

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** July 9, 2004  
**TO:** Blanca S. Bayó, Commission Clerk and Administrative Services Director  
**FROM:** Dale R. Buys, Regulatory Analyst III, Division of Competitive Markets & Enforcement *DRB*  
**RE:** Docket No. 040062-TI; Compliance investigation of New Century Telecom, Inc. for apparent violation of Rule 25-4.118, F.A.C., Local, Local Toll, or Toll Provider Selection.

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Please file the attached facsimile from The Helein Law Group, LLC., dated July 9, 2004, in the above referenced docket.

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CTR \_\_\_\_\_ Attachment  
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**THE HELEIN LAW GROUP, P.C.**

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**FACSIMILE TRANSMISSION**

**\*\*\*\*\* For Immediate Delivery \*\*\*\*\***

DATE: July 9, 2004  
TO: Mr. Dale Buys  
FAX: 850-413-6067  
REFERENCE: 535.99  
FROM: Charles H. Helein  
SENDER'S TELEPHONE: (703) 714-1301  
SENDER'S FAX PHONE: (703) 714-1330  
PAGES TRANSMITTED: 5, INCLUDING THIS SHEET.

IF THERE ARE ANY DIFFICULTIES IN RECEIVING THIS TRANSMISSION, PLEASE CONTACT (703) 714-1300 IMMEDIATELY. THANK YOU!

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**MESSAGE OR SPECIAL INSTRUCTIONS:**

Please see attached.

Charles H. Helein

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Complex Litigation  
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July 9, 2004

Mr. Dale Buys  
Division of Competitive Markets and Enforcement  
Public Service Commission  
State of Florida  
Capital Circle Office Center  
2540 Shumard Oak Boulevard  
Tallahsee, FL 32399-0850

**Re: New Century Telecom, Inc. ("NCT")  
Docket No. 040062-T1**

Dear Mr. Buys:

In preparation for the meeting July 13<sup>th</sup> to further discuss settlement of the issues in the above referenced Docket, this letter will set forth on behalf of NCT certain responses to the objections of Staff to the proposed Terms of Settlement submitted on May 12, 2004 ("Settlement") as set forth in its Memorandum of June 17, 2004 ("Memo").

Memo at p.3: The Settlement is intended to be executed by the appropriate authority to do so, the Commission and the language of the Settlement will be amended to eliminate this concern.

Memo at p.3: NCT withdraws its request to seal the docket.

Memo at p.3: NCT cannot agree to cease marketing and generating the revenues to pay the contribution it has offered. However, it certainly will not tolerate the marketing activities Staff believes caused the apparent problems.

Memo at p.3: NCT categorically denies ever having edited verification tapes. Similarly, it is impossible to edit auto-attendant recordings not in NCT's possession when made. Copies are not retrieved unless requested by a third party. NCT is in the process of

contracting with a new verification company located in Illinois. NCT is prepared to work with Staff to achieve a verification script that satisfies all of the Commission's verification requirements.

Memo at p.3: NCT can demonstrate that it is unable to make a lump sum payment even of the amount it has proposed. NCT is in no position to abandon the company as it has operations in several other states. By resisting the installment payment proposed the Staff is acting to make non-payment a self-fulfilling prophecy that does not serve the ends of justice or the taxpayers of Florida.

Memo at p.3: NCT categorically denies that it is involved in some "consortium" with Miko Telephone Communications, Inc. or any other company. NCT's relationship with other companies has been explained and that relationship was not to engage in slamming, but to save back office costs. Optical Telephone Corporation corroborates this explanation and relationship in its May 28, 2004 letter to the Commission's Office of General Counsel in Docket No. 040289-TI.

Memo at p.4: Miko's customers were transferred to NCT because Global Crossing had disconnected Miko's network and its customers had no long distance service. In the extreme circumstances that existed, the larger public interests were served by restoring service to innocent customers as quickly as possible albeit certain regulatory notices could not be accommodated given the emergency.<sup>1</sup>

Memo at p.4: NCT's Karyn Bartel was never in any management position with UKI Communications, Inc. NCT cannot lawfully be held accountable for any default by UKI in connection with its activities of any kind.

Memo at p.4: NCT is accused of employing the same telemarketing tactics as Miko. Independent agents do NCT's telemarketing. Independent agents, by practice and by legal definition, work for more than one employer. It is not impossible therefore that there would be some similarities in telemarketing practices among these agents. While most of those similarities are sound, it is not surprising that irresponsible agents will use similar tactics. NCT is not responsible for independent agents that violate NCT's guidelines before NCT discovers a problem exists and before therefore it can take action to eliminate that problem.

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<sup>1</sup> Miko was victimized by the arrogant actions of Global Crossing. Despite legitimate disputes over Global Crossing's billing, Global Crossing simply disconnected Miko. That Global Crossing's billings were rightfully subject to challenge can be supported by more recent revelations about its own accounting practices. In an article in the Wall Street Journal of April 28, 2004, by reporter Shawn Young, it was reported that just 5 months after exiting bankruptcy protection, Global Crossing disclosed it had to restate its 2003 financial results, review its 2002 results, and suspend its financial projections for 2004. The company blamed "faulty internal controls" that led it to "underestimate its largest expense, the cost of getting access to other companies' phone and data networks."

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More to the point however, in the next four paragraphs, it is not the telemarketing practices cited, but 42 instances in which verification methodologies (specifically 9 cases of no TPV recording, 27 cases of technical insufficiencies in the TPVs and 6 cases involving Miko customers NCT took over in the emergency created by Global Crossing's wrongful disconnection of Miko) that form the basis of the alleged misconduct by NCT.

Memo at p.5: The Staff's view of the situation involving Ms. Figueroa is based on assumption and hypothesis that lacks any valid evidentiary support. The Staff's view of that situation is not credible and can be shown not to be.

Memo at p.5: It should be no surprise that a few customers did not receive a free calling card. All companies work very hard at fulfillment, but few escape making mistakes in doing so.

Memo at p. 6: Again, NCT denies that it has ever edited verifications and maintains that this is not technically possible. The Apps' claim that their third party verification was edited is rejected and is not admissible as evidence in that it is self-serving and lacks credibility as the Apps are not sound recording experts and had no access to any recording after it was made by which they can state with certainty what was and was not said.

Memo at p.6: If an independent agent stayed on the line during verification, it does not mean an independent third party didn't make the verification. Moreover, as the verification was auto-attended, the independent agent could not change the recorded questions asked. Prompting a customer who may be unfamiliar with the process is not proof that such prompts changed the customer's understanding or volition or otherwise affected the answers given. The Staff's view is make weight and treats customers as if they have little discretion and are unable to speak for themselves or refuse to make an answer suggested by a third party.

Memo at pp.6-7: The analysis of "willful violation" will not hold water. The precedents cited are circuitous – willful action is affirmative action, it's intentional, it's voluntary. These synonyms for willful are not facts of willfulness, affirmative actions, intentional actions or voluntary actions. There are in fact no willful violations committed by NCT.

In addition to the foregoing, NCT believes there are several serious issues concerning the Commission's jurisdiction in this matter that will have to be raised and litigated if the matter cannot be settled.

It is NCT's position that it wishes to remain in good standing in the State of Florida, that it will work with Staff to accomplish this and to stay in good standing, and that to accomplish these objectives it will make the significant financial sacrifice it has proposed. NCT's position should completely remove the Staff's concerns that it will exit the Florida market only to reappear under another guise. Such a strategy is self-defeating and financially foolish. It makes no sense for NCT to embark on a program to make a significant voluntary contribution to the State, and then at some point pullout of the State and forfeit the "peace"

NCT was willing to and did pay for, whether in whole or in part. Indeed, if this were NCT's strategy, these discussions would not be taking place. NCT would have already left the State.

Respectfully submitted,  
New Century Telecom, Inc.

By 

The Helein Law Group LLP  
Its Counsel  
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cc: Of Counsel:  
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