

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of T.R.A.C., Inc. for) DOCKET NO. 881027-TI
 Authority to Provide Interexchange) ORDER NO. 21065
 Telecommunications Service.) ISSUED: 4-18-89
 _____)

Pursuant to Notice, a Prehearing Conference was held on March 31, 1989, in Tallahassee, Florida, before Commissioner Gerald L. Gunter, as Prehearing Officer.

APPEARANCES:

JAMES ATTEBERRY, PRO SE, 201 S. Orange Street, Suite 800, Orlando, Florida 32801 as President of T.R.A.C., Inc.

ENNIS L. JACOBS, Jr., Esquire, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0863 on behalf of the Commission Staff.

PRENTICE P. PRUITT, Esquire, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0862 on behalf of the Commissioners.

PREHEARING ORDERI. BACKGROUND

In May, 1988, upon reason and belief that Telecommunication Resellers through Advanced Computerization, Inc. (T.R.A.C.), also known as Trade Results through Automated Communications, was operating in Florida as a telephone company without valid authority, Commission Staff contacted T.R.A.C. officials informing them of the certification requirement in Chapter 364, Florida Statutes. On July 20, 1988, a complaint was received from Pierce Enterprises, Inc., alleging that T.R.A.C. had not performed under its agreement with Pierce and that T.R.A.C.'s President, Mr. James Atteberry, had threatened Pierce officials with forfeiture of a prepaid deposit should the complaint be filed.

Following a lack of response by T.R.A.C. to a series of correspondence from Commission Staff, an application for authority to operate as an interexchange company (IXC) was filed on July 29, 1988. The application stated that T.R.A.C. had not transmitted intrastate traffic. The services listed were indicative of retail residential and business services. In reviewing T.R.A.C.'s marketing methods, Commission Staff concluded that T.R.A.C. was involved in a long distance resale operation involving the multi-level distribution of its services. It was further evident that T.R.A.C. could not know if it were facilitating intrastate telecommunications or not.

Because of T.R.A.C.'s initial lack of cooperation, because the tariff filed appeared to be inconsistent with T.R.A.C.'s offerings, because the tariff neglected the resale aspect of the business and because of T.R.A.C.'s failure to address the potential for carriage of intrastate traffic, Order No. 20198 was issued on October 24, 1988, as a Proposed Agency Action denying the certificate. Order No. 20205 was issued on the

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same day requiring T.R.A.C. to show cause why it should not be fined \$10,000 for violation of Rule 25-24.470, Florida Administrative Code, and \$5,000 for falsification of its application.

On November 14, 1988, T.R.A.C. filed a protest to the PAA disputing the facts alleged in the above-referenced Order. On December 2, 1988, an official response to the show cause Order was filed. The protest requested a hearing as to the certificate denial, which is scheduled for April 20, 1988, and will encompass the issues in the show cause proceeding.

II. TESTIMONY AND EXHIBITS

Upon insertion of a witness's testimony, exhibits appended thereto may be marked for identification. After opportunity for opposing parties to object and cross-examine, the document may be moved into the record. All other exhibits will be similarly identified and entered at the appropriate time during hearing. Exhibits shall be moved into the record by exhibit number at the conclusion of a witness's testimony.

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

In order to efficiently organize the numbering and presentation of exhibits the parties have been assigned the following witness identification number sequences:

| | |
|----------|-------|
| T.R.A.C. | 10-19 |
| Staff | 20-29 |

III. ORDER OF WITNESSES

| <u>Witness</u> | <u>Witness No.</u> | <u>Appearing For</u> | <u>Date</u> | <u>Issues</u> |
|----------------|--------------------|----------------------|-------------|---------------|
| Atteberry | 10 | T.R.A.C. | 4/21 | 1-7 |
| Marshall | 20 | Staff | 4/21 | 5-7 |

IV. BASIC POSITIONS

T.R.A.C.'S BASIC POSITION: T.R.A.C., Inc. should be granted a certificate of public convenience and necessity to operate and IXC within the State of

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Florida. Further T.R.A.C.' business plan offers no violation of any Statute or Order presently before them. As to the matter of fines they are addressed in T.R.A.C.'S POSITION on ISSUE 6.

STAFF'S BASIC POSITION: T.R.A.C. did operate as a nonfacilities-based reseller of long distance telecommunications services in the State of Florida without certificate authority from this Commission. T.R.A.C. did not respond to various correspondence from Staff intended to assist it in complying with applicable rules and statutes. When an application was eventually filed, it did not reflect the nature of the business provided by T.R.A.C. Thus, Staff believes that T.R.A.C. did violate Rule 25-24.470, Florida Administrative Code. T.R.A.C. also evidenced either a refusal to comply with or a gross disregard for Commission rules.

The multi-level distribution system operated by T.R.A.C. has not served the public interest in providing adequate and reliable telecommunications service. Therefore, T.R.A.C. should be denied authority to operate as an interexchange telephone company in Florida and it should be fined ten thousand dollars (\$10,000.00) for operating without a certificate, and five thousand dollars (\$5,000.00) for falsifying statements in its tariff.

V. ISSUES AND POSITIONS:

ISSUE 1: Is T.R.A.C., Inc., a "telephone company" as defined in Section 364.02, Florida Statutes? (Legal)

T.R.A.C.'S POSITION: No, T.R.A.C., Inc. is not a "telephone company" as defined in Section 362.02, Florida Statutes, because T.R.A.C., Inc. is not "owning, operating, or managing any telephone line or part of a telephone line used in the conduct of the business of affording telephonic communication service for hire within this state."

STAFF'S POSITION: Pertinent provisions of Section 364.04, Florida Statutes state: "telephone company" includes every corporation, company, association, joint stock association, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever... owning, operating, or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication service for hire within this state. We believe the terms "owning, operating, or managing", along with the broad definition of "telephone line" in this section clearly identify T.R.A.C. as a telephone company.

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ISSUE 2: Do T.R.A.C.'s business procedures constitute a "multi-level distribution scheme" or a "pyramid sales scheme" as defined in Rule 2-17.001, Florida Administrative Code? Is this activity therefore unfair or deceptive as provided in Rule 2-17.003? (Legal)

T.R.A.C.'s POSITION: No, there is no investment involved or required for T.R.A.C. sales representatives to receive commissions for sales made. T.R.A.C.'s products to receive commissions on sales made. As provided in the definition of a "multi-level distribution scheme" or a "pyramid sales scheme" in Rule 2-17.001 subpart (3) "...employing the use of a sales device whereby a person, upon the condition that he make an investment, is given the privilege, license, right, or power to recruit for profit one or more additional persons who also are given such privilege, right license, or power upon condition of making an investment and may further perpetuate the chain of persons who are given such privilege, right or power upon such condition." (emphasis added).

STAFF'S POSITION: Final determination and enforcement of this issue rests with the Florida Attorney General's Office. However, this Commission can and should make a determination as to whether the business concept proposed by T.R.A.C. is in the public interest for telephone service. To the extent that it falls within the confines of Rule 2-17.002, the law implies a public interest determination. Unfortunately, the confines of this rule are unsettled and subject a to case by case determination.

It appears that T.R.A.C. does meet some of the accepted criteria that identify pyramid programs. However, it is also evident that T.R.A.C. has attempted to conform to the prevailing standards to avoiding operating such programs in an unfair or deceptive manner.

ISSUE 3: Do the transactions between T.R.A.C. and T.R.A.C. Representatives constitute "business opportunities" as defined in Section 559.801, Florida Statutes? (Legal)

T.R.A.C.'s, POSITION: No, T.R.A.C., Inc. does not provide or assist any associate or representative in finding locations for the similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by T.R.A.C. or associate or representative. T.R.A.C., Inc. does not purchase any products made, produced, fabricated, grown, bred, or modified by any associate or representative using in whole or in

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part the supplies, services, or chattels sold to them. T.R.A.C., Inc. makes no guarantees of income to associates or representatives. T.R.A.C., Inc. does not require associates or representatives to pay a fee or sum of money to derive income from sales made by associate or representative.

STAFF'S POSITION: Final determination and enforcement of this issue rests with the Florida Department of Agriculture and Consumer Services. However, this Commission can and should make a determination as to whether the business concept proposed by T.R.A.C. is in the public interest for telephone service. To the extent that it falls within the confines of this statute, the law implies a public interest determination. Unfortunately, the confines of this law are unsettled and subject a to case by case determination.

It appears that T.R.A.C. does meet some of the accepted criteria that identify business opportunities. However, it is also evident that T.R.A.C. has attempted to conform to the prevailing standards to avoid operating such programs in unfair or deceptive manner.

ISSUE 4: If Issue 3 is answered in the affirmative, did T.R.A.C., Inc. comply with all the applicable provisions of Sections 559.803-811, F.S., before offering such opportunities?

T.R.A.C.'s POSITION: Not applicable.

STAFF'S POSITION: See Staff Position in Issue 3 above.

ISSUE 5: Did T.R.A.C. operate as a telephone company in Florida without a certificate? If so, should T.R.A.C. be fined ten thousand dollars (\$10,000) for failure to comply with Rule 25-24.470, Florida Administrative Code?

T.R.A.C.'S POSITION: Yes, T.R.A.C., Inc. did operate in Florida without a certificate. During the period in time in which T.R.A.C., Inc. operated in Florida they were under "bad" counsel from consultants. Some of which were certified IXC's in Florida. When T.R.A.C., Inc. was notified of erroneous counsel by the Public Service Commission staff T.R.A.C., Inc. ceased any and all business within the state.

It was never T.R.A.C.'s intention to violate any regulations. This was the reason for seeking advise from other IXC's.

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It is further T.R.A.C.'s position that any fines should be waived as the nature of the violation was never to deceive the public or the commission. Also, as a show of good faith T.R.A.C. has tried to comply fully with any and all requests placed upon them by the Commission. T.R.A.C. has always wanted to comply fully and is just now learning these procedures with the help of the commission and that of correct counsel.

STAFF'S POSITION: Yes. The company operated intrastate telephone service in Florida as early as May, 1988. However, the company's July 29, 1988 application for authority to operate as an interexchange telephone company included the statement that T.R.A.C. had not previously provided such service. We believe the company should be fined ten thousand dollars (10,000) for failure to comply with Rule 25-24.470, Florida Administrative Code.

ISSUE 6: Did T.R.A.C.'s application for certification contain false or misleading information? If so, should T.R.A.C. be fined five thousand dollars (\$5,000) for filing such information.

T.R.A.C.'S POSITION:

STAFF'S POSITION: Yes. This company operated without a certificate and stated differently on its application. Further, it filed a tariff that, in a very substantial way, misled the Commission as to the way in which its business operated. Staff believes all of these circumstances to be very serious matters and therefore that a fine in the amount of five thousand dollars (5,000.00) is appropriate

ISSUE 7: Is it in the public interest to grant a certificate of public convenience and necessity to T.R.A.C. to operate as an interexchange telephone company in Florida?

T.R.A.C.'S POSITION: Yes, the public is always best served by another entrant in the arena. T.R.A.C. rates are very competitive and allow the public a strong alternative to the carriers presently available.

STAFF'S POSITION: No. T.R.A.C. has acted in a misleading and irresponsible manner, and we do not believe it is in the public interest to grant the company a certificate to operate as an interexchange telephone company in Florida. Lastly, the multilevel program, as implemented by this company, has been significantly flawed.

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VI. EXHIBIT LIST

| <u>Witness</u> | <u>Proffering Party</u> | <u>Exh. No.</u> | <u>Title</u> |
|-----------------|-------------------------|-------------------|--|
| Atteberry Staff | | Composite 10-A | Deposition of James Atteberry; Taken 3/31/89. Pages 1-86. |
| Atteberry Staff | | Composite 10-B | Application of T.R.A.C. for Certificate of Public Convenience and Necessity. |
| Marshall Staff | | Composite 20-A | Tracking report of T.R.A.C. transmissions. |

VII. STIPULATIONS: None.

VIII. PENDING MOTIONS: None.

IX. RULINGS:

T.R.A.C.'s Motion for Extension of Time to file Testimony was granted as well as additional time to file a prehearing statement.

X. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION:

In the event it becomes necessary to handle confidential information, the following procedure will be followed:

1. The Party utilizing the confidential material during cross examination shall provide copies to the Commissioners and the Court Reporter in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material 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.
2. Counsel and witnesses should state when a question or answer contains confidential information.
3. Counsel and witnesses should make a reasonable attempt to avoid verbalizing confidential information and, if possible, should make only indirect reference to the confidential information.
4. Confidential information should be presented by written exhibit when reasonably convenient to do so.

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5. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the owner of the information. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Commission Clerk's confidential files.

If it is necessary to discuss confidential information during the hearing the following procedure shall be utilized.

After a ruling has been made assigning confidential status to material to be used or admitted into evidence, it is suggested that the presiding Commissioner read into the record a statement such as the following:

The testimony and evidence we are about to receive is proprietary confidential business information and shall be kept confidential pursuant to Section 364.093, Florida Statutes. The testimony and evidence shall be received by the Commissioners in executive session with only the following persons present:

- a) The Commissioners
- b) The Counsel for the Commissioners
- c) The Public Service Commission staff and staff counsel
- d) Representatives from the office of public counsel and the court reporter
- e) Counsel for the parties
- f) The necessary witnesses for the parties
- g) Counsel for all intervenors and all necessary witnesses for the intervenors.

All other persons must leave the hearing room at this time. I will be cutting off the telephone ties to the testimony presented in this room. The doors to this chamber are to be locked to the outside. No one is to enter or leave this room without the consent of the chairman.

The transcript of this portion of the hearing and the discussion related thereto shall be prepared and filed under seal, to be opened only by order of this Commission. The transcript is and shall be non-public record exempt from Section 119.07(1), Florida Statutes. Only the attorneys for the participating parties, Public Counsel, the Commission staff and the Commissioners shall receive a copy of the sealed transcript.

(AFTER THE ROOM HAS BEEN CLOSED)

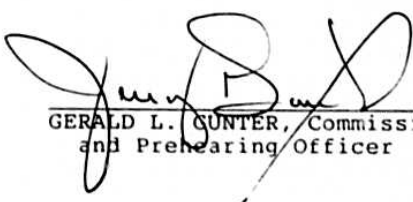
Everyone remaining in this room is instructed that the testimony and evidence that is about to be received is proprietary confidential business information, which shall be kept confidential. No one is to reveal the contents or substance of this testimony or evidence to anyone not present in this room at this time. The court reporter shall now record the names and affiliations of all persons present in the hearing room at this time.

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It is therefore,

ORDERED by Commissioner Gerald L. Gunter, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Gerald L. Gunter, as Prehearing Officer, this 18th day of APRIL, 1989.


GERALD L. GUNTER, Commissioner
and Prehearing Officer

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