

MEMORANDUM

September 12, 1997

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FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF APPEALS (CALDWELL) *DWC*

RE: DOCKET NO. 970882-TI

75697-1071-PCO-TI

Attached is an Order _____, with attachments, to be issued in the above referenced docket. (Number of pages in order 12.)

DWC

Attachment

cc: Division of Communications
Division of Consumer Affairs
Division of Research and Regulatory Review

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see 1

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Rule 25-24.845,
F.A.C. Customer Relations;
Rules Incorporated, and proposed
amendments to Rules 25-4.003,
F.A.C., Definitions; 25-4.110,
F.A.C., Customer Billing; 25-
4.118, F.A.C., Interexchange
Carrier Selection; 25-24.490,
F.A.C., Customer Relations;
Rules Incorporated.

DOCKET NO. 970882-TI
ORDER NO. PSC-97-1071-PCO-TI
ISSUED: September 12, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER GRANTING PETITION BY THE ATTORNEY GENERAL AND OFFICE OF
PUBLIC COUNSEL AND ESTABLISHING PROCEDURE

BY THE COMMISSION:

On July 15, 1997, the Attorney General and Public Counsel for the Citizens of the State of Florida filed a Joint Petition for Initiation of Formal Proceedings Pursuant to Section 120.57, Florida Statutes, to Investigate the Practice of "Slamming" and to Determine the Appropriate Remedial Measures. Slamming is the practice of certain telecommunications companies of changing a telephone customer's primary interexchange company of without that customer's authorization. The Petition requests the Public Service Commission to conduct a full investigation into the practice of slamming within the context of an evidentiary proceeding under Section 120.57(1), Florida Statutes, with the objective of assessing the scope and extent of the practice and determining the appropriate remedial measures calculated to protect consumers.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

In their petition, the Attorney General and Public Counsel requested the following:

- (a) Open an investigative docket initiating formal proceedings under Section 120.57(1), Florida Statutes, before the full Commission to investigate the practice of slamming;
- (b) Set public hearings throughout the state to hear testimony from the public about slamming; and
- (c) Establish an expedited schedule for responses to discovery requests, all other prehearing matters, final hearing, and final disposition of the matter.

Staff has drafted proposed amendments to rules intended to reduce or eliminate slamming. In the June 6, 1997, edition of the Florida Administrative Weekly, the draft rules were published with a notice of rule development. Pursuant to several requests, a rule development workshop was held July 23, 1997.

In light of the facts that (1) the Commission had begun rulemaking under Section 120.54, Florida Statutes, and (2) the ultimate outcome sought in the Petition was the adoption of rules, the Assistant Attorney General and Deputy Public Counsel agreed, by letter dated August 13, 1997, to a course of action that could utilize the rulemaking process outlined in Section 120.54, Florida Statutes, to meet their objective.

With respect to the request for public hearings throughout the state, the letter states public workshops as provided in Section 120.54(2)(c), Florida Statutes (1996 Supp.), "would be acceptable, as part of an overall solution, as long as the workshops were well publicized ahead of time and allowed testimony under oath by any interested person." The petitioners suggested holding the workshops in "Ft. Myers, the Tampa/St. Petersburg area, the Miami/Ft. Lauderdale area, West Palm Beach, Orlando, Jacksonville, Tallahassee, and Pensacola."

With respect to their request for hearing under Section 120.57, Florida Statutes, the Petitioners suggested procedures requested in the petition be incorporated into the rulemaking proceeding. The petitioners also requested "full discovery rights to all parties, requiring prefiled testimony and requiring witnesses to provide testimony under oath subject to cross-examination at hearing before all five commissioners." Finally,

"[t]he hearing would take up the proposed rules and the investigation."

Discussion

The Petition of the Attorney General and Public Counsel is granted to the extent discussed below. Section 120.54, Florida Statutes, provides for rulemaking and was revised by the Legislature in 1996 to insure that the public and those persons affected by rules would have adequate notice and input in the rulemaking process.

Section 120.54(2), Florida Statutes, provides for rule development workshops and negotiated rulemaking. Section 120.54(2)(c) provides in part: "An agency must hold public workshops, including workshops in various regions of the state, for purposes of rule development if requested in writing by any affected person," In his August 13th letter, the Assistant Attorney General stated that workshops in lieu of hearings would be acceptable so long as the testimony was allowed under oath. He also suggested numerous cities around the state where the hearings could be held. Many locations are in areas subject to numerous slamming complaints. The workshops will be held in the locations suggested by the Attorney General and Office of Public Counsel. In addition, testimony taken at the workshops will be sworn.

Section 120.54(3)(c) provides for a hearing if requested by any affected person to allow an opportunity to present evidence and argument on all issues. Commission Rule 25-22.016, Florida Administrative Code, provides for hearing in rulemaking proceedings. In addition, the Commission rules for more formal proceedings include discovery under Rules 25-22.034, witnesses under 25-22.046, and evidence under 25-22.048, Florida Administrative Code.

Rather than hold a draw-out proceeding provided by Section 120.54(3)(c)2. on the factual issues raised by the Attorney General and Public Counsel in their petition, the rulemaking hearing is modified to include discovery and prefiled testimony. All of the issues that may be raised in the course of rulemaking can then be fully explored. The rulemaking hearing will be held before the full commission. At the hearing, witnesses will be required to provide testimony under oath and subject to cross-examination consistent with Rules 25-22.046 and 25-22.048.

Discovery will be allowed under Rule 25-22.034 and as provided in this Order to afford participants in this proceeding the ability to establish a factual record involving the slamming controversy.

Procedure

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and the rules of this Commission.

Discovery

a. When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

b. The hearing in this docket is set for Friday, February 6, 1998. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by Friday, January 30, 1998. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 30, and requests for production of documents, including all subparts, shall be limited to 30.

c. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If

a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183(2), Florida Statutes.

Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

Prefiled Testimony and Exhibits

Pursuant to Rule 25-22.048, Florida Administrative Code, each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 1/4 inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and fifteen copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Prehearing Statement

Pursuant to Rule 25-22.038(3), Florida Administrative Code, a prehearing statement shall be required of all parties in this

docket. Staff will also file a prehearing statement. The original and fifteen copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

(a) the name of all known witnesses that may be called by the party, and the subject matter of their testimony;

(b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;

(c) a statement of basic position in the proceeding;

(d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(e) a statement of each question of law the party considers at issue and the party's position on each such issue;

(f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(g) a statement of issues that have been stipulated to by the parties;

(h) a statement of all pending motions or other matters the party seeks action upon; and

(I) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Prehearing Conference

A prehearing conference will be held in this docket at the Florida Public Service Commission, 2540 Shumard Oak Boulevard Tallahassee, Florida 32399-0850. The conditions of Rule 25-22.038(5)(b), Florida Administrative Code, shall be observed. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure: Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

Document Identification

To facilitate the management of documents in this docket, exhibits will be numbered at the Prehearing Conference. Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____
Cost Studies for Minutes of Use by Time of Day

Tentative Issues

Attached to this order as Appendix "A" is a tentative list of the issues which have been identified in this proceeding. Prefiled testimony and prehearing statements shall address the issues set forth in Appendix "A".

Controlling Dates

The following dates have been established to govern the key activities of this case.

1)	Utility's direct testimony and exhibits	October 13, 1997
2)	Intervenors' direct testimony and exhibits	November 11, 1997
3)	Staff's direct testimony and exhibits, if any	November 24, 1997
4)	Rebuttal testimony and exhibits	December 15, 1997
5)	Prehearing Statements	January 5, 1998
6)	Prehearing Conference	January 15, 1998
7)	Hearing	February 6, 1998
8)	Briefs (2 weeks after transcripts)	March 6, 1998

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183(4), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

Post-Hearing Procedures

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing

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position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

Based upon the foregoing, it is

ORDERED that the Petition by the Attorney General and Office of Public Counsel to investigate the practice of slamming is granted to the extent described in this order. It is further

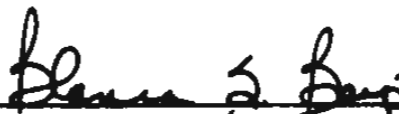
ORDERED that the rulemaking process initiated by staff be incorporated into this docket and the docket title be changed to reflect a rulemaking proceeding. It is further

ORDERED that discovery is allowed in accordance with this Order. It is further

ORDERED that rule development workshops will be held throughout the state of Florida and testimony will be taken under oath. It is further

ORDERED that witness will be sworn and subject to cross examination at the hearing before the full Commission.

By ORDER of the Florida Public Service Commission this 12th day of September, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

DWC

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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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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Appendix A

Issues:

1. Should additional safeguards be adopted by the Commission to protect consumers from slamming? If so, what safeguards should be adopted.