges for 1998 and 1999.

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By ORDER of the Florida Public Service Commission this 10th
day of May, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

KMP/BK

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

The show cause portion of this Order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by this Show Cause Order may file a response within 21 days of issuance of the Show Cause Order as set forth herein. This response must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 31, 2000.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to the show cause portion of this Order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this Order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.

As identified in the body of this Order, our action regarding the company's failure to comply with Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, 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 Records and Reporting, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 31, 2000. If such a petition is filed, 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. In the absence of such a petition, this Order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this Order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.