BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against EDGEWATER BEACH RESORT for operating as a telephone company in violation of Rules 25-4.004 and 25-24.470, F.A.C.	DOCKET NO. 910289-TP ORDER NO. 24878 ISSUED: 8-5-91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
MICHAEL McK. WILSON

ORDER TO SHOW CAUSE

BY THE COMMISSION:

BACKGROUND

The Edgewater Beach Resort (Edgewater or EBR) is a waterfront resort community of luxurious high-rise, mid-rise, and garden-style condominium residences located on Alternate Highway 98 in Panama City Beach, Florida. The development consists of privately owned units, rental units, privately owned units in EBR's rental program, privately owned units rented through other than the EBR rental program, and various commercial entities. EBR is located in the Southern Bell Telephone and Telegraph Company (Southern Bell) service area; however, since 1984, the majority of owners, residents, and guests received local and long distance telephone service through the resort's private branch exchange (PBX) system, prior to our Staff's involvement in this matter.

Our Staff has been working with representatives of Edgewater and Southern Bell over a considerable period of time, leading to an agreement in March of 1989, whereby Southern Bell would purchase twenty-five pair increments of EBR's cable in order to provide service to EBR owner-residents. Southern Bell subsequently confirmed that it could begin receiving applications for service on April 3, 1989. Edgewater agreed to provide appropriate notification to all owner-residents by March 27, 1989, and to supply documentation of this fact to our Staff. During this same time period, our Staff reviewed our decisions in Dockets Nos. 871185-TI and 880899-TP (the Sandestin and Barrier Dunes dockets) with EBR representatives.

Our Staff has met with Edgewater representatives on a number of other occasions to discuss EBR's telephone operations, including such issues as: complaints from property owners; telephone charges as part of EBR's closing costs; ownership of inside wire within the individual units; refunds to property owners for local and long distance telephone charges; and restriction of resort-provided telephone service to transient guests and units in EBR's rental program. EBR has taken the following positions: that it provided telephone service when Southern Bell was unwilling and/or unable to do so; that it collected telephone fees as part of the closing costs for the convenience of property owners; that it has the right to retain ownership of the inside wire because it is a "common element;" that it should be allowed to provide telephone service to any units that are being rented, not just those units in its own rental program; and, that being required to make refunds would unjustly enrich the property owners, as they received communications equipment and service from EBR.

We think it is important to note that, overall, Edgewater has been cooperative in working with our Staff and Southern Bell to convert owner-residents to Southern Bell service. However, EBR remains in violation of a number of our policies as discussed below. Additionally, we are extremely concerned by allegations of EBR that telephone service is being provided in a similar manner by other resorts throughout Florida. In our discussions of each of the issues below, we wish to reiterate our standing policies as reflected in both the Sandestin and Barrier Dunes dockets. We believe that a major concern in this docket is the fact that the property owners have been captive customers of EBR.

We have consistently interpreted the provisions of Section 364.335(3)(1990), Florida Statutes (renumbered from Section 364.335(4)(1989)) and Rule 25-4.004, Florida Administrative Code, as prohibitions against duplication of or competition with the local exchange company (LEC), absent a specific exception authorized by this Commission. Rule 25-4.004 restricts residential telephone service to the certificated LEC. In a similar vein, Rule 25-24.470, Florida Administrative Code, restricts the provision of interexchange telephone service to certificated interexchange carriers (IXCs). Edgewater has never applied for or been issued any such certificate by this Commission.

Restrictions on the resale of telephone service are matters of long-standing policy of this Commission. By Order No. 11206,

issued September 29, 1982, we addressed the issue of resale of long distance service. In setting forth our regulatory scheme for resale of intrastate Wide Area Toll Service (WATS) and Message Toll Service (MTS), we recognized a "transient" exception to the no-resale provision. This exception was limited primarily to hotels, motels, dormitories, nursing homes, hospitals, and other entities providing telephone service to transient guests. In Order No. 13367, issued June 1, 1984, we reaffirmed the findings made in Order No. 11206.

By Order No. 11375, issued December 3, 1982, we disallowed intercommunication among lessees, behind the switch, without accessing the central office of the certificated LEC. We found that such intercommunication between tenants constituted local exchange service, requiring certification by this Commission.

In Order No. 17111, issued January 15, 1987, we enunciated our policy with regard to resale and/or sharing of local telephone service in a number of diverse situations. Notably, Order No. 17111 defined transients as persons residing in places for nine months or less.

Both Order No. 18936, issued March 2, 1988 (in the Sandestin docket), and Order No. 20790, issued February 21, 1989 (in the Barrier Dunes docket), dealt with the provision of telephone service in facilities such as Edgewater that contain mixed types of occupancy.

In Order No. 18936, Sandestin argued that most of the service it provided was to transient end users. After examining the problem of how to reasonably classify facilities with mixed occupancy, we found inclusion in the resort's own rental program to be the appropriate yardstick. Accordingly, we determined that Sandestin could only provide telephone service to those rental units that it owned and those privately owned units that were included in its rental program. We disallowed resort-provided telephone service to all other privately owned units. A limited exception was authorized for four key resort employees, provided that those employees also took service from the certificated LEC. See Order No. 20657, issued January 25, 1989, and Order No. 21590, issued July 21, 1989.

In Order No. 20790, we again were confronted with the situation where a resort had mixed types occupancy. While

recognizing the unique nature of time-share facilities, our conclusions remained the same. In addition, we expressed strong concern over Barrier Dunes' failure to clarify its status with this Commission, particularly in light of its expressed doubts regarding our policies on this subject.

DISCUSSION

Edgewater's provision of local and toll telephone service for hire has violated the statutes, rules, and orders set forth above. The only exceptions are those specifically noted above; that is, a limited exception for those rental units owned by the resort, as well as those privately owned units placed in the resort's own rental program.

We have received several written complaints and telephone calls from residents and owners regarding the telephone service that Edgewater has been providing, including specific concerns over the various types of charges that have been imposed. There have been no complaints, however, from those owner-residents switched to Southern Bell service in 1989.

During the period of February 27 through March 1, 1991, our Staff visited Edgewater to verify the status of its telephone operations. It appears from our Staff's review that Edgewater is still providing telephone service to owners that we believed were converted to Southern Bell service in 1989. In addition, our Staff's review of a random selection of thirty-one names identified by Edgewater as unit owners not in the EBR rental program disclosed that the vast majority were receiving telephone service from the resort. These actions constitute violations of the previously enumerated policies of this Commission.

On the matter of rental agreements between resorts and private owners, our decision in the Sandestin docket allows resale of telephone service as part of the transient exception. However, orders issued in that docket require that each owner execute a rental agreement with the resort, with the burden on the resort to ensure that the individual units are in fact "transient." Spot checks during our Staff's 1991 visit found units receiving EBR telephone service without such rental agreements.

An additional area of concern is Edgewater's imposition of telephone closing costs and its retention of ownership of wire and

jacks inside privately owned units, as well as the cabling to serve these units. Rule 25-4.0345, Florida Administrative Code, provides that inside wire is all wire or cable located on the customer's side of the demarcation point, with customer premises defined as the discrete real property owned, leased, or controlled by a customer for the customer's own business or residential purposes. The private owners are the customers and Edgewater's ownership of the inside wire, jacks, or cabling to serve these units, except the cabling now under lease to Southern Bell, renders Edgewater a telecommunications company as defined in Section 364.02(7), Florida Statutes, placing it in violation of Sections 364.33 and 364.335, Florida Statutes. Further, even if Edgewater were a properly certificated LEC, its ownership of the inside wire and jacks for privately owned units places it in violation of Rule 25-4.0345. Edgewater's arguments raising its status as a condominium do not persuade us to the contrary.

Edgewater has admitted to charging telephone-related fees of $150 to $200 at the time of closing the sale of its units. Edgewater states that it discontinued this practice following its April, 1990, meeting with our Staff. Because of the context in which these charges were applied, we find these charges to be characteristic of a telephone company and in violation of Sections 364.33 and 364.335. We have reached this conclusion because we do not believe the purchasers had any realistic choice but to accept EBR's telephone service. We find such charges are not in the public interest, particularly when coupled with Edgewater's attempt to retain ownership of the inside wire and jacks. We note, however, that our Staff's 1991 visit supports Edgewater's claim that the practice of exacting such fees has been discontinued.

Because Edgewater has been providing telephone service without first obtaining the approval of this Commission, we find it in the public interest to require Edgewater to show cause why it should not required to refund, with interest, certain categories of charges as set forth below. Interest shall be calculated in accordance with Rule 25-4.114, Florida Administrative Code. We recognize that the refund proposed herein differs from that ordered in the Barrier Dunes docket. However, we believe our approach here is reasonable given the period of time involved, the number of unit owners, rate changes since 1984, and the sheer volume of billing data and other variables. Our refund methodology will allow Edgewater to retain certain categories of revenues while requiring it to refund others and we believe the tradeoff to be fair to all

concerned, particularly when considering the costs that would be involved in implementing other types of refund methodologies.

Finally, we have concluded that it is appropriate to require Edgewater to show cause why it should not be fined for its conduct. While we do not discount the efforts expended by Edgewater, its continued provision of telephone service to a number of those residents supposedly removed from the system in 1989 causes us considerable concern. Such apparent willful disregard of our rules and orders will not be tolerated by this Commission.

CONCLUSION

Upon consideration of the facts and circumstances set forth above, we find it appropriate to require Edgewater to show cause:

1. Why it should not be found in violation of Rule 25-4.004, Florida Administrative Code.

2. Why it should not be found in violation of Rule 25-24.470, Florida Administrative Code.

3. Why it should not limit its resale of telephone service to transients as set forth above and, within thirty days of the date of this Order, discontinue all telephone service to owner-occupied units, including those rented outside the resort's rental program.

4. Why its practice of charging telephone closing costs to purchasers and its retention of ownership of wiring and jacks inside those privately owned units, as well as cabling to serve those units, does not violate Rule 25-4.0345, Florida Administrative Code, and Sections 364.33 and 364.335, Florida Statutes, and why it should not be required to:

   a. relinquish ownership of the premises inside wire and jacks to the respective unit owners, at no charge;

b. discontinue charging telephone closing costs or similar telephone-related fees;

c. restrict its ownership of cabling and inside wire to only that needed to serve units owned by EBR or to provide service to EBR affiliates, subject to the conditions in "d" below;

d. allow access by Southern Bell to provide cabling to the demarcation points of individual property owners and EBR, either through Southern Bell-installed cable or, where mutually agreed, through the lease of EBR's existing cable to Southern Bell; and

e. meet all requirements in item number 4 above (including subparts) within thirty days of the date of this Order and notify our Staff of such compliance, to include a list of the names and addresses of those property owners to whom EBR has relinquished ownership of the respective units' inside wiring and jacks (including an explanation of how the transfer of ownership was accomplished).

5. Why it should not be required to provide a refund, plus interest, to unit owners for charges imposed in the following categories:

a. telephone closing costs, phone fees, or equivalent telephone-related charges collected at the time of purchase or closing;

b. recurring monthly service charges, surcharges, or local access charges collected from the owners during any period of time their units were on EBR's telephone system;

c. intrastate toll charges collected from the owners for EBR telephone service the owners received while they were owner-residents; and

d. intrastate and interstate toll charges collected from the owners for transient guests' calls during any period of time their units were on EBR's telephone system, regardless of whether the units were in the resort's own rental program.

6. Why it should not be fined up to $25,000 per day for each violation alleged in the body of this Order, in accordance with Section 364.285, Florida Statutes.

Our directive to show cause extends to the Edgewater Beach Resort, the Edgewater Beach Telephone Company, Edgewater Beach Communications, and any and all affiliated entities necessary to the resolution of this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Edgewater Beach Resort shall show cause, in writing, in response to each of the six points (including subparts) set forth at the end of the body of this Order. It is further

ORDERED that any response filed must contain specific statements as to fact and law. It is further

ORDERED that any response filed to this Order must be received by the Director of Records and Reporting, 101 East Gaines Street, Tallahassee, Florida 32399-0870, within the time limit established below. It is further

ORDERED that failure to specifically request a hearing in any written response that is submitted will constitute a waiver of any right to a hearing in this matter. It is further

ORDERED that failure to respond in the form and within the prescribed time frame will constitute an admission of the violations alleged herein and a waiver of any right to a hearing. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 5th this AUGUST, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

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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.

This order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on 8-25-91.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing pursuant to Rule 25-22.037(3), Florida Administrative Code, and a default pursuant to Rule 25-22.037(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.