BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause proceedings against CHERRY PAYMENT SYSTEMS, INC. d/b/a CHERRY COMMUNICATIONS for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection.	DOCKET NO. 921250-TI ORDER NO. PSC-93-1374-FOF-TI ISSUED: 09/20/93

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
JULIA L. JOHNSON

ORDER REVOKING CERTIFICATE NO. 3134 AND REQUIRING CHERRY TO NOTIFY ITS CUSTOMERS OF REVOCATION

BY THE COMMISSION:

I. CASE BACKGROUND

Cherry Payment Systems, d/b/a/ Cherry Communicati ns (Cherry or the Company) is a switchless reseller of the volume discounted outbound services of other interexchange carriers. The Company received its certificate to provide interexchange telecommunications service in Florida on December 4, 1992. One week later, on December 11, 1992, this docket was opened to address complaints which had been filed with our Division of Consumer Affairs against the Company. On February 22, 1993, we issued Order No. PSC-93-0269-FOF-TI, requiring Cherry to show cause why it should not be fined or have its certificate revoked for violation of Rule 25-4.118, Florida Administrative Code. The Company timely responded and this matter was set for hearing. Routine orders regarding procedural matters have been issued. An Issue Identification Conference was held and an Order Establishing Preliminary Issues for Hearing was subsequently issued.

The Company moved for reconsideration of the aforementioned Order Establishing Preliminary Issues and to strike certain issues set forth in that Order. Upon reconsideration, the Prehearing Officer denied the Motion. A Prehearing Conference was held on May 27, 1993, followed by a hearing which was held on June 18, 1993. As a preliminary matter at the hearing, the Company's Motion to Invoke the Rule, and have excused from the room any witness to the proceeding, was granted. Cherry's Motion for Reconsideration by

the Full Panel of the Prehearing Officer's Order denying the Company's Motion to Strike certain issues was denied. The Company's Motion in Limine to exclude "hearsay" testimony and the prefiled direct testimony of Roberta Ferguson, also was denied.

The Company filed its Brief on July 23, 1993.

II. POST HEARING FILINGS

The Company filed 43 Proposed Findings of Fact which are addressed individually below at Section VII. Proposed Findings of Fact.

In its Brief, which is virtually void of citation to the record, Cherry filed post hearing positions for each of the nine issues in this proceeding, a post hearing statement, and proposed conclusions of law. The post hearing positions are addressed at sections IV. VIOLATIONS, V. OTHER CONSIDERATIONS, and VI. PENALTY. The post hearing statement is discussed below under subsection II.A. Post Hearing Statement. The Company's proposed conclusions of law are addressed under subsection II.B. Legal Argument.

A. Post Hearing Statement

In its post hearing statement Cherry proclaims that:

1) It provides low cost long distance telephone service to about 30,000 Floridians;

2) It acknowledges the Commission's concern regarding the number of consumer complaints which allege unauthorized switches of long distance service;

3) It has taken steps to correct its marketing problems;

4) Most of the complaints stem from solicitations occurring prior to March 16, 1993;

5) In each instance when a Floridian has complained of an unauthorized switch it has initially responded with a letter of apology and a $12.00 check to reimburse any switching charges and inconvenience incurred;

6) It has hired a law firm to investigate complaints, draft responses for this Commission, and solicit customer input;

7) It has hired consultants to assist it in correcting marketing difficulties;

8) It has eliminated telemarketing in Florida, and currently is only soliciting customers through signed Letters of Agency which are verified by Cherry's customer service staff;

9) These remedial measures illustrate its good faith efforts to correct its problems;

10) A recommendation by staff that Cherry's certificate should be cancelled would be "an outrageous, unnecessary and draconian penalty given the diminimus number of complaints which have recently been received by the Commission;"

11) "Because this is Cherry's first Rule to Show Cause in Florida, cancellation of Cherry's certificate is unwarranted and Cherry should be allowed to continue to provide quality long distance service at competitive prices to Floridians."

Upon review, we observe that the positions put forth by the Company fail to address the core issues in this proceeding which involve allegations of serious misconduct by Cherry.

B. Legal Argument

Cherry has advanced a number of legal arguments in opposition to various portions of the record in this case. Each is addressed separately below.

1. Hearsay

Cherry has consistently maintained that the record in this case is nothing more than hearsay. The Company's hearsay arguments are premised upon the following:

a) The Company quotes Section 90.801(1)(C), Florida Statutes (1983), which defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered, in evidence to prove the truth of the matter asserted."

b) The Company cites case law and the Florida Administrative Code for the proposition that hearsay evidence may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

c) The Company argues that to be admissible in an administrative hearing hearsay evidence which does not supplement or explain other admissible evidence, must fall within an exception to the hearsay rule.

d) The Company asserts that staff's direct case "consists solely" of inadmissible hearsay which does not supplement or support other evidence.

e) The Company argues that staff's evidence is not a recognized exception to the hearsay rule. Specifically, the Company asserts that staff's evidence is neither a business record nor a public record or report as these terms are defined under Florida law.

Upon review, we find that the Company's analysis goes awry with its assertion that for hearsay to be admitted it must supplement or explain other admissible evidence, or fall within an exception to the hearsay Rule. Rule 25-22.047(3), Florida Administrative Code, provides in pertinent part that "Any relevant evidence shall be admitted if it is the sort of evidence which is normally admissible in civil trials in Florida or which reasonably prudent persons are accustomed to relying upon in the course of their affairs." (Id. emphasis added; this language paraphrases the language found at Section 120.58(1)(a), Florida Statutes) We find that the hearsay evidence presented in this case is relevant and of the sort that reasonably prudent persons are accustomed to relying on in the course of their affairs. Thus, the evidence was appropriately admitted into the record of this proceeding.

Likewise, the case law cited by the Company does not address admissibility as it asserts. Rather, it addresses whether bare hearsay evidence can support a finding of fact. (See CF Chemicals v. Fla Dept. of Labor, Etc., 400 So. 2d 846 (Fla. 1st DCA 1981).)

In this regard, we agree that bare hearsay evidence alone cannot support a finding of fact.

The Company's argument that staff's case consists solely of hearsay testimony fails to acknowledge the existence of other evidence, included in the record of this proceeding, which the hearsay evidence supplements and explains. Cherry's own witness acknowledged that the Company had "unethical employees" who engaged in "questionable behavior" and "gross abuse." He admitted that, (like Centel, WilTel, and the Commission) Cherry was "inundated" with complaints regarding the Company's marketing and treatment of customers. Indeed, the Company witness acknowledged that one source of complaints was individuals "who had been switched from their carrier either without their knowledge or consent." The Company also admitted, in its Formal Response to the Order Initiating Show Cause Proceedings, (Response) that its field sales representatives "engaged in conduct improper in nature" which "resulted in customers being transferred from their previous interexchange carrier to MATRIX without proper authorization."

Other record evidence includes: the testimony of staff witness Rick Moses regarding unethical marketing; the testimony of Nancy Pruitt regarding complaint volumes; the business records of the Company, prepared pursuant to Company protocol, which virtually mirror the testimony and exhibits of Nancy Pruitt regarding both slamming and unethical marketing; the testimony of Roberta Ferguson regarding excessive slamming complaints received by Wiltel, which is Cherry's underlying carrier; the testimony of Deda Sheffield regarding the negative impact that the excessive slamming complaint volumes had on Centel and the precautions which Centel was forced to take as a result of the volume and nature of the complaints.

The Company discusses hearsay <u>exceptions</u> at length. However, we do not reach these arguments because at their base is a presumption that hearsay evidence is otherwise inadmissible in administrative proceedings. We reiterate that, in administrative hearings, hearsay testimony is admissible for the purpose of "supplementing or explaining other evidence." This is precisely the way in which such evidence has been used in this case.

2. <u>Testimony of Roberta Ferguson</u>

The Company argues that the direct testimony of Roberta Ferguson was replete with redactions of crucial information and that without the crucial information, the Company was unable to

effectively prepare its rebuttal testimony and unable to effectively cross examine the witness. Cherry argues that pursuant to Rule 25-22.048(2), Florida Administrative Code, it has a "right: to present evidence relevant to the issues; to cross-examine opposing witnesses; to impeach any witness in accordance with § 90.608, F.S., regardless of which party first called that witness to testify; and to rebut the evidence presented against it."

The Company cited various authorities for the propositions that:

a) no person shall be deprived the right of life, liberty or property without due process of law;

b) the extent of due process varies with the character of the interest and nature of the proceeding involved;

c) due process is flexible and calls for such procedural protections as the particular situation demands;

d) due process requires an opportunity granted at a meaningful time and manner, for a hearing appropriate to the nature of the case;

e) in the exercise of quasi-judicial powers, administrative agencies may not deprive an individual of property rights without notice and hearing;

f) a hearing must afford the parties full appraisal of the evidence, with opportunity to test, explain and rebut it, and an opportunity to cross-examine witnesses and present evidence.

The Company argues that because of the redactions in Ms. Ferguson's testimony its due process rights were violated and concludes that Roberta Ferguson's direct testimony cannot support the FPSC's case in chief.

Initially, we observe that, although the Company complains that the testimony at issue cannot be relied upon to support the FPSC's case in chief, several of the Company's proposed findings of fact rely solely on Ms. Ferguson's testimony.

Ms. Ferguson testified pursuant to a Commission subpoena. The testimony at issue was submitted to the Commission by counsel for

WilTel (the Company which employs Ms. Ferguson) with a notice of intent to seek confidential treatment pursuant to Rule 25-22.006, Florida Administrative Code. This was done by WilTel under the terms of a contractual obligation to Cherry to protect sensitive information relating to Cherry from public disclosure. When material comes into the Commission with a notice of intent to seek confidential treatment, its confidentiality is preserved until a determination can be made. Staff can not serve such material on parties. Therefore, staff sent a redacted version of the testimony to Cherry's counsel.

An unredacted version of the testimony was sent by WilTel to the CEO of Cherry Communications when it was filed with the Commission. The unredacted version was supplied to Cherry to enable the Company to present its arguments why such information should be held from public disclosure pursuant to Chapter 119, Florida Statutes.

Cherry failed to file a request for confidential treatment and pursuant to Rule 25-22.006, the material became public. A review of the now-public material reveals that it is comprised largely of complaint statistics at WilTel involving Cherry PIC change requests and the number of states in which WilTel had stopped accepting PIC change requests from Cherry. Cherry was on notice from May 11, 1993 until the hearing on June 18, 1993 that the redacted information existed. However, the Company failed to make known --- either formally, by filing a motion with the Commission, or informally, by simply calling or writing a letter to either counsel for staff or WilTel --- that there was any problem regarding the redacted statistics.

The prefiled testimony with the sensitive information omitted included the questions to which the witness was asked to respond and only a small portion of the testimony, essentially the specific numbers, was redacted. Under the circumstances, we find that the Company was on notice regarding the parameters of the testimony. Moreover, if Cherry was unaware of the nature and extent of its own complaint statistics and service arrangements with WilTel, we note that the witness in question was subject to pretrial discovery and the Company failed to use its available discovery tools to ascertain potential strengths or weaknesses of her testimony.

We find that the Company was afforded an opportunity to meaningfully cross examine and rebut the testimony of the witness pursuant to Rule 25-22.048(2), Florida Administrative Code, and

Section 90.608, Florida Statutes. Moreover, while we agree with the elements of due process as described by the Company, we disagree with the conclusion that those concepts are violated by the inclusion of Ms. Ferguson's testimony in the record. In view of Cherry's failure to make any effort to obtain the information in question, which was readily available to it, it appears that Cherry does not come to this argument with clean hands.

3. Investigation of Customer Complaints

Cherry maintains that it has appropriately investigated and responded to customer complaints. More specifically, the Company argues that:

a) it complied with the requirements of Rule 25-22.032(1), Florida Administrative Code;

b) response requirements exist only in the Commission's internal procedures for handling complaints which have not been made available to the public;

c) Section 120.53(2)(a)(1), Florida Statutes requires that each agency make available for public inspection "All rules formulated, adopted, or used by the agency in the discharge of its functions;"

d) Section 120.53(1)(b), Florida Statutes provides that each agency shall "adopt rules of practice setting forth the nature and requirements of all formal and informal procedures;"

e) a "rule" is defined as an "agency statement . . . [which] describes the . . . procedure . . . requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." The term "rule" does not include "internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public;"

f) the FPSC should have published its internal procedures regarding the investigation of consumer complaints and cannot fault Cherry for failing to strictly adhere to FPSC procedures not published and not made available to Cherry to guide its response;

g) Given no formal procedure from the FPSC, Cherry properly investigated all customer complaints it received. Cherry appropriately explained its actions in connection with each complaint and demonstrated the extent to which its actions were consistent with Cherry's tariffs and procedures, applicable state laws, and FPSC rules, regulations and orders.

We observe that Rule 25-22.032(1), Florida Administrative Code provides in pertinent part that "The response should explain the utility's actions in the disputed matter and the extent to which those actions were consistent with the utility's tariffs and procedures, applicable state laws, and Commission rules, regulations, and orders." However, Cherry's compliance with Rule 25-22.032(1), was not an issue in this proceeding, nor has the Company asked that it be added as an issue. The issue before the us concerns the timeliness of Company replies to staff inquiries under Rule 25-4.043, Florida Administrative Code.

4. Revocation of Certification

With a single citation to a staff witness, Cherry asserts that the facts presented at the hearing do not warrant the revocation of its Certificate. Cherry recites the authority of the Commission to revoke a certificate set forth at Sections 364.285, 350.127 and 364.335, Florida Statutes and Rules 25-24.474 and 25-24.471(3), Florida Administrative Code. The Company notes that certificates are granted based on a public interest standard, and concludes that a revocation should be based on the same standard.

The Company asserts that staff has failed to demonstrate:

a) that Cherry has violated any of the terms and conditions under which its authority to operate was originally granted;

b) that the Company violated "willfully or otherwise, any of the Florida Statutes or FPSC rules and regulations;"

c) that it is in the public interest to revoke Cherry's certificate.

With no citation to the record, Cherry asserts that the "undisputed facts" show that:

a) Cherry presently provides long distance telephone service to approximately 30,000 Florida residents;

b) Cherry's long distance telephone service is appreciably less expensive than the basic packages offered by Sprint, MCI or AT&T;

c) Cherry has retained outside consultants to assist it in correcting any marketing difficulties;

d) Cherry's present intention is to eliminate telemarketing in Florida, and to only solicit Floridians through Letters of Agency;

e) Cherry initiated a solicitation system which verifies 100% of its letters of agency;

f) In each instance when a customer has complained of an unauthorized switch, regardless of the legitimacy of the complaint, Cherry has initially responded with a letter of apology and a $12.00 check to reimburse any switching charges and inconvenience incurred;

g) Cherry has retained a law firm to investigate any Florida customer complaints it receives. The law firm's investigation includes contacting the complaining customers, drafting responses to these complaints and soliciting further customer input;

h) Cherry requires that its telemarketers use tightly drafted scripts in soliciting customer orders;

i) Cherry also requires that its third-party verifiers use tightly drafted scripts in verifying customer orders;

j) Cherry employs Compliance Monitors to monitor conversations between telemarketers and prospective customers;

k) Cherry requires each of its telemarketers to sign an Employee's Agreement which provides, inter alia, that Cherry will terminate the employee if he/she engages in any unethical behavior in connection with his/her telemarketing activities;

1) Cherry requires each of its sales managers to sign a Management Agreement which provides, inter alia, that Cherry will terminate the sales manager if he/she engages in any unethical behavior in connection with his duties at Cherry.

Cherry concludes that it would not be in the public interest to revoke its certificate to provide telecommunications services in the State of Florida and submits that it "has shown cause why its Certificate to do business in Florida should not be cancelled, nor should any other Draconian penalty be imposed."

The standards for revocation cited by the Company include whether it is in the public interest for the Company to operate in Florida, whether the Company willfully violated Commission Rules, and whether the Company violated the terms and conditions under which its certificate was granted. Upon review, as set forth below, we find that it is not in the public interest for the Company to be allowed to continue to operate in Florida, that the Company has willfully violated Commission Rules, and that the Company has violated the terms and conditions under which its certificate was granted. It has not been established that all of the "undisputed facts" alleged by the Company are included in the record of this case. Moreover, many of the alleged "facts" are tangential at best to the issues before us which involve allegations of serious violations committed by the Company.

III. "WILLFUL"

At various points in its post hearing filings, the Company raises the argument that its actions were not "willful." Rather than repeat the analysis throughout this Order we shall address the issue once at this time.

This Commission has addressed the "willful" argument before. For example, in Order No. 24306, issued in Docket No. 890216-TL, the Commission reasoned:

> We believe that in authorizing the Commission to fine regulated utilities for "willful" acts, the Legislature was not limiting this authority only to circumstances in which the Commission finds that the utility set out on a course of action with the intended purpose of violating one of its rules. (Id., at 6)

Willful "implies intent to do an act, and this is distinct from intent to violate a rule." (Id.) This reasoning is consistent with the stipulation language regarding intent which is contained in the prehearing order issued this case.

The Company has admitted that its sales staff are agents for the Company, that it can control its sales staff, and that it is responsible for the actions of its sales staff when making sales. We find that sales agent violations flourished under Cherry's management and that it is not plausible that the Company's sales agents did not intend or "will" the acts of repeatedly submitting unauthorized PIC change requests. Indeed, the record evinces a pattern of such acts dating from a time prior to certification. Likewise, the Company's routine failure to meet Commission staff inquiry reply deadlines which are established by Rule, evince a "willful" disregard of that Rule.

Regarding the inaccuracies in the application, we note that just above the signature line on the application there is an attestation of accuracy. We do not accept that having an agent submit the application relieves Cherry of the obligation to provide complete and accurate information. Moreover, there is no intent element in the applicable Rule. The applicable standard for revocation of a certificate is simply whether the Company "violated the terms and conditions under which the authority was originally granted." (Rule 25-24.474, Florida Administrative Code) Upon review, we find that the Company's application inaccuracies do indeed violate those "terms and conditions."

IV. VIOLATIONS

A. Rule 25-24.470(1), Florida Administrative Code

The Rule provides in pertinent part that:

> 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.

Cherry argues that the record presents no competent substantial evidence establishing that any Florida resident was

provided intrastate interexchange telephone service by Cherry Communications prior to their obtaining a certificate of public convenience and necessity from the Commission. The Company contends that it was not established that any customer contacts or advertisements violated the Rule.

Initially, we observe that Company witness Giangreco testified that "[i]f we had solicited prior to certification, it would be easier to prove that fact. A party would merely have to show that a Cherry agent had submitted a PIC change on behalf of Cherry Communications, Inc. prior to December 4, 1992." In this regard, WilTel regulatory analyst Roberta M. Ferguson testified that "WilTel has been processing Cherry PIC change requests for Florida since November 20, 1992." Witness Pruitt testified that the first slamming complaint against Cherry was received by the Commission's Division of Consumer Affairs on November 3, 1992, one month before Cherry was certificated, and that there is evidence that December slamming complaints had their genesis in PIC change requests submitted as early as October of 1992.

Upon review, we find that Cherry willfully violated Rule 25-24.470(1), Florida Administrative Code.

B. Rule 25-4.118(1), Florida Administrative Code

The Rule provides in pertinent part that:

> (1) The primary interexchange company (PIC) of a customer shall not be changed without the customer's authorization.

(Violation of this Rule is commonly called "slamming a customer.")

Cherry argues that the staff has failed to sustain its burden and that the record contains no testimony of an individual with personal, first-hand knowledge, or other competent substantial evidence establishing that the long distance service of Florida customers was changed without authorization. The Company concludes that evidence presented by staff is hearsay and should be excluded.

Initially, we observe that, in its Formal Response to the Order Initiating Show Cause Proceedings, the Company admitted that its field sales representatives "engaged in conduct improper in nature" which "resulted in customers being transferred from their previous interexchange carrier to MATRIX without proper

authorization." Moreover, Cherry's witness acknowledged that the Company was "inundated" with complaints regarding the Company's marketing and treatment of customers. Indeed, the Company witness acknowledged that one source of such complaints was individuals "who had been switched from their carrier either without their knowledge or consent."

We find that these are Company admissions of multiple customer slams. The nature and extent of the admitted multiple slams is explained and supplemented by: the testimony of Nancy Pruitt regarding excessive slamming complaint volumes; the business records of the Company, prepared pursuant to company protocol which virtually mirror the slamming testimony and applicable exhibits of Nancy Pruitt; the testimony of Roberta Ferguson regarding excessive slamming complaints received by Wiltel, which is Cherry's underlying carrier; the testimony of Deda Sheffield regarding the negative impact that the excessive slamming complaint volume had on Centel and the precautions which Centel was forced to take as a result of the volume and nature of the complaints.

Upon review we find that Cherry willfully violated Rule 25-4.118(1), Florida Administrative Code by slamming Florida customers in unparalleled numbers.

C. Rule 25-4.118(2), Florida Administrative Code

The pertinent language in the Rule requires that when a PIC change is submitted by an IXC acting on behalf of a customer the IXC must certify to the LEC that at least one of the following actions has occurred prior to the PIC change request:

(a) the IXC has on hand a ballot or letter from the customer requesting such change; or

(b) the customer initiates a call to an automated 800 number and through a sequence of prompts, confirms the customer's requested change; or

(c) the customer's requested change is verified through a qualified, independent firm which is unaffiliated with any IXC; or

(d) the IXC has received a customer request to change his PIC and has responded within three days by mailing of an information package that

> includes a prepaid, returnable postcard and an additional 14 days have past before the IXC submits the PIC change to the LEC. The information package should contain any information required by Rule 25-4.118(3).

Cherry argues that the staff has failed to sustain its burden to prove this Rule was violated and that the record contains no testimony of any individuals presenting personal, first-hand competent substantial evidence establishing a violation. The Company contends that all evidence submitted to support staff's position is hearsay and should be excluded.

Initially, we find that the Company's admissions that customers "had been switched from their carrier either without their knowledge or consent" is an implicit admission that the required verification procedures were not followed. In addition to this admission, a review of Cherry's Composite Exhibit 9 confirms that the appropriate verification did not take place. A summary of complaints compiled on behalf of the Company reveals that customers complained that Cherry had not provided an explanation of how their long distance service came to be switched and that they had not received copies of purported letters of authorization or other documentation which Cherry had promised to supply. Moreover, while the Company's witness testified that Telemedia Resource Consultants, Inc. handles its third-party verification, we observe that nowhere in the verification script is the question asked whether the customer wants to have his or her carrier changed.

Upon review, we find that Cherry willfully violated Rule 25-4.118(2), Florida Administrative Code.

D. Rule 25-4.043, Florida Administrative Code

The Rule provides that:

> 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.

Cherry argues that staff has not made available to Cherry any rule or policy establishing procedures for responses or investigations regarding complaints and that in response to formal

inquiries by Cherry, the staff responded that these procedures do not exist in any specific rule or written policy statement.

Initially, we observe that the requirement of a written reply within 15 days from the date of a Commission inquiry is included in the applicable Rule and that Cherry acknowledged receipt and understanding of the Commission's rules. Each complaint form which the Division of Consumer Affairs sent to Cherry contained a response due date. On the day of the hearing, there were 42 complaints that were over 15 days old and for which the Commission staff had received no reply. Witness Pruitt testified that: "As of April 30, 1993, 61 complaints against Cherry Communications had been closed by the Division of Consumer Affairs. Of those cases, 32 were noted as having late responses from Cherry Communications. In at least one case, no response was ever received, even after calls and certified letters requesting an answer were sent to Cherry." These figures establish that the Company has routinely failed to furnish in writing timely replies to inquiries propounded by staff.

Upon review, we find that Cherry willfully violated Rule 25-4.043, Florida Administrative Code.

V. OTHER CONSIDERATIONS

A. Effectiveness of Cherry in Deterring Slams

Cherry argues that David Giangreco presents unrebutted competent substantial evidence regarding the effectiveness of Cherry in deterring slams and that his testimony affirmatively sets forth the procedures in place that have succeeded in curtailing complaints in Florida and across the country. The Company contends that cross-examination of Pruitt supports evidence of improvement.

However, cross examination of witness Giangreco revealed that he was actually unaware of the volume of Cherry's complaints in Florida and Ms. Pruitt testified that "Cherry's complaints continued on a high level throughout the pendency of this proceeding including 108 complaints in April and May alone for unauthorized changes." A review of Ms. Pruitt's testimony on cross examination does not evince improvement in the Company's complaint volume. Based on the continued complaint volumes evident in the record, we find that no Cherry procedure has been effective in deterring slams in Florida.

B. Marketing Practices

Cherry asserts that it has experienced, and responded to, difficulties with sales practices that may have adversely affected Florida consumers, but that the record offers no competent substantial evidence that Cherry either engaged in unethical marketing practices in Florida or acted in a manner outside of industry standards.

However, the Company has admitted that its sales staff are agents for the Company, that it can control its sales staff and that it is responsible for the actions of its sales force. The Company's witness acknowledged that: employees of Cherry "went out and they signed LOAs;" the Company "experienced some difficulties with unethical employees;" there were instances of "improper solicitation or questionable sales tactics" by Cherry employees; the Company was "inundated with individuals who were less than satisfied with the manner they had been contacted or their treatment once they had been switched. [The Company] also had complaints from individuals who had been switched from their carrier either without their knowledge or consent;" "Cherry's salesmen . . . acted improperly;" and finally that it is Cherry's responsibility to "police its sales force."

Witness Pruitt testified that the Commission received complaints alleging at least eight types of unethical marketing practices. One such practice was the forgery of customer signatures on letters-of-authorization (LOAs). Witness Deda Sheffield testified regarding the impact of the Company's slamming complaint volume on Centel, and also regarding Centel's corporate response to the problem. An exhibit to her testimony was a letter to WilTel in which she described why Centel was requiring that all Cherry PIC change requests be reverified. She wrote that "in some cases the customers advised that Cherry claimed to be an affiliate of Central Telephone Company and that the sales agent used inappropriate language when the sales effort was unsuccessful." Witness Moses testified that he had been contacted by Cherry and found Cherry's sales techniques to be very aggressive and non-responsive to his statements. He characterized the telemarketing contact as "very aggravating."

Unethical marketing and slamming complaints are related. Testimony of witness Pruitt indicates that Cherry's slamming complaint levels far exceed that of other IXCs. This is echoed in the testimony of witness Ferguson which indicates that Cherry

accounts for 89% of WilTel's complaint volume. Contrary to Cherry's position that it operates within industry norms, we find that the Company's slamming complaint record indicates marketing problems which are considerably outside of the industry norm. Upon review, we find that Cherry has routinely engaged in unethical marketing practices.

C. IXC Application

Cherry asserts that it unintentionally, and not willfully, allowed an application to be submitted by Network Solutions, that: falsely stated a fact otherwise in the public domain; and misstated a corporate number on one page that was accurately stated on several other pages of its application.

However, IXC application Form PSC/CMU 31 (included by reference in Rule 25-24.471, Florida Administrative Code which governs applications) provides that: "[b]y my signature below, I attest to the accuracy of the information contained in this application and associated attachments." It is our view that having its agent sign the application does not relieve Cherry of the obligation to submit accurate information including attachments. While the Company acknowledges that the application contained inaccuracies, it is the nature of the inaccuracies which cause concern. The "fact otherwise in the public domain" pertains to a failure to disclose the felony conviction for wire fraud of James R. Elliott, the Company's CEO. The "misstated corporate number" is the tip of an iceberg regarding two corporations which have shared the same name. It was unclear which corporation was the responsible party in the event of problems. There were discrepancies between the certificated corporation, the one registered with the Florida Division of Corporations, and the one registered in Illinois. Even after the second corporation applied for registration in Florida there was uncertainty regarding the relationship of the corporations and the one which was certificated by this Commission.

Rule 25-24.474, Florida Administrative Code, provides in pertinent part that:

> (1) The Commission may on its own motion cancel a company's certificate for any of the following reasons:

(a) Violation of the terms and conditions under which the authority was originally granted.

Inaccuracies in the Company's certificate application, whether their genesis is intentional, or negligent, appear to violate the terms and conditions under which the certificate was granted and, taken alone, might warrant revocation of the Company's certificate. Indeed, staff witness Moses testified that had he known about the false statement regarding Mr. Elliott's wire fraud conviction, he would have recommended against the original certification of the Company. Moreover, given the fraud conviction, the questionable corporate filings with two corporations sharing the same name, and Cherry's other regulatory problems which include complaints alleging fraudulent LOAs, we find that the inaccuracies raise questions regarding whether it is in the public interest for Cherry to operate in Florida.

Upon review, we find that Cherry's Florida IXC application contained inaccuracies.

D. The Public Interest

Cherry asserts that the public interest will be served if the Company retains its certificate and remains in business. Cherry contends that it presently provides low cost long distance telephone service to approximately 30,000 Floridians who have experienced no service problems with the Company. Cherry concludes that it would not be in the public interest to revoke the Company's certification.

While the Company asserts that it has approximately 30,000 customers who have experienced no service problems, we observe that the Company produced no satisfied customers as witnesses, nor any letters from satisfied customers stating that they wanted the Company to be allowed to continue operating in Florida. It also appears from the record that the only person to affirmatively testify to the number of customers the Company has in Florida is the Company's attorney.

Although the Company asserts that there have been no complaints regarding service problems, we observe that Cherry is a switchless reseller of other companies' long distance service. Regarding service, the Company acknowledges that there was widespread customer dissatisfaction with its billing process; that

it was "inundated with individuals who were less than satisfied with the manner they had been contacted or their treatment once they had been switched;" that "Cherry has engendered a great deal of ill will in Florida;" and that Cherry has "caused particular distress to Florida Citizens."

Briefly, the record indicates that Cherry:

1. filed an inaccurate application for certification which omitted the felony conviction for wire fraud of its CEO;

2. filed misleading corporate documents;

3. had ethical/marketing problems when it solicited customers in person;

4. had ethical/marketing problems when it solicited customers via telemarketing;

5. slammed an unprecedented number of Florida customers;

6. repeatedly failed to timely reply to Commission Staff inquiries;

7. operated as a reseller prior to certification;

8. despite implementation of new procedures, demonstrated no improvement in its slamming complaint record during the pendency of this proceeding.

Upon review, we find that it is not in the public interest for Cherry to continue to operate in Florida.

VI. PENALTY

Cherry argues that, on the record evidence of this hearing, and because this is Cherry's first Rule to Show Cause in Florida, no draconian penalty, such as cancellation of Cherry's certificate, is warranted. Cherry agrees to accept reasonable sanctions or restrictions so long as it is allowed to continue to provide service in Florida.

We have considered numerous penalty options in this case. However, for the reasons discussed above, we have found that it is not in the public interest for Cherry to operate in Florida. Thus, we find that the appropriate penalty is the revocation of Cherry's certificate to provide IXC service in Florida (No. 3134).

In order to minimize customer confusion, the Company shall notify its Florida customers of the revocation of its certificate within 30 days of the issuance of this Order. The notice shall inform the customers that they will need to select another carrier. The Company shall submit its proposed notice language to the Commission staff for review prior to sending it to its customers. The Company also shall refund any deposits it may have collected from Florida customers.

VII. PROPOSED FINDINGS OF FACT

The Company submitted the following 43 proposed findings of fact:

PROPOSED FINDING 1: The date a customer is solicited is necessarily earlier in time than the date their long distance service is PICed. The PIC date can be as much as thirty to sixty days earlier than the first time a bill is received by a customer. (Tr. p. 144, l. 8-16 (Issue 1)).

The record supports a lag time associated with solicitation, PIC changes, and when the customer receives a bill reflecting the change. However, the unqualified first sentence of the Proposed Finding is not supported by the record. In this regard, there is testimony that some Cherry customers report having their long distance service PICed who were never solicited.

The second sentence of the Proposed Finding is also inaccurate based upon the cited testimony which is that "if I were to solicit your business today, you would not receive -- you know, a bill maybe two months -- a month from now." (Emphasis added) Thus, while the second sentence of the Proposed Finding calls for a 30 to 60 day relationship between the PIC change date and the bill date, the cited testimony refers to such a relationship existing between the solicitation and billing dates. We deny the Proposed Finding of Fact.

PROPOSED FINDING 2: The Staff representing the Florida Public Service Commission did not submit Robert Ferguson's unredacted testimony to the attorneys representing Cherry Communications, Incorporated prior to hearing. (Tr. p. 30 at l. 11 (Issues 1, 2, 3, 5, 6, 8 and 9)).

We presume that the Company means Roberta Ferguson and not Robert Ferguson. That noted, we find that the record supports the statement. We approve the Proposed Finding of Fact.

To put the finding in perspective, we observe that the record also supports that the Company was provided an unredacted copy of the testimony approximately a month before the hearing. Additionally, we note that if there was uncertainty regarding the testimony, the Company could have employed any of the available discovery tools, could have filed a motion to compel, could have called either staff or WilTel (who protected the information pursuant to a contractual agreement with Cherry) and inquired about the redacted testimony, or could have simply asked their client, the owner of the information.

PROPOSED FINDING 3: Complaints were taken by several individuals of the Florida Public Service Commission staff. Although Nancy Pruitt testified that she received complaints, she did not indicate which complaints she had received, nor did she know how many of them she had personally received. (Tr. p. 235, l. 7; p. 235, l. 23-25 through p. 236, l. 10 (Issues 1, 2, 3, 5, 6, 8 and 9)).

The record supports the first sentence of the Proposed Finding. However, the second sentence of the Proposed Finding is a mischaracterization of the record which is that the analyst who takes a complaint is indicated by the initials on that complaint. Based on the initials on the complaints included in Exhibit 15, Ms. Pruitt took 29 of the 134 complaints. Moreover, Cherry's counsel discouraged the witness from adequately reviewing the materials which were before her in order to provide him with an answer. We deny the Proposed Finding of Fact.

PROPOSED FINDING 4: WilTel is the subject of its own Show Cause Proceeding before the Florida Public Service Commission. (Tr. p. 245, l. 22; p. 319, l. 19 (Issues 1, 2, 3, 5, 6, 8 and 9)).

The record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 5: In addition to having on staff a Vice President with ten years experience in long distance services, Cherry has recently sought outside assistance to correct marketing difficulties. Cherry has hired the law firm of Swidler & Berlin to investigate its application procedures, as well as the law firm of Gardner, Carton & Douglas to assist in investigations of complaints received by the Federal Communications Commission and the FPSC. Cherry has also hired an outside consultant familiar with Florida procedures and industry to assist in the selection of consultants necessary to correct difficulties they have encountered marketing this product. (Tr. p. 96, l. 15 through p. 97, l. 2; p. 122, l. 25; p. 151, l. 14 through p. 152, l. 3; p. 154, l. 9-17; p. 155, l. 25 through p. 156, l. 7), (Issues 1, 2, 5 and 8)).

The record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 6: Cherry has presently instituted a solicitation system of Letters of Agency that are 100% verified, in lieu of telemarketing. Cherry Communications believes that this system of verification will appreciably diminish difficulties related to marketing and slamming. (Tr. p. 163, l. 7-19 (Issues 1, 3, 5 and 8)).

At the cited Transcript reference, the witness testified that the Company is "going to start going direct to the customer." There is no indication that such a plan has "presently been implemented." We deny the Proposed Finding of Fact.

PROPOSED FINDING 7: No witness with first hand knowledge was presented by staff for cross examination on the issues of whether or not they: were "slammed"; were provided intrastate service prior to Cherry obtaining their certificate; were changed to Cherry Communications without Cherry having followed proper procedural compliances. (Tr. p. 20, l. 24 (Issues 1, 2, 3 and 6)).

We acknowledge that it is difficult to prove a negative and find that the record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 8: It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management ever directed its sales force to act in a manner to defraud Florida citizens. (Tr. p. 101, l. 1-5; p. 102, l. 24-25; p. 171, l. 14-25 (Issues 1, 2, 3, 6 and 8)).

There is testimony that it was not the Company's policy to encourage unethical behavior on the part of its sales force. However, we find that such statements are hollow when weighed against the record of the abuses which resulted from the manner in which this Company conducted business in Florida. Moreover, the Company has admitted that it can control its sales staff, that its sales staff are its agents, and that it is responsible for the actions of its sales staff. We deny the Proposed Finding of Fact.

PROPOSED FINDING 9: It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management ever directed its sales force to slam consumers or violate other rules and regulations of the Florida Public Service Commission. (Tr. p. 237, l. 20; p. 171, l. 15-21 (Issues 1, 2, 3, 6 and 8)).

There is testimony that salesmen were not encouraged to slam customers. However, we find that such statements are hollow when weighed against the record of the abuses which resulted from the manner in which this Company conducted business in Florida. Moreover, the Company has admitted that it can control its sales staff, that its sales staff are its agents, and that it is responsible for the actions of its sales staff. We deny the Proposed Finding of Fact.

PROPOSED FINDING 10: It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management directed its sales force to engage in improper marketing practices. (Tr. p. 237, l. 20; p. 169, l. 11-12; p. 101, l. 3-5 (Issues 1, 2, 3, 6 and 8)).

There is testimony that salesmen were not encouraged to engage in improper marketing practices. However, we find that such statements are hollow when weighed against the record of the abuses which resulted from the manner in which this Company conducted business in Florida. Moreover, the Company has admitted that it can control its sales staff, that its sales staff are its agents,

and that it is responsible for the actions of its sales staff. We deny the Proposed Finding of Fact.

PROPOSED FINDING 11: It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management directed its sales force to engage in unethical conduct. (Tr. p. 101, l. 1-5; p. 102, l. 23-25; p. 169, l. 11-12 (Issues 1, 2, 3, 6 and 8)).

There is testimony that salesmen were not encouraged to engage in unethical conduct. However, we find that such statements are hollow when weighed against the record of the abuses which resulted from the manner in which this Company conducted business in Florida. Moreover, the Company has admitted that it can control its sales staff, that its sales staff are its agents, and that it is responsible for the actions of its sales staff. We deny the Proposed Finding of Fact.

PROPOSED FINDING 12: Cherry Communications is unaware of any PIC changes submitted by their sales force in Florida that would indicate Cherry Communications were soliciting customers prior to certification. (Tr. p. 94, l. 1-5 (Issues 1 and 3)).

While there is testimony that Cherry was unaware of such solicitation, there is evidence that such PIC changes were received by WilTel prior to certification, and that there were complaints filed with this Commission prior to certification. The Company's witness testified that "If we had solicited prior to certification, it would be easier to prove that fact. A party would merely have to show that a Cherry agent has submitted a PIC change request on behalf of Cherry Communications, Inc. prior to December 4, 1992." Such evidence is included in the record. We deny the Proposed Finding of Fact.

PROPOSED FINDING 13: The Florida Public Service Commission has developed no rule or policy establishing procedures for investigations of, or responses to, consumer complaints. (Tr. p. 228, l. 1-4; p. 90, l. 16-17; p. 96, l. 3-10; p. 151 l. 4-18 (Issue 4)).

Initially, we note that there is no issue in this proceeding to determine the adequacy of the Company's responses to Commission

staff inquiries regarding customer complaints. The issue which is before us involves the timeliness of Company replies to such inquiries. Indeed, the Company asserts that this Proposed Finding relates to Issue 4 which asks whether the Company violated Rule 25-4.043, Florida Administrative Code. That Rule provides that:

> 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.

Thus, a requirement of a written reply within 15 days of a Commission inquiry is included in the applicable Rule.

Regarding what is actually required in a response to a staff inquiry about a consumer complaint, we note that Rule 25-22.032(1), Florida Administrative Code, provides in pertinent part that "The response should explain the utility's actions in the disputed matter and the extent to which those actions were consistent with the utility's tariffs and procedures, applicable state laws, and Commission rules, regulations, and orders."

We deny the Proposed Finding of Fact.

PROPOSED FINDING 14: In every instance where a customer has complained of an unauthorized switch, Cherry Communications has initially responded with a letter apologizing for that switch and a $12.00 check to reimburse switching charges and any inconveniences caused by that switch. (Tr. p. 90, l. 13-15; p. 112, l. 18-20; p. 95, l. 9 through p. 96, l. 2 (Issues 4, 6 and 8)).

While it is not clear from the record that this has happened in every instance, we find the statement to be substantially correct. We approve the Proposed Finding of Fact.

PROPOSED FINDING 15: In addition to its initial response to customers, which included a letter of apology and a $12.00 check, Cherry has undertaken yet a further investigation of complaints in Florida. Cherry Communications has hired a law firm to investigate and respond to complaints. The investigation includes contact of consumers by telephone, often after several attempts, and a follow

up letter summarizing complaints and soliciting further consumer input or information. (Tr. p. 96, l. 15-25; Composite Exhibit No. 9 (Issues 4, 6 and 8)).

While the Company's "initial response" does not appear to involve any investigation at all and Cherry characterizes what appears to be its initial investigation as "further investigation," the record supports that the Company has instituted a protocol to investigate and respond to complaints.

To put this investigation in context, we observe that the Company was not certain what the law firm does with the information which it collects, and that the purpose of the Company's investigation protocol "is to satisfy the customer's complaint not to determine the validity of the complaint." We approve the Proposed Finding of Fact.

PROPOSED FINDING 16: In 1992, Sprint was late in responding to complaints submitted by the Florida Public Service Commission an average of 39% of the time. (Tr. p. 247, l. 13-19; Composite Exhibit No. 8 (Issues 4 and 8)).

The record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 17: Cherry Communications terminated employees that engaged in improper conduct. (Tr. p. 78, l. 16-18 (Issues 5 and 6)).

The Company witness testifies that employees who engaged in improper conduct were terminated. To put this into perspective, we note that "improper conduct" is an ambiguous term which the Company has not defined. Moreover, it is not clear from the record that all employees who engaged in improper conduct have been terminated. However, we approve the Proposed Finding of Fact.

PROPOSED FINDING 18: Cherry Communications has prosecuted sales individuals for grossly unethical conduct. (Tr. p. 78, l. 18-20; Composite Exhibit No. 7 (Issues 2, 3, 5, 6 and 8)).

The testimony is that "at least one" employee was so terminated. The Exhibit cited by the Company evinces only one such

prosecution. The Proposed Finding states that "sales individuals" were prosecuted. Thus, we deny the Proposed Finding of Fact.

PROPOSED FINDING 19: Any telemarketing conducted by Cherry Communications is governed by tightly drafted scripts for both the telemarketers and third-party verifiers. Since the implementation of these revised scripts in mid-March, Cherry Communications has noticed a marked improvement in the level of complaints received nationally. (Tr. p. 81, l. 5-7, p. 82, l. 5-9 (Issues 2, 3, 5, 6, 8 and 9)).

The Company's record citations evince only that a script is provided to telemarketers and that the Company has hired a third party verifier. There is no indication of the results of such a program. We deny the Proposed Finding of Fact.

PROPOSED FINDING 20: Since the implementation of Cherry's verification procedures in mid-March, Cherry has noticed a marked improvement in the number of complaints received from the FPSC. (Tr. p. 208, l. 1-6; p. 227, l. 7-11 (Issues 2, 3, 5, 6, 8 and 9)).

The Company's citation to transcript page 208 lines 1-6 is inconclusive and the citation to Transcript page 227, lines 7-11 is to a "question" by Cherry's counsel. We do not find that the record supports a reduction in overall complaint volumes. We deny the Proposed Finding of Fact.

PROPOSED FINDING 21: When telemarketing, Cherry Communications employs Compliance Monitors to monitor conversations between telemarketers and prospective customers. (Tr. p. 85, l. 4-8 (Issues 5, 6, and 8)).

The proposed finding is over broad. The record does indicate that, beginning in April of 1993, compliance monitors were employed to monitor marketing efforts. However, prior to that date it appears that compliance monitors were not employed to monitor telemarketers. We deny the Proposed Finding of Fact.

PROPOSED FINDING 22: Telemarketers were required to sign an Employee's Agreement as a condition of their employment by Cherry. This agreement set forth in no uncertain terms the consequences of

unethical behavior while acting on behalf of Cherry Communications. (Tr. p. 86, l. 12-23 (Issues 5, 6 and 8)).

The testimony is that "Telemarketers are now required to sign an employee's agreement . . ." (emphasis added) The Proposed Finding implies that this has always been the case. Regarding the consequences of unethical behavior, the cited testimony is simply that deviations from the sales scripts "may subject the telemarketer to liability." Thus, the actual consequences of unethical behavior appear to be uncertain. We deny the Proposed Finding of Fact.

PROPOSED FINDING 23: Since the implementation of revised scripts for telemarketers and third-party verifiers first used on March 16, 1993, no complaints have been received by Cherry Communications regarding improper switching for sales activity that originated since that time. (Tr. p. 90, l. 1-4 (Issues 5, 6, and 8)).

There is evidence of continued marketing problems after March 16, 1993. On cross examination by Cherry, witness Pruitt agreed that the sales solicitation of a customer named "Shepherd" who complained April 6, 1993, would have occurred in the last week of March. Witness Pruitt also agreed with the Company's attorney that there was a complaint involving a customer named "Rodby" in which the sales contact occurred on April 8, 1993. Additionally, many complaints do not indicate the date that sales solicitation occurred. Indeed, witness Pruitt testified that in some cases "we have found that some people report they've been switched and never had been contacted." We deny the Proposed Finding of Fact.

PROPOSED FINDING 24: Many factors play a role in those instances where there may be a failure in a comprehensive third-party verification system. These factors include keying errors, electronic processing problems, orders placed and verified by relatives or individuals other than the authorized party, human error, and a failure of the third-party verifier to follow proper procedures. (Tr. p. 311, l. 16-21 (Issues 5, 6, and 8)).

The record supports this statement. We approve the Proposed Finding of Fact. However, we note that "orders placed and verified by . . . individuals other than the authorized party" could include sales scams. For example, the Company witness described a scam in which a telemarketer calls a friend and has the friend pose as

customer X who then deceives the third party verifier by claiming to be customer X and authorizing the switch.

Additionally, we observe that this Proposed Finding is based solely on the testimony of Roberta Ferguson. The Company has asserted that inclusion of her testimony in the record violates its due process of law.

PROPOSED FINDING 25: Cherry Communications has committed to a wide-scale consolidation of offices in order to better central its marketing procedures. Cherry Communications presently has two offices nationwide. (Tr. p. 79, l. 6-11 (Issues 5 and 8)).

We presume that by "better central" the Company actually means "better control." Company testimony supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 26: Sales managers for Cherry Communications are required to sign a Management Agreement as a condition of their employment. This agreement sets forth the dire consequences of engaging in unethical behavior. (Tr. p. 85, l. 23; Composite Exhibit No. 7 (Issues 5 and 8)).

Company testimony indicates that this is the case beginning in April of 1993. The dire consequences set forth in the agreement appear to be statements that fraud is against the law and that the "[a]greement may be terminated by Cherry Communications, Inc. without notice if Manager allows its employees to materially deviate from the letter or spirit of the script when soliciting a customer order, except as authorized above . . . ." We approve the Proposed Finding of Fact.

PROPOSED FINDING 27: The Florida Public Service Commission had received 23 marketing complaints concerning Cherry Communications from December 4, 1992 through April of 1993. The Florida Public Service Commission alleged that from April to June 17, 1993, it received only one additional marketing complaint. (Tr. p. 208, l. 1-6 (Issues 5 and 8)).

The record supports the statement. However, we observe that marketing complaints and slamming complaints are related. If a customer complains of marketing tactics and also was slammed, the

complaint is listed as simply a slamming complaint. Thus, while only one marketing complaint was recorded during the time frame in question, this statistic fails to reflect marketing complaints by customers who also were slammed during that period. We approve the Proposed Finding of Fact.

PROPOSED FINDING 28: The Florida Public Service Commission alleged that it received during the month of April, 1993 only five complaints alleging slamming. This was a significant improvement over previous months. (Tr. p. 227, l. 7-11; (Issues 5 and 8)).

Witness Pruitt testified that the Commission received 108 complaints in April and May alone for unauthorized changes." The Company's record citation is to a hypothetical question posed by Cherry's counsel. Moreover, counsel's hypothetical addresses complaints ultimately received which resulted from slams occurring in April, and not the volume of Complaints which the Commission received during the month of April as suggested by the Proposed Finding. The extent of the distortion in the Proposed Finding is evident in the line of questions which begins on page 212 of the transcript and continues to page 227. We deny the Proposed Finding of Fact.

PROPOSED FINDING 29: The Florida IXC Application was submitted on behalf of Cherry Communications by Network Solutions, Inc. The application was not signed by James Elliott nor by any officer of Cherry Communications. At the time of submission, Cherry Communications believed that all information was accurately presented for consideration. (Tr. p. 10, l. 16-25; p. 74, l. 7-24; p. 98, l. 3-20 (Issue 7)).

The record supports that the application was submitted on behalf of Cherry by its agent and that it was not signed by James Elliott. The Company cites testimony by its witness that it believed all information to be accurate. However, testimony that the Company believed the application to be accurate is not credible. IXC application Form PSC/CMU 31 is included by reference in Rule 25-24.471, Florida Administrative Code, which governs applications. That form provides that: "[b]y my signature below, I attest to the accuracy of the information contained in this application and associated attachments." We find that having its agent sign the application does not relieve Cherry of the obligation to submit accurate information including attachments.

We deny the Proposed Finding of Fact.

PROPOSED FINDING 30: Information regarding James Elliott was made public and fully disclosed in Dunn & Bradstreet Reports prior to Cherry's IXC Application being filed in the State of Florida. (Tr. p. 12, l. 25 through p. 13, l. 9; Exhibit No. 5; p. 99, l. 5-7 (Issue 7)).

The record supports this statement. To put this into context, we observe that the record also indicates that Dunn and Bradstreet is not reviewed by staff in making recommendations whether a certificate should be granted and that the staff "relies on the honesty of the companies whenever they file these applications." We approve the Proposed Finding of Fact.

PROPOSED FINDING 31: Once the inaccuracy in Cherry's Florida application regarding James Elliott was brought to Cherry Communications' attention, Cherry addressed the issue directly by submitting a letter under the signature of the CEO, Peter Wegmann, disclosing all relevant information to the Florida Public Service Commission. (Tr. p. 99, l. 8-11; Composite Exhibit No. 8 (Issue 7)).

The record supports this statement. On May 14, 1993 the Company telefaxed a letter to Steve Tribble stating that the answer in response to question 9(a) of the Application . . . needs to be retroactively amended." The Company then disclosed the felony convictions of two of its officers, one for mail fraud and the other for attempted violation of the Hobbs Act. The Hobbs Act is a federal anti-racketeering act making it a crime to interfere with interstate commerce by extortion, robbery, or physical violence. (18 U.S.C.A Section 1951) We approve the Proposed Finding of Fact.

PROPOSED FINDING 32: In the Florida application submitted on Cherry Communications' behalf by Networks Solutions, Inc., an incorrect Illinois file number is represented on one of several pages where file numbers are indicated. On all other pages where an Illinois file number was required in the Florida application, Cherry's correct file number was indicated. (Tr. p. 148-150; p. 252, l. 21 through p. 253, l. 1 (Issue 7)).

The record supports this statement. We approve the Proposed Finding of Fact.

However we observe that the statement discounts the significance of the discrepancy between the two corporate entities evinced by the two corporate numbers. There were inconsistencies regarding filings in Illinois, Florida, and with the Commission. Indeed, the Company which was registered as a foreign corporation in Florida no longer existed in Illinois.

PROPOSED FINDING 33: The confusion created on the application by multiple Illinois filing numbers was resolved prior to hearing. (Tr. p. 282, l. 11-21; Exhibit No. 4 (Issue 7)).

In response to Cherry counsel's questions at the cited transcript reference, the witness uniformly responded in the negative. While Exhibit 4 does indicate that the second Cherry corporation applied as a foreign corporation in Florida and also applied for a fictitious name, it does not indicate that the application was approved. Moreover, the questions raised by staff regarding which corporation is responsible and "how there can be two corporations in the same name being responsible" remain. We deny the Proposed Finding of Fact.

PROPOSED FINDING 34: Even after extraordinary measures were taken to correct their slamming difficulties, MCI and Sprint have yet to totally curtail their problems. (Tr. p. 97, l. 21-24; Composite Exhibit No. 8 (Issues 7 and 8)).

The record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 35: Cherry Communications presently offers a product of long distance telecommunications service which is appreciably less expensive than the basic packages offered by Sprint, MCI or AT&T. (Tr. p. 158, l. 4-6 (Issue 8)).

The citation to the record does not support the statement. At transcript page 158, lines 4-6, the Company witness testifies that: "And then we went to US Sprint where Bob Bevilacqua worked, and we tried to negotiate lower prices to increase our profitability, which we did." There is no definition of what a "basic package" is or how Cherry's prices compare. Moreover, the Company acknowledged

that in some instances, Cherry is not less expensive than its competition. We deny the Proposed Finding of Fact.

PROPOSED FINDING 36: The information presented by the Florida Public Service Commission staff regarding Cherry's activities in states other than Florida was taken by Ms. Pruitt over the telephone. No competent substantial evidence was presented to verify information regarding Cherry's activities in other states. (Tr. p. 239, l. 11-25 (Issue 8)).

The record does support that witness Pruitt spoke with people over the telephone regarding the activities of Cherry in other states. However, attached to witness Pruitt's testimony was an Order issued by the Louisiana Public Service Commission requiring Cherry to cease soliciting customers in that state, and an Order from the Chancery Court in Davidson County Tennessee approving an assurance of voluntary compliance regarding Cherry's operations in that state. Moreover, witness Ferguson testified that, nationally, WilTel has received more than 5,000 slamming complaints alleging complaints involving Cherry. She testified that "WilTel has stopped accepting PIC change requests from Cherry in Louisiana, based on an order from the Louisiana Public service Commission, and for Oregon, based on an order from the Oregon Attorney General." Based on mutual agreement WilTel has stopped processing any PIC change requests in seven additional states.

We deny the Proposed Finding of Fact.

PROPOSED FINDING 37: The Florida Public Service Commission has never revoked a certificate of public convenience and necessity for issues relating to "slamming." (Tr. p. 255, l. 19-22 (Issues 8 and 9)).

The record supports the statement. We approve the Proposed Finding of Fact.

PROPOSED FINDING 38: The Rule to Show Cause, which is the subject of this hearing, is the first and only rule ever issued by the FPSC against Cherry Communications, Inc. (Tr. p. 256, l. 19-22 (Issues 8 and 9)).

The record supports that this is the first and only show cause proceeding initiated against the Company in Florida. The Company was certificated on December 4, 1992; the instant docket was opened one week later to address customer complaints; on February 22, 1993, we issued Order No. PSC-93-0269-FOF-TI which initiated show cause proceedings against the Company. We approve the Proposed Finding of Fact.

PROPOSED FINDING 39: WilTel has not experienced any problems stemming from WilTel's association with Cherry Communications. (Tr. p. 305, l. 12-17 (Issue 8)).

The lines cited by the Company reflect only a portion of a sentence. The entire sentence is:

> To the best of my knowledge in my capacity as a Regulatory Analyst, since October, 1992, WilTel has not experienced any problems with Cherry Communications except for direct and indirect complaints from their customers of unauthorized conversions, telemarketing practices, and some complaints regarding the responsiveness of their customer service department. (Emphasis added)

The cited testimony does not support the statement. We deny the Proposed Finding of Fact.

Additionally, we note that the entire record authority for the Proposed Finding is the testimony of Witness Ferguson. Cherry has argued that including this testimony in the record violates its due process of law.

PROPOSED FINDING 40: WilTel's association with Cherry Communications has not affected WilTel's reputation adversely. (Tr. p. 314, l. 10-16 (Issue 8)).

The cited testimony in response to the question whether the association of WilTel with Cherry affects WilTel's reputation is: "Not directly. As the underlying carrier, WilTel's relationship with any of its resellers, like Cherry, is indirectly affected by any marketing or operational problems they may experience." This testimony does not support the Company's statement. We deny the Proposed Finding of Fact.

Additionally, we note that the entire record authority for the Proposed Finding is the testimony of Witness Ferguson. Cherry has argued that including this testimony in the record violates its due process of law.

PROPOSED FINDING 41: There is normally a direct correlation between the number of complaints and the size of the company. The larger the volume of business a company has, the more complaints the company would expect to receive. These correlations regarding relative volume are certainly applicable to Cherry. (Tr. p. 315, l. 23 through p. 316, l. 14) (Issue 8)).

Initially, we note that the Proposed Finding omits other testimony included in the Company's transcript citation which follows: "Other factors that tend to account for a considerable number of errors are: processing errors, the improper practices of sales agent(s)/representative(s), system breakdowns, and telemarketing. . . . Based on customer complaints, Cherry may have some telemarketing problems."

Other evidence indicates that Cherry's complaint volumes are considerably greater than other companies relative to its customer base. For example, witness Pruitt testified that in a four month period, of 361 complaints received by the Commission, 143 were due to the activities of Cherry. We deny the Proposed Finding of Fact.

Additionally, we note that the entire record authority for the Proposed Finding is the testimony of Witness Ferguson. Cherry has argued that including this testimony in the record violates its due process of law.

PROPOSED FINDING 42: WilTel's overall impression of Cherry Communications is favorable. Although Cherry has experienced difficulties as a new entrant in the national communications market, Cherry has found a market niche and offers a service that has attracted a substantial number of customers. (Tr. p. 316, l. 19 through p. 317, l. 2 (Issue 8)).

The testimony cited by the Company is silent regarding an overall evaluation and thus, does not support the first sentence of the Proposed Finding. Other testimony by the witness indicates that nationally, from all sources, no other reseller is generating the volume of complaints to WilTel that Cherry is generating. The

witness does state what the Company paraphrases in the second sentence of the Proposed Finding. We deny the Proposed Finding of Fact.

Additionally, we note that the entire record authority for the Proposed Finding is the testimony of Witness Ferguson. Cherry has argued that including this testimony in the record violates its due process of law.

PROPOSED FINDING 43: Cherry Communications presently provides 30,000 Floridians with a low cost long distance service. Cherry has received no complaints regarding these customers. (Tr. p. 101, l. 22-25; p. 102, l. 3-8) (Issues 8 and 9)).

The cited testimony is that "We are priced, I believe, far below any of our competitors except in certain cases." Regarding the 30,000 customer base, the witness simply observes that "counsel mentioned 30,000 customers." The cited record authority contains no meaningful evaluation of the Company's complaint volumes and indeed, Cherry's witness testified that he was unaware of the Company's Florida complaint volumes. Moreover, there is evidence of a multitude of complaints filed with this Commission, filed with WilTel, filed with Centel, and filed with Cherry itself, by the Company's customers. The record simply does not support a finding of no complaints regarding Cherry's customer base. We deny the Proposed Finding of Fact.

Therefore, based upon the foregoing, it is

ORDERED by the Florida Public Service Commission all findings contained in this Order are hereby affirmed in every respect. It is further

ORDERED that Cherry willfully violated Rule 25-24.470(1), Florida Administrative Code. It is further

ORDERED that Cherry willfully violated Rule 25-4.118(1), Florida Administrative Code. It is further

ORDERED that Cherry willfully violated Rule 25-4.118(2), Florida Administrative Code. It is further

ORDERED that Cherry willfully violated Rule 25-4.043, Florida Administrative Code. It is further

ORDERED that no Cherry sale's procedure has been effective in deterring slams. It is further

ORDERED that Cherry has engaged in unethical marketing practices in Florida. It is further

ORDERED that Cherry's Florida IXC application contained inaccuracies. It is further

ORDERED that it is not in the public interest for Cherry to continue to operate in Florida. It is further

ORDERED that Cherry's certificate of public convenience and necessity (No. 3134) is hereby revoked. It is further

ORDERED that Cherry shall notify its customers within 30 days of the issuance of this Order that its certificate has been revoked and that such customers will need to select another carrier. Cherry shall submit the aforementioned notice to the Commission staff for review prior to sending it to its customers. It is further

ORDERED that Cherry shall refund any deposits which it may have collected from its Florida Customers. It is further

ORDERED that the Proposed Findings of Fact are approved or denied as set forth above. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 20th day of September, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer 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 after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.