

SCANNED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against WebNet Communications, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, and Toll Provider Selection.

DOCKET NO. 001109-TI
ORDER NO. PSC-01-2091-PHO-TI
ISSUED: October 22, 2001

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on October 8, 2001, in Tallahassee, Florida, before Commissioner Braulio L. Baez, as Prehearing Officer.

APPEARANCES:

LOUBNA W. HADDAD, Esquire, The Helein Law Group, P.C., 8180 Greensboro Drive, Suite 700, Mclean, Virginia 22102
On behalf of WebNet Communications, Inc.

WAYNE D, KNIGHT, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On August 11, 2000, this docket was established to require WebNet Communications, Inc. (WebNet) to show cause why it should not be fined for apparent violation of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, and Toll Provider Selection. On April 26, 2001, Order No. PSC-01-1027-SC-TI was issued requiring WebNet to show cause for apparent violation of Rule 25-4.118, Florida Administrative Code. Thereafter, on May 2,

DOCUMENT NUMBER-DATE

13340 OCT 22 01

FPSC-OPERATIONS CLERK

2001, WebNet filed a timely protest of the order, and this matter was set for hearing.

Orders Nos. PSC-01-1521-PCO-TI and PSC-01-1521A-PCO-TI established the procedures and controlling dates for this docket. On September 27, 2001, by Order No. PSC-01-1947-PCO-TI, I modified the filing dates. This matter is currently set for an administrative hearing on November 7, 2001.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. 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 used 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 periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service 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.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, 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.
- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) 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.
- d) 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.
- e) 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 the Commission Clerk and Administrative Services's confidential files.

IV. POST-HEARING PROCEDURES

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

Pursuant to Rule 28-106.215, Florida Administrative Code, 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 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties and Staff has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

Melinda Watts (Direct and Surrebuttal)	Staff	Issues 1 and 2
M. Howard Lewis (Rebuttal)	WebNet	Issues 1 and 2

VII. BASIC POSITIONS

WEBNET:

WebNet's basic position in this case is that it has not willfully violated or refused to comply with Rule 25-4.118, Florida Administrative Code, which prohibits unauthorized carrier changes. WebNet's telemarketing script makes clear to the prospective customer that the telemarketer is calling on behalf of WebNet for the purpose of soliciting the called party's long distance business. Once the customer indicates its desire to switch to WebNet, the telemarketer advises that a verification procedure will begin, the purpose of which is to verify that the customer is choosing WebNet as its long distance service. The verifications are in substantial compliance with Rule 25-4.118 and substantially achieve the regulatory goal of notifying the customer it selected WebNet as its long distance provider. These facts undercut the allegations of intentional slamming by WebNet. To the extent that any deficiencies in the process are viewed as evidencing willful violations of the anti-slamming rules, these deficiencies are not those of WebNet. Such deficiencies to the extent shown to be actual and substantive reside in the third party verification process. This is a process over which WebNet has no control. The third party verifier is, and by law must be, independent of WebNet. As such, WebNet cannot and should not be held liable for any failures of an independent agent, particularly where it is clear, even in the

light of verification deficiencies, proper customer authorization to switch service was obtained by WebNet.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE A: What is the Commission's jurisdiction in this matter?

POSITIONS

WEBNET:

No position stated.

STAFF:

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.01, 364.183, 364.285, and 364.603, Florida Statutes.

ISSUE 1(a): During the period of April 21, 2000, through February 16, 2001, did WebNet Communications, Inc. willfully violate or refuse to comply with Rule 25-4.118, Florida Administrative Code, which prohibits unauthorized carrier changes?

POSITIONS

WEBNET:

WebNet did not willfully violate or refuse to comply with Rule 25-4.118 and there is no competent evidence to the contrary. WebNet's telemarketers complied with applicable requirements, made clear that the prospective customers were being solicited to switch service to WebNet and the prospective customers were aware or should have been aware that the verification process was meant to verify their authorization of the switch.

The intent of WebNet's telemarketing script was to make clear that the purpose of the call was to obtain authorization for a switch in long distance service. WebNet's independent third party verifier did in fact obtain authorizations from all of the alleged complainants. If any technical deficiencies in the verifications existed, WebNet had no knowledge of them and was not in a position to prevent them. The telemarketing and verification processes as described, constitutes un rebuttable(sic) evidence that WebNet was intent on complying with all rules and obtaining proper authorization for all switches of long distance service.

STAFF:

Yes. During the period of April 21, 2000, through February 16, 2001, WebNet Communications, Inc. willfully violate or refuse to comply with Rule 25-4.118, Florida Administrative Code, which prohibits unauthorized carrier changes

ISSUE 1(b): If so, how many willful violations were there, and what is the appropriate action, penalty, and/or fine to be imposed by the Commission for any such violations?

POSITIONS

WEBNET:

As shown, there is no evidence to support a conclusion that there were any willful violations involved. The FPSC may not then impose penalties and/or fines against the company because there is no factual or legal basis on which to do so.

Moreover, the FPSC should take into consideration WebNet's actions that made the complainants whole, the amount of money it has expended to refund all its legitimate tariffed charges, and the remedial measures it has and will take.

STAFF:

There were 58 willful violations. The appropriate action, penalty, or fine is for the Commission to fine WebNet \$10,000 for each violation, for a total of \$580,000.

ADDITIONAL ISSUES*

In its prehearing statement, WebNet introduced several additional issues. Upon further examination, it appears that these issues are positions or arguments that would be offered up on a factual basis in order to prove or support WebNet's positions on issues 1(a) and 1(b). As such, these issues are withdrawn and more appropriately subsumed within issues 1(a) and 1(b).

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
M. Howard Lewis	WebNet	_____	W e b N e t ' s
		(MHL-1)	telemarketing
		_____	script
		(MHL-2)	A g r e e m e n t
		_____	between WebNet
(MHL-3)	and FCG, Inc.		
(MHL-3)	A u t o m a t e d		
(MHL-3)	Third Party		
(MHL-3)	Verification		
(MHL-3)	Recording		
(MHL-3)	Script		
(MHL-4)	Printout from		
(MHL-4)	FCG's, Inc.'s		
(MHL-4)	website		
(MHL-5)	Composite list		
(MHL-5)	of all refunds		
(MHL-5)	provided to		
(MHL-5)	the 58		
(MHL-5)	complainants		
(MHL-5)	in this		
(MHL-5)	Docket.		
Melinda Watts	Staff	_____	Rule 25-4.118,
		(MW-1)	F.A.C.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Melinda Watts	Staff	_____ (MW-2)	C o n s u m e r c o m p l a i n t s a n d s t a f f c o r r e s p o n d e n c e
		_____ (MW-3)	A p p a r e n t v i o l a t i o n s o f s p e c i f i c e l e m e n t s o f R u l e 2 5 - 4 . 1 1 8

WebNet and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

None.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters at this time.

XIII. RULINGS

- A. On October 4, 2001, WebNet filed an Unopposed Motion for Leave to Attend Prehearing Conference via Telephone. WebNet feared the irregularity of flights out of the Washington D.C. area might prevent counsel from appearing at the prehearing in a timely manner, thereby prejudicing WebNet. Staff Counsel did not oppose this motion, and the motion is now formally granted.
- B. Opening statements, if any, shall not exceed ten minutes per party.

ORDER NO. PSC-01-2091-PHO-TI
DOCKET NO. 001109-TI
PAGE 10

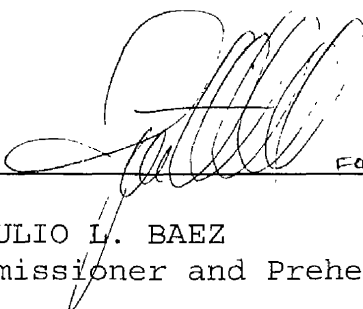
It is therefore,

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission. It is further

ORDERED that the additional issues introduced by WebNet are withdrawn, and those arguments subsumed within WebNet's positions in Issues 1(a) and 1(b), as appropriate. It is further

ORDERED that WebNet's Unopposed Motion for Leave to Attend the October 8, 2001 Prehearing Conference via Telephone is granted.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 22nd Day of October, 2001.



FOR BAEZ

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

WDK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative

ORDER NO. PSC-01-2091-PHO-TI
DOCKET NO. 001109-TI
PAGE 11

hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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 the Commission Clerk and Administrative Services, 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.