

ORIGINAL



JACK SHREVE
PUBLIC COUNSEL

STATE OF FLORIDA
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison St.
Room 812
Tallahassee, Florida 32399-1400
850-488-9330

October 10, 1997

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. ~~970332-T1~~

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the First Motion to Compel Against BDP by the Attorney General and the Citizens of Florida. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICES 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-T1

Filed: October 10, 1997

**FIRST MOTION TO COMPEL AGAINST BDP
BY THE ATTORNEY GENERAL AND THE CITIZENS OF FLORIDA**

Robert A. Butterworth, Attorney General ("Attorney General") and the Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, move the Florida Public Service Commission to issue an order requiring Business Discount Plan, Inc. ("BDP") to produce each of the documents requested in the First Set of Requests for Production of Documents to BDP by the Attorney General and the Citizens. In support of this motion, the Attorney General and the Citizens submit the following:

1. On September 11, 1997, the Attorney General and the Citizens served our first set of requests for production of documents to BDP. These requests for documents seek documents necessary for the Attorney General and the Citizens to prepare our case. On October 1, 1997, BDP served its objections to this request for production of documents. These objections were received by the Citizens on October 6, 1997.

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2. **BDP's objections begin by stating that it reserves the right to supplement, revise, or modify the objections it served on October 1, 1997. By making this claim, BDP seeks to unilaterally change Commission Order PSC-97-1071-PCO-TI issued September 12, 1997, which requires objections to be made within 10 days of service of the discovery request. The order specifically states that objections "shall" be made within this time frame. BDP has no right to unilaterally change the requirements of the order. The Commission should reject BDP's claim that it can supplement, revise, or modify its objections in contravention of the Commission's order.**

3. **BDP objects to the definition of the word "document" in the request for production of documents, claiming that the definition is overly broad, burdensome and harassing. However, BDP does not explain how the definition is overly broad, burdensome, and harassing, nor does BDP provide a single example of the definition being overly broad, burdensome, and harassing. Since BDP provided no analysis or examples giving the reasoning or basis for its objection, the objection should be denied.**

4. **Similarly, BDP states that the definition of the word "document" in the request for production of documents seeks to impose requirements outside the scope of the Florida Rules of Civil Procedure, Florida Administrative Code, and applicable law. Again, BDP does not explain why this is so, nor does BDP provide any example. This objection should be denied.**

5. BDP claims that the definition of the word "document" seeks to include documents beyond the scope of the rulemaking procedure and not relevant to the subject matter of this proceeding. BDP does not explain why this is so, nor does it provide any example. Its objection, which amounts to nothing more than a conclusion and is provided without analysis or explanation, should be denied.

6. BDP objects to the definitions of "you," "your," "company," and "Business Discount Plan" in the request for documents. Definition number 2 of the request for documents stated that the terms "you" and "your" meant BDP together with its officers, employees, consultants, agents, representatives, attorneys (unless privileged), and any other person or entity acting on behalf of BDP. The document request does not seek to have BDP procure documents from every affiliated company of BDP. Rather, it seeks only those documents from persons or entities acting on behalf of BDP. This is a proper request for documents. Rule 1.350, Florida Rules of Civil Procedure (adopted by Commission rule) allows requests for documents in the possession, custody, or control of the party to whom the request is directed. Persons or entities acting on behalf of BDP are within the "control" of the company. In addition, when two companies "act as one," discovery is permissible. *Medivision of East Broward County, Inc. vs. Department of Health and Rehabilitative Services*, 488 So.2d 886 (Fla. 1st DCA 1986). See also *Michelin Tire Corporation vs. Susan Ann Roose*, 531 So.2d 361 (Fla. 4th DCA 1988). BDP must therefore produce documents by persons and entities acting on its behalf, not just those strictly within the possession of BDP. BDP's objection should be denied.

7. BDP next objected to every request and instruction to the extent that the instruction or request called for information which is exempt from discovery by virtue of various privileges. BDP identified no such documents and gave no specific examples of where that privilege might apply. This objection should be denied unless and until BDP can identify specific documents to which it applies. Once BDP specifically identifies such documents, the Attorney General and the Citizens will then decide whether to seek an *in camera* inspection of those documents to determine the extent and validity of any claimed privilege. The claim of a "self-critical analysis privilege" should be rejected in total, since no such privilege exists under Florida law.

8. BDP objected to every request on the grounds that BDP is not a party to this proceeding. This matter was specifically discussed at the agenda conference when the Commission took up the joint petition by the Attorney General and the Citizens for initiation of formal proceedings pursuant to section 120.57, Florida Statutes. The staff recommended that the Commission's undocketed rule proceeding dealing with slamming be joined with the petition by the Attorney General and the Citizens of Florida. Since this docket is now a rule proceeding, there are no "parties" to the proceeding. At the agenda conference dealing with the joint petition, the Attorney General and the Citizens specifically requested confirmation that all telecommunications companies with a certificate from the Commission could be served with discovery requests in this proceeding. All such companies are potentially affected by a change in rules. The staff confirmed that it agreed with this interpretation, and the Commission questioned staff about this interpretation. No

disagreement was expressed by the Commission, staff, or any other party at agenda concerning this matter. Therefore, the Commission has already confirmed that any company with a certificate from the Commission is subject to discovery requests in this docket. Had this not been so, the Attorney General and the Citizens would not have agreed to joining the rule proceeding with our petition for an investigation into slamming. BDP's objection should be denied.

9. BDP objected to each request because it claims the requests are burdensome and harassing, yet again BDP provide no analysis or examples showing a basis for this claim. This objection should be denied.

10. BDP objected to each and every request insofar as the request was vague, ambiguous, imprecise, or utilized terms that are subject to multiple interpretations. However, BDP provided no example whatsoever of any case where such a request for documents fell within that objection. This type of boilerplate objection is improper because BDP does not identify any request to which the objection relates. The objection should be denied.

11. Similarly, BDP objected to every request insofar the request was not relevant to its provision of intrastate telecommunications services in Florida. The Attorney General and the Citizens do not object to BDP's limitation as it relates to specific customer complaints about slamming from customers outside of Florida. However, to the extent

other document requests relate more generally to analyses or matters related to slamming, the document requests should not be limited only to BDP's Florida intrastate operations. Matters related to slamming either in other states in general are relevant to this proceeding because they deal with the same general problems experienced in Florida. Slamming is not a phenomena known only to Florida intrastate operations. Instead, it is a nationwide problem, and documents related to this nationwide problem are relevant to Florida operations. Therefore, to the extent that BDP's objection relates to anything other than specific customer complaints from other states or jurisdictions, BDP's objection should be denied.

12. BDP objected to each request to the extent that it was not reasonably calculated to lead to the discovery of admissible evidence and not relevant. However, like most of its objections, BDP provides no analysis or examples of instances where its objection might relate. The objection should be denied.

13. BDP objected to the instructions in the document request, insofar as they seek to impose obligations on BDP which exceed the requirements of the Florida Rules of Civil Procedure or Florida law. Like other objections, this boilerplate objection provided no specific example or any instance where this objection might apply. Since BDP was unable to provide any specific example or describe where it might apply, the objection should be denied.

14. BDP further objected to providing information to the extent that such information is already in the public record before the Florida Public Service Commission. The rules of discovery do not provide such an exemption from discovery. This invalid objection must be denied.

15. BDP objected to each and every request to the extent that it sought information that BDP is prohibited from disclosing pursuant to Section 364.24, Florida Statutes, but BDP identified no such information. This statute, which deals with disclosing customer account information, has a specific exemption for matters required by subpoena, court order, other processes of court, or as otherwise allowed by law. Formal requests for production of documents in a proceeding before the Florida Public Service Commission qualify as "otherwise allowed by law." Therefore, in any event, even if BDP had identified any such documents, the documents would be exempt from Section 364.24, because they are required as otherwise allowed by law. BDP's objection should be denied.

16. BDP states that each of its objections are "continuing" objections, but Florida law does not allow "continuing" objections. This objection must be denied.

17. BDP is due to produce the requested documents on or before October 16, 1997. Accordingly, the Attorney General and the Citizens request the Commission to rule on this motion as soon as possible in order to mitigate the delay caused by BDP's untimely filing of objections.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL A. GROSS
Assistant Attorney General
Fla. Bar No. 0199481

Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

(850) 488-5899
FAX (850) 488-6589

JACK SHREVE
Public Counsel


Charles J. Beck
Deputy Public Counsel
Fla. Bar No. 217281

Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

(904) 488-9330

**CERTIFICATE OF SERVICE
Docket No. 970882-TL**

**I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail
or hand-delivery to the following parties on this 30th day of September, 1997.**

**Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, FL 32399-1050**

**Diana Caldwell, Esq.
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850**

**Marsha Rule, Esq.
Tracy Hatch, Esq.
AT&T Communications of the
Southern States, Inc.
101 N. Monroe
Suite 700
Tallahassee, FL 32301**

**Walter D'Haeseleer
Director of Communications
Florida Public Service
Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850**

**C. Everett Boyd, Jr.
Ervin, Varn, Jacobs & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302**

**Benjamin Fincher
Sprint Communications Company
3100 Cumberland Circle
Atlanta, GA 30339**

**Patrick K. Wiggins
Wiggins & Villacorta, P.A.
501 East Tennessee Street
Suite B
Post Office Drawer 1657
Tallahassee, FL 32302**

**Ky E.B. Kirby
Warren A. Fitch
Don W. Blevins
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W.
Washington, D.C. 20007**

**Robert G. Beatty
Nancy B. White
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, FL 32301**

**Richard D. Melson
P.O. Box 6526
Tallahassee, FL 32314**

Thomas K. Bond
MCI Telecommunications Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342

Suzanne Fannon Summerlin
1311-B Paul Russell Road
Suite 201
Tallahassee, Florida 32301

Greg L. Eriksen
Levine & Eriksen
2560 North Santiago Blvd.
Orange, California 92667

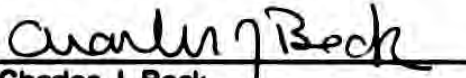
Pamela Melton
Regulatory Counsel
LCI International Telecom Corp.
8180 Greensboro Drive, Suite 800
McLean, Virginia 22101

Charles Rehwinkel
Sprint/United Florida
Sprint/Centel Florida
P.O. Box 2214
Tallahassee, FL 32316

Michael L. Glaser
Canora T. Podd
Halignman and Lottner, P.C.
First Interstates Tower North
633 Seventeenth Street, Suite 2700
Denver, CO 80202

Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Andrew O. Isar
Director, Industry Relations
Telecommunications Reseller Assoc.
4312 92nd Avenue, N.W.
Gig Harbor, WA 98335-4461


Charles J. Beck