BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause proceedings against CHERRY PAYMENT SYSTEMS, INC. d/b/a CHERRY COMMUNICATIONS for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection.	DOCKET NO. 921250-TI ORDER NO. PSC-94-0115-FOF-TI ISSUED: January 31, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JULIA L. JOHNSON

ORDER UPON RECONSIDERATION

I. CASE BACKGROUND

Cherry Payment Systems, d/b/a/ Cherry Communications (Cherry or the Company) is a switchless reseller of the volume discounted outbound services of other interexchange carriers. The Company received its certificate to provide interexchange telecommunications service in Florida on December 4, 1992. One week later, on December 11, 1992, this docket was opened to address complaints which had been filed with our Division of Consumer Affairs against the Company. On February 22, 1993, Order No. PSC-93-0269-FOF-TI, was issued requiring Cherry to show cause why it should not be fined or have its certificate revoked for violation of Rule 25-4.118, Florida Administrative Code. The Company timely responded and this matter was set for hearing. Routine orders regarding procedural matters have been issued. An Issue Identification Conference was held and an Order Establishing Preliminary Issues for Hearing was subsequently issued.

The Company moved for reconsideration of the aforementioned Order Establishing Preliminary Issues and to strike certain issues set forth in that Order. Upon reconsideration, the Prehearing Officer denied the Motion. A Prehearing Conference was held on May 27, 1993, followed by a hearing which was held on June 18, 1993. As a preliminary matter at the hearing, the Company's Motion to Invoke the Rule, and have excused from the room any witness to the proceeding, was granted. Cherry's Motion for Reconsideration by the Full Panel of the Prehearing Officer's Order denying the

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Company's Motion to Strike certain issues was denied. The Company's Motion in Limine to exclude "hearsay" testimony and the prefiled direct testimony of Roberta Ferguson, also was denied.

On July 23, 1993, the Company filed its Post Hearing Statement, Brief of Issues and Positions, and Conclusions of Law (Post Hearing Filing) as well as its Proposed Findings of Fact. By Order PSC-931374-FOF-TI, issued on September 20, 1993, the Company's certificate to provide interexchange service in Florida was revoked and the Company was required to notify its customers of the revocation. On October 5, 1993, the Company filed a Motion for Reconsideration of Order No PSC-931374-FOF-TI, and a Request For Oral Argument. Cherry also filed an Emergency Request for Stay Pending Reconsideration and Judicial Review. On October 13, 1993, Order No. PSC-931374-FOF-TI, was amended to reflect both the Full Panel who participated in the decision, and appearances which were entered at the hearing. By Order No. PSC-93-1561-FOF-TI, issued on October 25, 1993, the Company's Request for Stay was granted and the Company's Request for Oral Argument on Reconsideration was denied. This Order addresses the Company's October 5, 1993, Motion for Reconsideration.

Throughout its Motion, the Company blurs the distinction between our staff's recommendation, which is an advisory memorandum, and the Final Order issued in this docket. Indeed, much of the Company's Motion is directed toward staff, which the Company asserts acted as a Hearing Examiner. In our analysis of the Motion, the Company's arguments regarding staff's recommendation are applied to the Order at issue. This is because it is the Order, and not the recommendation, which is subject to reconsideration. However, this approach breaks down in some instances. For example, we necessarily address assertions regarding staff's role before this Commission.

II. STANDARD OF REVIEW

The purpose for reconsideration of an Order is to bring to the Commission's attention some point which it overlooked or failed to consider when an Order was rendered. Reconsideration is not intended as a procedure to reargue the whole case merely because a party disagrees with the Order. Diamond Cab v. King, 146 So. 2d 889, 891 (Fla. 1962).

III. FINDINGS OF FACT

A recurring argument in the Company's Motion is that the Commission inappropriately relied upon record evidence in denying certain of Cherry's Proposed Findings. The Company asserts that reliance on the evidence in question is inappropriate because staff failed to submit its own Proposed Findings which incorporate the evidence relied upon. The Company also argues that the Commission did not independently and individually review its Proposed Findings.

The Company asks that certain of its Proposed Findings be approved upon reconsideration. Cherry refers to these Proposed Findings as "contested findings." A recurring argument regarding these specific Proposed Findings is that where the Commission does not find fault with an element of a Proposed Finding, that the element be severed from the full text of the Proposed Finding and approved. However, it is our view that for a Proposed Finding to be approved, each element of the Proposed Finding must be supported by the record. The Company's general concerns are addressed below, followed by a review of the individual "contested findings."

A. Basis of Commission Decision

The Company quotes a portion of Rule 25-22.056 (1)(a), Florida Administrative Code, which provides that "all parties may submit proposed findings of fact, conclusions of law and legal briefs on the issues within a time designated by the presiding officer," and Rule 25-22.056 (2)(b), Florida Administrative Code, which provides in part that "any written statement that is not clearly designated as a proposed finding of fact shall be considered to be legal argument rather than proposed finding of fact."[1]

Cherry contends that staff had an opportunity to file Proposed Findings of Fact and Conclusions of Law and waived the opportunity to do so. The Company argues that the Findings of Fact which Cherry proposed, and we subsequently approved, represent the only facts approved in this proceeding. The Company then reiterates the approved Findings which it characterizes as "uncontested."

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[1] The Company propounds arguments regarding Rule 22.056, Florida Administrative Code in other contexts. These arguments are addressed throughout this Order.

We observe that while staff is permitted to participate in proceedings as a "party," its post hearing role is advisory to the Commission. Although the Company questions whether staff was able to successfully make the transition from party/advocate (during the hearing) to advisory staff (post hearing), the Company acknowledges the two roles. Regarding its post hearing role, we note that staff is not substantially effected by a Commission decision and can neither file motions for reconsideration nor appeal Commission orders. The post hearing document which staff did file in this proceeding was an advisory memorandum in which staff made recommendations to the Commission based upon the record.

The Company argues that because staff failed to file Proposed Findings of Fact that our review is limited to the Company's approved Findings. However, the Company cites no authority for the proposition that a Commission Panel cannot consider the entire record in reaching a decision. Such a determination would radically change practice before the Commission because it is the exception, rather than the rule, for a party to file Proposed Findings in Commission proceedings. Moreover, to our knowledge, staff has never filed Proposed Findings of Fact or Conclusions of Law in a proceeding before a Commission Panel and it is our view that making post hearing filings of that sort would be inconsistent with staff's advisory role.

Upon review, we find that the Company's "uncontested" Proposed Findings of Fact do not represent the only facts upon which a decision can be based.

B. Compliance with Post Hearing Rules

Cherry asserts that we failed to rule on each of its Proposed Findings as required by Rule 25-22.056 et. seq, Florida Administrative Code.[2] To this end, the Company alleges that we failed to consider the Findings independently, much less, individually. The Company observes that analysis in the Order is taken directly from staff's recommendation.

However, we find that the Order is consistent with the requirements of our post hearing rules. We agree that the analysis is taken directly from staff's recommendation. However, this is understandable since we approved the recommendation, which

[2] The Company propounds arguments regarding Rule 22.056, Florida Administrative Code in other contexts. These arguments are addressed throughout this Order.

addresses the Proposed Findings individually. We do not believe that the lack of debate at a Commission Agenda Conference regarding the Proposed Findings yields a reasonable inference that the Commission Panel did not individually and independently review each of the Proposed Findings.

Upon review, we find that Cherry's Proposed Findings of Fact were reviewed in accordance with this Commission's post hearing rules.

C. Specific Proposed Findings

The individual Proposed Findings are reviewed below.

1. Proposed Finding 1

> "The date a customer is solicited is necessarily earlier in time than the date their long distance service is PICed. The PIC date can be as much as 30 to 60 days earlier than the first time a bill is received by a customer."

Cherry asserts that we acknowledge a lag time associated with solicitation, PIC changes, and when a bill is received by the customer reflecting a carrier change. Regarding the first sentence of the Proposed Finding, the Company questions the premise that the Proposed Finding should be denied because of record evidence that "some Cherry customers report having their long distance service PICed who were never solicited." The Company contends that this observation is not on point because if a customer is solicited, such solicitation is necessarily prior to the customer being PICed. The Company argues that its Proposed Finding does not address a circumstance where a customer is PICed who was never solicited.

Regarding the second sentence of the Proposed Finding, the Company agrees that there is testimony by its witness that a lag time of 30 to 90 days exists and references a question by staff counsel which refers to a 30 to 60 day lag time. The Company contends that the "critical element of this testimony is that the lag time could last a minimum of 30 to 60 days" and that all parties agree on this point. In this regard, we observe that the Proposed Finding refers to "as much as 30 to 60 days" and not "as little as" that period of time. Moreover, in an objection to a question asked to Cherry's witness regarding lag time, the Company's counsel stated that "This witness hasn't said that it couldn't happen in less than 30 days, he said it can take thirty to

ninety days. So there isn't any testimony that it couldn't happen in four days and I object to the misrepresentation." Upon reconsideration we shall deny the Proposed Finding.

2. Proposed Finding 3

> "Complaints were taken by several individuals of the FPSC Staff. Although Nancy Pruitt testified that she received complaints, she did not indicate which complaints she had received nor did she know how many of them she had personally received."

Cherry argues that we concede the first sentence and consequently the first sentence should be included as an "uncontested" Finding of Fact. We disagree. The Company has submitted Proposed Findings which contain multiple elements. It is our view that, for a Proposed Finding to be approved, each element of the Proposed Finding must be supported by the record.

Cherry argues that staff failed to propose as an alternative Finding that "Ms. Pruitt took 29 of the 134 complaints." The Company is concerned that we flatly state this extrapolation without a citation to the record. Cherry contends that the record supports the contention that Ms. Pruitt alleges she received complaints, and did not otherwise indicate which complaints she received, as well as the fact that she did not know how many of them she personally received. Cherry asserts that when asked whether she had any idea how many complaints she had personally discussed with complainants, she stated that she would have to guess. Cherry concludes that the record supports the Finding as proposed.

However, the complaints which Ms Pruitt received are clearly indicated by the initials on the face of the complaints found in Exhibit 15. Ms. Pruitt testified regarding the inclusion of the reviewer's initials on the face of the complaints contained in that Exhibit. The Order clearly indicates that the "extrapolation" was from the aforementioned Exhibit, and correctly notes that Cherry's counsel discouraged the witness from reviewing the materials which were before her in order to provide him with an answer. Upon reconsideration, we find that the second sentence is a mischaracterization of the record. We shall deny the Proposed Finding.

3. Proposed Finding 6

> "Cherry has presently instituted a solicitation system of Letters of Agency that are one hundred percent verified, in lieu of telemarketing. Cherry Communications believes that this system of verification will appreciably diminish difficulties related to marketing and slamming."

Cherry asserts that the fact that this procedure has already been implemented is verified in the cross examination of its witness by Chairman Deason. Cherry notes that the second sentence of this Proposed Finding is "uncontested." The Company concludes that the Finding should be allowed.

Originally, Cherry did not cite the aforementioned transcript reference in its Proposed Findings of Fact. However, after reviewing the referenced citation, we find that---while the testimony does evince a belief that Cherry's presently implemented system will reduce slamming---the testimony does not indicate that the presently implemented system employs one hundred percent verified Letters of Authorization as stated in the Proposed Finding. Upon reconsideration, we shall deny the Proposed Finding.

4. Proposed Finding 8

> "It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management ever directed it sales force to act in a manner to defraud Florida citizens."

Cherry asserts that testimony that it was not the Company's policy to encourage unethical behavior on the part of the sales force went uncontested; that subsequent Findings support the contention that extraordinary efforts have been taken by the Company to improve their systems; and that Findings also support that actions have been taken against those agents who may have abused their responsibilities while working for the Company.

Cherry questions the relevance of admissions, referenced in the Order, that the Company can control its sales staff, that its sales staff are its agents, and that it is responsible for the actions of its sales staff. The Company contends that these statements, which are not placed in context, do not support a contention that the Company had a policy to defraud the citizens of Florida. The Company asserts that staff failed to directly confront Cherry's witness on the matter and that the admissions taken independently, or in concert, do not support the contention

that management directed its sales force to act in the manner described. Cherry concludes that the Proposed Finding should be allowed.

We observe that the admissions at issue are the Company's responses to staff's Request for Admissions which are included in the record as Exhibit 3. Rather than being taken out of context, we find that the statements themselves, along with the Company's abuses which are evident in this record, <u>are</u> the context in which the Company's assertions must be weighed. Upon reconsideration, we shall deny the Proposed Finding.

<u>5. Proposed Finding 9</u>

> "It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management ever directed its sales force to slam consumers or violate other rules and regulations of the FPSC."

Cherry argues that the witness was not cross examined on his statement that salesmen were not encouraged to slam customers, and that his testimony is uncontested and unimpeached. The Company reiterates that management never directed its sales staff to violate Commission regulations and urges approval of the Finding.

However, we find that these assertions by Cherry's witness lack credibility when taken in the context of the abuses evident in the record and the admissions referenced in the Order. At base, it is our view that the Company simply questions the weight which we assigned to the evidence. Upon reconsideration, we shall deny the Proposed Finding.

<u>6. Proposed Finding 10</u>

> "It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management directed its sales force to engage in improper marketing practices."

Cherry asserts that direct evidence in the record supports this Finding and then adopts the arguments presented in support of reconsideration of Proposed Findings 8 and 9.

For the reasons set forth in our reconsideration of Proposed Findings 8 and 9, we shall deny the Proposed Finding. The Company is simply rearguing its case which is inappropriate under Diamond Cab v. King, 146 So. 2d 889, 891 ((Fla. 1962).

7. Proposed Finding 11

> "It has never been the policy of Cherry Communications, nor is there any evidence that Cherry's management directed its sales force to engage in unethical conduct."

Cherry asserts that direct evidence in the record supports the Finding and then adopts the arguments presented in support of reconsideration of Proposed Findings 8 and 9.

For the reasons set forth in our reconsideration of proposed Findings 8 and 9, we shall deny the Proposed Finding. The Company is simply rearguing its case.

8. Proposed Finding 12

> "Cherry Communications is unaware of any PIC changes submitted by their sales force in Florida that would indicate Cherry Communications was soliciting customers prior to certification."

Cherry disputes our determination and asserts that: no substantial evidence exists that contests the truth of this statement; there is direct testimony to support the statement; while the Order references complaints prior to certification, no such complaints were forwarded to Cherry which indicate that solicitation activity took place on behalf of Cherry prior to certification; nonrecord complaint activity prior to certification is related to Matrix solicitations only. The Company concludes that the Finding should be allowed.

However, we observe that Roberta Ferguson testified that WilTel received its first Florida PIC change request from Cherry on approximately November 20, 1992, and has been processing PIC change requests for Cherry since that date. Upon reconsideration, we shall deny the Proposed Finding. The Company is simply rearguing its case.

9. Proposed Finding 13

> "The FPSC has developed no rule or policy establishing procedures for investigations of, or responses to consumer complaints."

Cherry asserts that we did not decide that the Finding is false, but rather that the Finding is not relevant. Cherry asserts that it was accused of not giving sufficient responses to consumer complaints, but was given no form, nor directed to any rule to judge what was sufficient. The Company alleges that the rule referenced in the Order does not establish procedures for investigations. The Company argues that it is undisputed that every customer received a letter and check regarding the unauthorized switch and contends that only if this procedure for response is determined to be sufficient can the Proposed Finding not be relevant. Cherry concludes that because there is no rule or policy establishing procedures for investigation of---or responses to---consumer complaints, the Finding should be approved.

However, we observe that the issue to which the Company indicates that this Proposed Finding applies involves the timeliness of replies pursuant to Commission Rule. The applicable standards with citations to the Florida Administrative Code are set forth in the Order. The standard is clear; any investigation which yields the information required in response to Rule 25-22.032(1), Florida Administrative Code would suffice. Upon reconsideration, we shall deny the Proposed Finding.

10. Proposed Finding 18

> "Cherry Communications has prosecuted sales individuals for grossly unethical conduct."

Cherry asserts that the transcript cited in support of this Finding verifies that a sales person was prosecuted for gross unethical conduct. The Company argues that this substantiates how seriously the Company endeavors to police its sales forces. The Company concludes that the Finding should be allowed.

As the Order and the Company's argument on reconsideration note, the record indicates that one sales person was prosecuted. The Proposed Finding is that the Company "prosecuted sales individuals." Upon reconsideration, we shall deny the Proposed Finding.

11. Proposed Finding 19

> "Any telemarketing conducted by Cherry Communications is governed by tightly drafted scripts for both the telemarketers and the third-party verifiers. Since the implementation of these revised scripts in mid-March, Cherry Communications has noticed a marked improvement in the level of complaints received nationally."

Cherry argues that there is no dispute regarding the first sentence of the Proposed Finding. The Company contends that the second sentence is supported by the direct testimony of its witness at Transcript page 90, lines 1 through 4.

We observe that this citation was not included in the Company's original filing. While the referenced testimony refers to complaints which had their genesis in an improper switch which occurred since mid-March, the record indicates that complaints continued at a high volume until the hearing. Upon reconsideration, we shall deny the Proposed Finding.

12. Proposed Finding 20

> "Since the implementation of Cherry's verification procedures in mid-March, Cherry has noticed a marked improvement in the number of complaints received from the FPSC."

Cherry asserts that its first record citation is to Ms. Pruitt's testimony, which shows only one marketing complaint received by the Commission from April through June 17th. The Company argues that since marketing complaints necessarily do not suffer from the same "Lag Time" considerations discussed throughout the record, this affirmatively shows a marked improvement post implementation of its verification procedures. Cherry contends that---in response to an unspecified inquiry by the Company---later in the transcript, Ms. Pruitt confirms that Cherry's activities over this period indicate a significant improvement.

However, the as set forth in the Order, one transcript reference is inconclusive, and the other is a "question" posed by the Company's counsel. If, in its instant Motion, "later in the transcript" refers to Ms. Pruitt's response to the aforementioned "question," we observe that the witness gave a qualified answer to a hypothetical question. Upon reconsideration, we shall deny the Proposed Finding.

13. Proposed Finding 21

> "When telemarketing, Cherry Communications employs Compliance Monitors to monitor conversations between telemarketers and prospective customers."

Cherry asserts that the Order "does not contest the truth of the statement asserted." The Company reiterates that when telemarketing, it does employ compliance monitors. Given the context of this record, the Company contends that the Finding supports actions taken by Cherry to remedy its problems in the State of Florida. The Company argues that to contest the Finding based on temporal issues belies the point. Cherry argues that it has implemented procedures which have and will improve services to customers and that the Proposed Finding is correct as stated. Cherry reiterates that staff failed to file alternative Proposed Findings. Cherry concludes that the Finding should be approved.

In rejecting this Proposed Finding as overbroad, we observed that "[t]he record does indicate that beginning in April of 1993, compliance monitors were employed to monitor marketing efforts. However, prior to that date it appears that compliance monitors were not employed to monitor telemarketers." The Company is simply rearguing its case. Upon reconsideration, we shall deny the Proposed Finding.

14. Proposed Finding 22

> "Telemarketers were required to sign an Employee's Agreement as a condition of their employment by Cherry. This agreement set forth in no uncertain terms the consequences of unethical behavior while acting on behalf of Cherry Communications."

Cherry asserts that we take issue with the period of time in which this protection was implemented. Cherry contends that rather than condition approval on an understanding that this was a remedial measure intended to improve telemarketing implemented in March of 1993, we ignore the truth inherent in the proposed language. Cherry agrees that telemarketers were required to sign an Employee's Agreement post March of 1993 and speculates that telemarketers would also be required to sign such an agreement if telemarketers were presently soliciting on behalf of Cherry. Cherry contends that to deny this Proposed Finding on the aforementioned grounds inappropriately places form over substance.

Cherry is also concerned that the Order misquotes the language contained in the Employee's Agreement. Cherry contends that the consequences to telemarketers of unethical behavior included the possibility of civil and criminal prosecution. The Company concludes that the Finding should be approved.

Regarding the second sentence, we agree that the Hearing Exhibit was misquoted and that the Exhibit does evince the possibility of civil and criminal prosecution. Upon reconsideration, we shall approve the Proposed Finding of Fact with the qualification that such signings were implemented in March of 1993.

15. Proposed Finding 28

> "The FPSC alleged that it received during the month of April 1993 only five complaints alleging slamming. This was a significant improvement over previous months."

Cherry asserts that the Order references 108 complaints with no record citation and that it is not specified whether these are all Cherry complaints. Next, the Company contends that the Commission distinguishes the five complaints referenced in the Finding as those which allege activity that took place in April 1993. Cherry contends that this was the intention of the Company when submitting this Proposed Finding and Cherry accepts that interpretation of the wording. Cherry contends that Ms. Pruitt acknowledges in the referenced testimony, that 5 complaints from April would be a significant improvement. Cherry concludes that this proposal should be allowed.

However, the record indicates that the witness accepted neither the premise that the five complaints were the only Cherry complaints the Commission received which had their genesis in April activity nor that the pool of complaints which she was asked to review constituted the universe of all such complaints received by the Commission regarding Cherry's April activity. The Order accurately notes that the Proposed Finding severely distorts the testimony and that Ms. Pruitt's qualified response was to a hypothetical question posed by Cherry's counsel. Regarding the 108 complaints which Cherry questions, Ms. Pruitt testified that "Cherry's complaints continued on a high level throughout the pendency of this proceeding, including 108 complaints in April and May alone for unauthorized changes." Upon reconsideration, we shall deny the Proposed Finding.

16. Proposed Finding 29

> "The Florida IXC Application was submitted on behalf of Cherry Communications by Network Solutions, Inc. The Application was not signed by James Elliott nor by any officer of Cherry Communications. At the time of submission, Cherry Communications believed that all information was accurately presented for consideration."

Cherry asserts that we do not question the first two sentences of this Finding and consequently those Findings should be approved as stated. Next Cherry argues that, despite the testimony of David Giangreco, we decided that the last sentence is not accurate. Cherry notes that Mr. Giangreco was presented for cross-examination but that his testimony that the error was inadvertent was not challenged. Cherry contends that no evidence is presented that any officer either read the certification, or ever knew of it. Cherry asserts overzealous representation by staff counsel regarding Cherry's knowledge of the inaccuracies. Cherry asserts that the Proposed Finding is accurate, unimpeached, and should be approved.

However, our Order references the attestation of accuracy clause contained in the application for a certificate and then states: "We find that having its agent sign the application does not relieve Cherry of the obligation to submit accurate information including attachments." It is our view that the Company is simply rearguing its case. Upon reconsideration, we shall deny the Proposed Finding.

17. Proposed Finding 33

> "The confusion created on the application by multiple Illinois filing numbers was resolved prior to hearing."

Cherry asserts that at the citation referenced by the Company in support of this Finding, the witness acknowledges that the confusion created by the multiple filing numbers could be corrected by qualifying a second corporation by mid-July. Cherry asserts that staff acknowledged the filing of those documents and otherwise agreed to the submission into this record of Exhibit 4. No issue or question was raised at that time regarding the accuracy of the information contained therein, despite the fact that counsel for Cherry specifically offered that the Exhibit was being submitted to affirm that the appropriate action had been taken. Cherry concludes that this Finding should be allowed.

However, the Order noted a distinction between applying as a foreign corporation and having that application approved. Indeed, there is no record evidence that the second corporation was qualified. Upon reconsideration, we find that the questions regarding which corporation is responsible and how there can be two corporations with the same name being responsible, remain. We shall deny the Proposed Finding.

18. Proposed Finding 35

> "Cherry Communications presently offers a product of long distance telecommunications service which is appreciably less expensive than the basic packages offered by Sprint, MCI or AT&T."

Cherry asserts that the telemarketing script allows for substantial savings over the mentioned competition and that the record supports that the information contained in the script is accurate and uncontested. Cherry concludes that the Finding should be allowed.

We note that the Exhibit referenced at the record citation was not cited in Cherry's initial pleading. Based on the testimony to which it relates, it is offered as an example of what Cherry marketers were instructed to tell customers. Upon reconsideration, we observe that the Order notes that "basic package" is not defined in the cited testimony. The Order also references testimony by Cherry's witness that in some instances Cherry is not less expensive than its competition. We shall deny the Proposed Finding.

19. Proposed Finding 39

> "WilTel has not experienced any problems stemming from WilTel's association with Cherry Communications."

Cherry asserts that we question the context of the Proposed Finding. The Company contends that when the question asked, and full response, are read in context it is clear that WilTel has not experienced any problems internally stemming from WilTel's association with Cherry. Cherry acknowledges that the testimony references WilTel's problems involving complaints from customers regarding Cherry and concludes that the fact that Cherry's association with WilTel has not otherwise been affected is uncontested.

Cherry takes exception to our reference to Cherry's motion to exclude Ms. Ferguson's testimony. The Company asserts that even if certain aspects of Ms. Ferguson's testimony are disregarded, the information which the Company draws upon to support this Finding is not information that the Company argued was improperly withheld from its attorneys. Cherry asserts that the Finding should be allowed.

However, we observe that the Proposed Finding states: "WilTel has not experienced any problems stemming from WilTel's association with Cherry Communications." (Emphasis supplied) In essence, Cherry now asks to rewrite the Proposed Finding and insert the word "internally" after the word "any." Moreover, the Order---which quoted the entire sentence relied upon as the sole record authority for the Proposed Finding---noted problems which WilTel has experienced in its association with Cherry. Upon reconsideration, we shall deny the Proposed Finding.

20. Proposed Finding 41

> "There is normally a direct correlation between the number of complaints and the size of the company. The larger the volume of business a company has, the more complaints the company would expect to receive. These correlations regarding relative volume are certainly applicable to Cherry."

Cherry again takes exception to references in our Order to the Company's motion to exclude Ms. Ferguson's testimony. While the Company objected to the testimony being admitted, it asserts that having been admitted, it appropriately uses that testimony to support its case. In this regard, we observe that in no instance did we prohibit the Company from relying on Ms. Ferguson's testimony to support its case.

Next, Cherry argues that the information contained in the Proposed Finding is accurate and taken directly from testimony presented to the Commission. Cherry contends that additional testimony referenced in our Order does not effect the truth of the statement proposed by the Company. Cherry concludes that the Finding should be approved.

The Order references qualifying statements in the record authority for the Proposed Finding. The Order also references testimony that, over a four month period, Cherry's activities accounted for 143 of 361 complaints received by this Commission.

It appears that the Company is simply rearguing its case. Upon reconsideration, we shall deny the Proposed Finding.

21. Proposed Finding 42

> "WilTel's overall impression of Cherry Communications is favorable. Although Cherry has experienced difficulties as a new entrant in the national communications market, Cherry has found a market niche and offers a service that has attracted a substantial number of customers."

Cherry reiterates its concerns regarding our reference to its motion to exclude Ms. Ferguson's testimony. The Company then asserts that because we did not find fault with the second sentence of this Proposed Finding that it should be approved. The Company argues that no citation is provided to support "generalizations" in the Order regarding Ms. Ferguson's testimony. Cherry concludes that the Proposed Finding should be allowed.

However, regarding the first sentence, the Order notes that the testimony relied upon by the Company for support of the Proposed Finding is silent regarding an overall evaluation of the Company. The "generalization" in the Order directly quotes Ms. Ferguson that: "nationally, from all sources, no other reseller is generating the volume of complaints to WilTel that Cherry is generating." Upon reconsideration we shall deny the Proposed Finding.

22. Proposed Finding 43

> "Cherry Communications presently provides 30,000 Floridians with a low-cost long distance service. Cherry has received no complaints regarding these customers."

Cherry argues that the figure of 30,000 customers in Florida was confirmed at numerous points in the record and that no witness presented a number to contradict this accounting. Cherry concludes that the Finding should be adopted.

While we agree that the number is supported by the record, we note that the Proposed Finding contains other inaccuracies which are addressed by in the Order but are not addressed in the Company's instant Motion. In the Order, we observed that:

> there is evidence of a multitude of complaints filed with this Commission, filed with WilTel, filed with Centel,

> and filed with Cherry itself, by the Company's customers. The record simply does not support a Finding of no complaints regarding Cherry's customer base.

We also noted that there is no meaningful evaluation of the Cherry's complaint volumes at the record authority relied upon by the Company and that the witness was actually unaware of Cherry's complaint volumes. Upon reconsideration, we shall deny the Proposed Finding.

IV. HEARING ISSUES

Cherry asks us to adopt a specific format for reconsideration of the issues presented. The Company then asks us to reverse our decision regarding every issue in this proceeding. We address the format question first, and then reconsider the specific issues presented at hearing.

The Company notes that Rule 25-22.056 (3) Florida Administrative Code[3] provides that:

> in any proceeding where a pre-hearing order has been issued, and such pre-hearing order contains a statement of the issues as well as the positions of the parties thereon, all post-hearing statements and other documents filed pursuant to this rule shall conform to the form and content of the statement of the issues and positions.

Cherry notes that although the Final Order does not specifically distinguish each of the issues which are the subject to this hearing, the issues are discussed generally. The Company requests that reconsideration of the issues be set out specifically, and that the Commission adopt Cherry's position in resolution of each issue.

Initially, we observe that a Commission order is not a document filed pursuant to Rule 25-22.056(3), Florida Administrative Code. Thus, the Order at issue (PSC-93-1374-FOF-TI) is not subject to the requirements in the Rule cited by the Company. Upon review, we do not adopt the format which the Company requests. However, the Company has asked that every issue in this

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[3]. The Company also propounds arguments regarding 25-22.056(3), Florida Administrative Code in other contexts. The Rule is addressed at some length in this Order under our analysis of the legal issues.

proceeding be reconsidered. The Company's arguments are considered immediately below.

A. Rule 25-24.470 (1), Florida Administrative Code

Rule 25.24.470 (1) Florida Administrative Code provides in pertinent part that:

> No person shall provide intrastate interexchange telephone service without first obtaining a Certificate of Public Convenience and Necessity from the Commission. Services may not be provided, nor may deposits or payment for services be collected, until the effective date of a Certificate, if granted.

Cherry reiterates its arguments regarding Proposed Findings of Fact which are addressed at Section III. of this Order. Cherry asserts that no foundation was laid qualifying Roberta Ferguson to testify about receipt by WilTel of Florida PIC change requests and that no foundation is laid supporting the alleged initial date of November 20, 1992, as the period of time when WilTel began processing Cherry PIC change requests for Florida customers. The Company contends that no business record or document is submitted supporting this fact and that early complaints received in Florida were all Matrix complaints. The Company concludes that since no document is presented as evidence of a November processing of a Cherry complaint, the presumption is that it is Matrix related.

The Company observes that Ms. Ferguson's present responsibilities as described in her testimony, would indicate that her expertise is in handling applications submitted by WilTel, and as a liaison with commissions regarding testimony on state regulatory issues. The Company quotes Finding 4: "WilTel is the subject of its own show cause proceeding before the Florida Public Service Commission." Cherry concludes that the Commission should necessarily require documentary evidence to support her contentions, considering the inherent prejudice emanating from WilTel's status as a respondent in their own action.

Cherry argues that no evidence is presented showing that WilTel provided intrastate interexchange service to any Florida customer on behalf of Cherry prior to its obtaining a Certificate of Public Convenience and Necessity from the Commission and that the testimony alluded to in the Order does not support the contention that service was provided or that deposits or payment for services were collected prior to the effective date of the certificate.

Cherry is concerned that the Commission references testimony by witness Pruitt, without citation. Cherry asserts that Ms. Pruitt testifies that allegations were made against Cherry in a document received on November 3, 1992 and that no witness was called to testify about said document. Cherry concludes that the purely hearsay evidence is otherwise unsubstantiated, and the Company was not given an opportunity to face its accuser in this instance in cross examination. Cherry asserts that the November complaint would have been on behalf of Matrix, not Cherry as an IXC.

Cherry observes that the Commission discusses Ms. Pruitt's allusion to evidence that December complaints have their genesis in PIC change requests submitted as early as October of 1992. In this regard, Cherry is concerned that no citation to the record is provided. Cherry contends that no witnesses testified to these facts. No opportunity was given the Company to cross-examine witnesses on these facts.

Cherry asserts that no Finding of Fact in this record supports the conclusion that Cherry violated this Rule and asks us to find that competent, substantial evidence has not been presented to support the conclusion that Cherry violated Rule 25-24.470 (1).

Upon review, it appears that the Company largely questions the weight which we assigned to the record evidence in reaching our decision. However, the Company did raise specific concerns which we address as follows.

The Company is concerned that the Order did not provide citations to Ms. Pruitt's testimony. The referenced testimony by Ms. Pruitt is found at Tr. p 191, lines 6-8; p. 193, lines 22-25; Composite Exhibit 12, NP-15, p.1.

The Company alleges that Ms. Pruitt's testimony is hearsay and that the Company has not had the opportunity to confront its accuser. However, we observe that hearsay is allowed in proceedings before this Commission provided it is not relied upon exclusively to support a Finding. In this case, Ms. Pruitt's testimony and related Exhibits supplement Ms. Ferguson's testimony that "WilTel has been processing Cherry PIC change requests for Florida since November 20, 1992," Moreover, we find that taken alone, Ms. Ferguson's testimony supports the a determination that Cherry provided service prior to its December certification in violation of Rule 25-24.470(1), Florida Administrative Code.

Upon reconsideration, we shall not reverse our decision that Cherry willfully violated Rule 25-24.470 (1), Florida Administrative Code.

B. Rule 25-4.118 (1), Florida Administrative Code

Rule 25-4.118 (1), Florida Administrative Code provides in pertinent part that:

> the primary interexchange company (PIC) of a customer shall not be changed without the customer's authorization.

Cherry argues that approved Finding 7 states that:

> No witness with first-hand knowledge was presented by Staff for cross-examination on the issues of whether or not they: were 'slammed'; were provided intrastate service prior to Cherry obtaining their certificate; were changed to Cherry Communications without Cherry having followed proper procedural compliances.

Cherry contends that without support of facts otherwise recognized by the Order and with no citation to the record, we rely on various observations to support our decision. Cherry contends that the Order strings together many separate sources taken out of context to conclude that the Company has admitted multiple customer slams and that without the benefit of citations, the Company's ability to adequately address these allegations is severely impaired.

The Company argues that the alleged admission that its field sales representatives "engaged in conduct improper in nature" does not speak to whether or not a customer was PICed without authorization and that allegations regarding whether or not PICs were made to service provided by Matrix are outside of the record presented in this case which deals with whether or not customers were changed to Cherry's service without authorization. The Company also argues that whether or not it was inundated with complaints does not speak to the merits of those complaints and that Mr. Giangreco's testimony relates complaints to separate billing issues, not to slamming.

Cherry argues that receipt of a complaint that a customer may have been switched from their carrier without knowledge or consent is insufficient to support the contention that a customer was in fact switched without knowledge or consent and that when the legal

rights of a party are being considered, mere allegations cannot be adopted as facts. Cherry argues that whether or not Ms. Pruitt's testimony supports the contention that an inordinate volume of complaints were received regarding the unauthorized switch of customers to Cherry Communications, this evidence does not support the truth or veracity of those complaints. Cherry complains that the Commission decided that "business records" were presented by the Company, despite staff's failure to lay the foundation for the business records as a hearsay exception and that when asked to admit that documents, presented as Exhibits, were in fact business records, the Company explicitly denied Staff's request.

Cherry argues that no basis is presented to support the contention that evidence collected in any documents submitted before this Commission is true independent of cross examination of witnesses who presented the testimony and that there is no Finding of Fact in this record that supports the conclusion that Cherry violated this Rule.

Cherry asks us to find that competent, substantial evidence has not been presented to support the conclusion that Cherry has violated Rule 25-4.118 (1), Florida Administrative Code.

Regarding the Company's statement in its Response to the Show Cause Order, we agree that the admission applies to Matrix and thus, is not dispositive of Cherry's own slamming violations. We also agree that the testimony by the Company that it was inundated with complaints does not attest to the accuracy of such complaints. However, this does not alter our decision which is otherwise supported by the record.

Cherry is concerned that we did not provide citations to the record authority upon which our determination was based. The decision was based on the admission of slams by the Company's witness which is found at found at Tr. p. 88 l. 14-16. The Order also references the following: Response to Show Cause (Response at 6) (discussed above); Cherry's inundation with complaints (Tr. 88, lines 11-14) (discussed above); Cherry's responses to complaints filed with the Commission by the Company's law firm (Tr. p. 90; Tr. pp. 112-114; Exhibit 9); excessive slamming complaints filed with the Commission, WilTel, Centel (Tr. p. 191, lines 11 through p. 193 line 15; Composite Exhibit 12, NP-1, NP-2, NP-15; Tr. p. 308, lines 13-21; Tr p. 307, lines 1-3); Tr. pp. 332-333).

Cherry attempts to limit Mr. Giangreco's admission to "separate billing issues." However, in direct testimony, in response to a question regarding "unhappy or angry clientele," the witness discusses several problems and then concludes: "We also had

complaints from individuals who had been switched from their carrier either without their knowledge or consent." (Emphasis supplied) The testimony is not that the individuals alleged that they had been switched but that the switches had in fact occurred. It is made in the context of a follow-up to a previous question regarding customer service problems. The nature and extent of Cherry's admitted slams are explained and supplemented by other record evidence which is described above.

Upon reconsideration, we shall not reverse our decision that Cherry willfully violated Rule 25-4.118 (1) Florida Administrative Code.

C. Rule 25-4.118 (2), Florida Administrative Code

Rule 25-4.118 (2), Florida Administrative Code provides in pertinent part that when a PIC change is submitted by an IXC acting on behalf of a customer the IXC must certify to the LEC that at least one of the following actions has occurred prior to the PIC change request:

> (a) the IXC has on hand a ballot or letter from the customer requesting such change; or
>
> (b) the customer initiates a call to an automated 800 number and through a sequence of prompts, confirms the customer's requested change; or
>
> (c) the customer's requested change is verified through a qualified, independent firm which is unaffiliated with any IXC; or
>
> (d) the IXC has received a customer request to change his PIC and has responded within three days by mailing of an information package that includes a prepaid, returnable postcard and an additional 14 days have past before the IXC submits the PIC change to the LEC. The information package should contain any information required by Rule 25-4.118(3).

Cherry asserts that no Finding is presented in the Order which supports our determination that Cherry has implicitly admitted that required verification procedures were not followed and that no citations are given to support this contention. Cherry is concerned that the decision simply states that "a review of Cherry's Composite Exhibit 9 confirms that the appropriate verification did not take place." Cherry contends that no specific

reference is made to this Exhibit which would support that contention. Cherry observes that staff called no witnesses regarding allegations made in complaints contained in this Exhibit and urges that it is inappropriate to submit statements made in these documents by third parties for the truth of the matter asserted.

Cherry contends that there is no competent evidence to support the conclusion that Cherry has violated Rule 25-4.118 (2) and asks us to reverse our determination that the Company violated that Rule.

The Company largely questions the weight which we assigned to the record evidence in reaching our decision. The Order plainly states that we "find that the Company's admissions that customers 'had been switched from their carrier either without their knowledge or consent' is an implicit admission that the required verification procedures were not followed." We also found fault with the Company's third party verification process. (Record citations: Tr. p. 82, line 6; Tr. p. 142, line 22 through p. 143 line 13; Exhibit 7, Attachment 6). Information which explains and supplements verification process failures is found in the Company's responses to complaints which were filed with the Commission. (Record citation: Exhibit 9)

Upon reconsideration, we shall not reverse our decision that Cherry willfully violated Rule 25-4.118 (2) Florida Administrative Code.

D. Rule 25-4.043, Florida Administrative Code

Rule 25-4.043, Florida Administrative Code provides that:

> the necessary replies to inquiries propounded by the Commission's staff concerning service or other complaints received by the Commission shall be furnished in writing within fifteen (15) days from the date of the Commission inquiry.

Cherry argues that other than time constraints, no guideline is given as to what appropriate action should be taken by a company in responding to complaints or what is a "necessary response." Cherry contends that relevant Findings of Fact adopted by the Commission (Proposed Finding 14) support the contention that "in every instance where a customers has complained of an unauthorized switch, Cherry Communications has initially responded with a letter

apologizing for that switch and a $12.00 check to reimburse switching charges and any inconvenience caused by that switch." In addition to this initial response, Cherry contends that it took further and extraordinary measures regarding investigation despite the fact that there is no requirement for this additional action.

Cherry asks that we reconsider our initial ruling, and find that competent, substantial evidence has not been presented to support the conclusion that Cherry has violated Rule 25-4.043.

However, we observe that the response requirements which the Company asserts do not exist are clearly set forth in the Order in our analysis regarding the Company's Proposed Finding 13. Any investigation which yields the information required by Rule 25-22.032(1), Florida Administrative Code, would suffice. Moreover, the record is clear that the Company routinely failed to timely respond to inquiries. Thus, upon reconsideration, we shall not reverse our decision that Cherry willfully violated Rule 25-4.043, Florida Administrative Code.

E. Ability of Cherry to Deter Slams

Cherry asserts that without citation to the record, the Commission summarizes and otherwise mischaracterizes the testimony of Mr. Giangreco. Cherry asserts that nowhere does Mr. Giangreco state that he is "unaware of the volume of Cherry's complaints in Florida," and that a review of his testimony shows that Mr. Giangreco was aware of complaint volumes generally.

Cherry asserts that the record is replete with references to changes that took place in mid-March through early April regarding newly installed sales procedures and their effectiveness. Cherry argues that several adopted Findings speak to the aggressive manner in which Cherry Communications has addressed difficulties it has encountered. For example, approved Finding 27, taken from Ms. Pruitt's testimony, evinces improvement in the Company's volume of complaints. The Company observes that several of its unapproved Proposed Findings speak to additional safeguards implemented by the Company. Cherry concludes that an uncited reference to Ms. Pruitt's allegations that a high level of complaints were received in April and May of this year does not support the conclusion that Cherry Payment Systems' sales procedures were not effective. Cherry contends that the record supports that a lag time exists that can last 90 days past the time an individual is initially solicited and/or picked. Thus, Cherry contends that procedures implemented in mid-March and early April would not prevent the receipt of complaints whose genesis had been months earlier.

Cherry asks that we reverse our decision and find that Cherry Payment Systems' sales procedures have been effective at deterring slams.

In rearguing its case for this issue, the Company largely questions the weight which we assigned to the record evidence in making our decision. However, the Company does complain that the Order did not contain citations to record authority. The record citations are as follows: Mr. Giangreco was unaware of Florida complaint volumes (Tr. pp. 106-110); Cherry slamming complaints continued at a high rate with 108 received by the Commission in April and May (Tr. p. 206 line 23 through p. 207, line 1); No improvement in complaint volume (Tr. pp. 209-227).

Upon reconsideration, we shall not reverse our decision that no Cherry sales procedure has been effective in deterring slams.

F. Marketing Practices

Cherry asserts that no Findings have been set forth in the Final Order that would support a ruling adverse to Cherry regarding unethical marketing practices. Cherry argues that the Order sets forth an uncited string of alleged "admissions", which are not placed in context. Cherry argues that while we concludes that problems encountered with the solicitations made by members of Cherry's sales force constitute unethical marketing practices, the stern responses to these problems on behalf of management, as well as an aggressive revamping of sales procedures, necessarily belie the unethical behavior of agents in a corporate setting.

Cherry argues that the actions of an individual acting ultra vires should not condemn the Company and that no balancing is discussed in these considerations. Cherry concludes that the strongest case may have been presented by witnesses which were not called, and by questions not asked of the President of the Company when he was presented for cross-examination. Cherry contends that the high levels of "allegations received" are a poor substitute for witnesses stepping forward and testifying to their individual experiences. Cherry concludes that the record does not demonstrate that Cherry has engaged in unethical marketing practices in Florida and asks that we find in their favor on this issue.

At base, the Company largely questions the weight which we assigned to the record evidence in making our decision. However, the Company did complain that the Order did not contain citations to record authority. The record citations are as follows:

1. Admissions that the sales force are agents for the Company, that Cherry can control its sales force and that it is responsible for its sales force. (Exhibit 3, Cherry Response to Staff's First Request for Admission);

2. It is Cherry's responsibility to "police its sales force." (Tr. p. 97, lines 17-18);

3. Cherry had difficulty with unethical employees. (Tr. p. 88, lines 9-10);

4. Improper solicitation and sales tactics used by Cherry employees. (Tr. p. 97 lines 9-10);

5. Cherry salesmen acted improperly. (Tr. p. 78, lines 7-8);

6. Admission that sales staff signed LOAs. (Tr. p. 160, lines 9-10);

7. Commission receipt of complaints alleging at least eight different types of unethical marketing practices including forgery of customer signatures on LOAs. (Tr. p. 199, line 24 through p. 200 line 20);

8. Cherry employed aggressive, nonresponsive, very aggravating sales techniques. (Tr. p. 274, line 15 through p. 275 line 1);

9. Company was "inundated with complaints" by individuals who were not satisfied with the manner in which then had been contacted or treated by Company. (Tr. p. 88, lines 11-16);

10. Problems were experienced by Centel as a result of Cherry's marketing practices. (Composite Exhibit 15, DGS-1);

11. There is a relationship between unethical marketing complaints and slamming complaints. (Tr. p. 190, line 22 through p. 191, line 3);

12. Cherry's slamming complaints far exceed those of other IXCs. (Tr. pp. 190-192; Exhibit 12, NP-1, NP-2);

13. Cherry accounts for 89% of WilTel's complaint volume. (Tr. p. 308 lines 13-21).

Upon reconsideration, we shall not reverse our decision that Cherry engaged in unethical marketing practices in Florida.

G. Cherry's Florida IXC Application

In its Motion, Cherry admits that the Company's Florida IXC application contained two inaccuracies. Cherry then asserts that three separate Findings were accepted by the Commission which speak to mitigation of this issue, and that the only conclusion that can be drawn from this record is that Cherry Communications did not intentionally hide the fact of Mr. Elliott's criminal record. Cherry observes that the felony conviction was a matter of public record easily accessed in the highly respectable publication of Dun & Bradstreet. Cherry asserts that the Company addressed the issue directly once the inaccuracy was brought to its attention and that there was no motive to falsify the application.

Cherry argues that the facts of the case affirmatively show that Cherry Communications did not willfully or intentionally hide the correct corporate number from the State of Florida when submitting its application and that the only Finding of Fact on the issue is that although an incorrect Illinois filing number was represented on one of several pages, on all other pages the correct filing number was disclosed. Cherry argues that no information was otherwise withheld from Florida and that no reasonable inference can be drawn from this record evincing any malicious intent regarding the inaccuracies contained in Cherry's IXC application.

Cherry is concerned that the Order does not acknowledge the inadvertence of Cherry's actions when discussing the "fact otherwise in the public domain," rather, it merely discusses the conviction. Next, Cherry contends that the Order recounts events regarding the two Illinois corporate filing numbers which do not accurately reflect the discussion in the Hearing Transcript, and is absent any citation to the record. Cherry argues that the record supports the contention that no intentional or willful malfeasance is evidenced by these inaccuracies, and that there is no basis for the conclusion that the public interest is threatened by Cherry's operation in the State of Florida. Cherry asks the Commission to reverse its decision based on the mitigating factors clearly set forth on the record, and adopted by the Commission in its Findings.

At base, the Company largely questions the weight which we assigned to the record evidence in making our decision. It is our view that the Company's admission that the inaccuracies exist largely resolves this issue. In this context, we observe that Cherry's Proposed Finding 28 regarding its application was denied. The relevant language contained in the denied Finding is that "at the time of submission, Cherry Communications believed that all information was accurately presented for consideration."

The Company complains that the Order does not contain citations to record authority which are provided as follows:

1. Misstated corporate number is tip of iceberg regarding two corporations which have shared the same name. (Tr. p. 276, line 24 through p. 277, line 8; Tr. p. 278, line 22 through p. 279, line 6; Tr. p. 280, lines 3-7);

2. It was unclear which corporation was responsible party in the event of problems. (Tr. p. 282, lines 23 through p. 283 line 3);

3. Discrepancies existed between certificated corporation, the corporation registered with Florida Division of Corporations, and the one registered in Illinois; confusion remained after second corporation applied for registration in Florida (Exhibits 2-3, Tr. p. 294 lines 13-21);

4. Staff would have recommended against the original certification of the Company had it known of Mr. Elliott's wire fraud conviction (Tr. p. 271, line 23 through p. 272, line 1).

Upon reconsideration, we shall not reverse our decision that Cherry's Florida IXC application was not accurate.

H. The Public Interest

Cherry asserts that on the one hand it is criticized for not taking proper responsibility for its actions while on the other hand, we construe Mr. Giangreco's public apology for any difficulties Cherry may have caused the citizens of the State of Florida as admissions to specific charges.

Cherry is concerned that the Order lists several statements as if they were facts determined from the record and reiterates its arguments that these statements were not proposed as fact by any party to this action. Cherry contends that each statement has been refuted and that none contain citations to the record.

Cherry avers that thousands of Florida residents are presently receiving the services of Cherry Communications, and have not otherwise thought to change carriers and that staff's witness concedes that "although Cherry has experienced difficulties as a new entrant in the national communications market, Cherry has found a market niche and offers a service that has attracted a substantial number of customers."

Cherry then recounts its approved Proposed Findings of Fact and avers that the record supports that an aggressive policy has been taken by Cherry Communications to rectify any difficulties it may have had in earlier times. Cherry argues that the record also indicates that other long distance telecommunications providers in this State have been unable to curtail their difficulties despite being subject to show cause proceedings and concludes that Cherry should necessarily be given an opportunity to show that it has corrected its problems. Cherry contends that it has already shown in public hearings its sincere remorse for any difficulties that its actions may have produced in the past and asks the Commission to reverse its decision that it is not in the public interest for Cherry to operate in Florida.

At base, the Company questions the weight which we assigned to the record evidence in making our decision. The Company is also concerned that the Order does not contain citations to record authority. Record references to customer dissatisfaction is found at Tr. p. 153, lines 7-25; Tr. p. 88, lines 11-14. Record reference to distress to Florida citizens is found at Tr. p. 94, lines 23-24. In reaching our decision, we also summarized other decisions reached in this proceeding as follows:

Briefly, the record indicates that Cherry:

1. filed an inaccurate application for certification which omitted the felony conviction for wire fraud of its CEO;
2. filed misleading corporate documents;
3. had ethical/marketing problems when it solicited customers in person;
4. had ethical/marketing problems when it solicited customers via telemarketing;
5. slammed an unprecedented number of Florida customers;
6. repeatedly failed to timely reply to Commission Staff inquiries;
7. operated as a reseller prior to certification;
8. despite implementation of new procedures, demonstrated no improvement in its slamming complaint record during the pendency of this proceeding.

A more direct approach might have been to recount the appropriate ordering paragraphs from Order No. PSC-93-1074-FOF-TI which follow:

1. Cherry willfully violated Rule 25-24.470(1), Florida Administrative Code;

2. Cherry willfully violated Rule 25-4.118(1), Florida Administrative Code;

3. Cherry willfully violated Rule 25-4.118(2), Florida Administrative Code;

4. Cherry willfully violated Rule 25-4.043, Florida Administrative Code;

5. No Cherry sales procedure has been effective in deterring slams;

6. Cherry has engaged in unethical marketing practices in Florida;

7. Cherry's Florida IXC application contained inaccuracies.

Upon reconsideration, we shall not reverse our decision that it is not in the public interest for Cherry to operate in Florida.

I. Revocation of Certificate

Cherry argues that: it has implemented many practices beyond those required by any state or federal commission; it has already implemented many of staff's alternative recommendations on this issue voluntarily; marketing has ceased for the past six months; PIC's are not being submitted; switch fees are being refunded; re-rating is offered to those for whom it may apply.

Cherry contends that the facts of this case support a consideration of mitigating factors. No rule to show cause previously has been issued against Cherry Communications in Florida. No other long distance telecommunications provider has ever had its certificate revoked in the State of Florida. Several other providers of long distance telecommunications have had their own show cause proceedings which have resulted in fines and these other companies have been unable to curtail their own problems in the State of Florida.

The Company asks that we reverse our decision to revoke Cherry's certificate to provide service in Florida and allow the Company to provide service to customers of the State of Florida under the procedures and safeguards set forth in this record, as well as any other guidelines which would promote the highest standards of the industry.

At base, the Company largely questions the weight which we assigned to the record evidence in making our decision. Upon reconsideration, the facts presented by this case warrant the penalty imposed and we shall not reverse our decision to revoke Cherry's certificate to provide service in Florida.[4]

V. LEGAL ARGUMENT

Cherry summarizes its argument and then raises specific concerns which we address immediately below.

A. Reliance on Advisory Memorandum

Under a general heading regarding Rule 25-22.056,[5] Cherry sets forth an argument regarding our reliance on staff's advisory memorandum with subsections entitled:

1. General Provisions
2. Proposed Findings of Fact
3. Statement of Issues and Positions
4. Recommended or Proposed Orders

1. General Provisions
(Rule 25-22.056(1))

Cherry asserts that the general provisions of post hearing filings provide in pertinent part that: "if a hearing . . . is conducted by a panel of two or more commissioners . . . , all parties may submit proposed findings of fact, conclusions of law,

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[4] See also Section V.B of this Order which addresses the Company's arguments regarding the legal standard for revocation of a certificate.

[5] The Company also raises concerns regarding the Commission's compliance with Rule 25-22.056, Florida Administrative Code, in the context of Proposed Findings of Fact. Those arguments are addressed in various contexts, throughout this Order.

and legal briefs on the issues within the time designated by the presiding officer." The Company asserts that two parties appeared before the Commission on this case and that one party, the Consumer Affairs Division of the Florida Public Service Commission, was represented by an attorney. The Company asserts that the staff attorney stated to counsel for Cherry Communications on several occasions that he was compelled to propound the wishes of the Director of the Consumer Affairs Division, at all times before the Commission.

Cherry observes that in these proceedings, it was represented by counsel from the law firm of Stroock & Stroock & Lavan, as well as counsel from Gardner, Carton & Douglas and that a separate counsel was assigned to the Commission as Counsel to the Commission, David Smith.

Cherry argues that the date designated for submission of all briefs was July 23, 1993 and that only Cherry submitted legal briefs on that date which included Proposed Findings of Fact Conclusions of Law, and its Post Hearing Statement of Issues and Positions.

<u>2. Proposed Findings of Fact</u>
(Rule 25-22.056(2))

Cherry asserts the Rule provides that "a party may submit proposed findings of fact. . . . Commissioners assigned to the proceeding will rule upon each finding of fact . . . when filed in conformance with this rule" and that "Any written statement that is not clearly designated as a proposed finding of fact shall be considered to be legal argument rather than proposed finding of fact." Cherry observes that it filed 43 Proposed Findings of Fact for consideration by this Commission and that the Consumer Affairs Division of the Florida Public Service Commission failed to file any.

Cherry asserts that on August 23, 1993, staff counsel, presumably acting as counsel to the Commission, signed his name to a 47-page memorandum responding to Cherry's Brief and Findings of Fact, as well as recommending action to be taken by the Commission. Cherry observes that no additional Findings of Fact or Conclusions of Law were enumerated in that document.

3. Statement of Issues and Positions
(Rule 25-22.056(3))

Cherry asserts that subsection (a) of the Rule provides in pertinent part that "each party to a proceeding shall file a post hearing statement of issues and positions which shall include a summary of each position of no more than 50 words, set off with asterisks. . . . Any issue or position not included in a post-hearing statement shall be considered waived." Cherry notes that at subsection (b) the Rule provides that "a party is not required to file post-hearing documents in addition to the post-hearing statement, unless otherwise required by the presiding officer."

Cherry argues that July 23, 1993 was the only opportunity presented for parties to file their post hearing statement of issues and positions in this case and that only Cherry Communications took advantage of this opportunity. Cherry contends that the Commission's Consumer Affairs Division waived its opportunity to take a position on any issue when it failed to file a brief in conformance with the Rule.

The Company argues that, although staff was not required to file other post hearing documents such as Proposed Findings of Fact or Conclusions of Law, like Cherry, staff was required to file a summary of its positions. Cherry concludes that failure to so file waived staff's positions.

4. Recommended or Proposed Orders
(Rule 25-22.056(4))

Cherry observes that _if_ this hearing had been conducted by a Hearing Officer, the Hearing Officer would have presented the Commission with a recommended or proposed order. In that proposed order the Hearing Officer, in accordance with this Rule, would have set forth separately a statement of the issues, Findings of Fact, and Conclusions of Law. Cherry argues that the Hearing Officer also would have set forth a recommendation for final Commission action.

Cherry then asserts that the Commission substantially treats the recommendations presented by staff in its advisory memorandum as a proposed order although none of the aforementioned elements are clearly set forth. Presuming that the staff attorney was not representing the Division of Consumer Affairs at this juncture, Cherry argues that the restatement of staff's prehearing positions does not correct staff's error in having failed to state its position previously. Cherry argues that if counsel was

representing the Division of Consumer Affairs at this juncture, this party is presenting rebuttal to Cherry's initial brief, outside of the rules and briefing schedule that had been set forth by the Commission. Cherry notes that the recommendation contains the following language: "AGENDA: 09/07/93-CONTROVERSIAL AGENDA-PARTIES MAY NOT PARTICIPATE." Cherry argues that, if staff counsel was representing the Division of Consumer Affairs at this point, all of his discussions would be ex parte and barred by law.

Next, Cherry asserts that staff counsel admitted to counsel for Cherry his frustration with "wearing two hats." Cherry contends that staff counsel failed to recognize the necessity for a Chinese wall between the two positions he was attempting to juggle. Thus, Cherry argues that staff counsel failed in his primary duty to see that all facts touching upon the general public interest are clearly brought before the Commission for its consideration, as well as what should have been his secondary consideration, the interests of the Consumer Affairs Division.

Cherry argues that much information was set forth in the record which supported the contention that Cherry's continued operation in Florida is in the public interest and that the recommendation and open court discussions by staff counsel to the Commission focused only on those elements of evidence which staff counsel believed supported the contention that Cherry's continued operation in Florida was not in the public interest. Cherry reiterates its argument that the only recognized facts of this case were presented by Cherry and concludes that staff counsel did not fulfill his primary duty in this case.

In reviewing the Company's arguments, we note that the role of staff and applicability of the aforementioned Rule to staff in its post hearing advisory role was raised by the Company in its arguments regarding Proposed Findings of Fact. We recount elements of our analysis of that issue at this time.

Rule 25-22.056, Florida Administrative Code sets forth post hearing filing obligations and options for "parties." Cherry contends that staff failed to make certain post hearing filings and thus, waived the opportunity to do so. The Company argues that the several Findings of Fact which it proposed, and which we subsequently approved, represent the only facts approved in this proceeding. The Company implies that because staff failed to make certain post hearing filings that our decision is limited to the Company's approved Findings. However, the Company cites no authority for the proposition that a Commission Panel cannot consider the entire record in reaching a decision.

Such a determination would radically change practice before this Commission because the decision by a party to file Proposed Findings is the exception rather than the rule in Commission practice. Moreover, to our knowledge, staff has never filed post hearing Proposed Findings, Conclusions of Law, or Statements of Position, in a proceeding before a Commission Panel. This is because making post hearing filings of this sort would be fundamentally inconsistent with staff's post hearing advisory role.

While staff is permitted to participate in proceedings as a "party,"[6] its post hearing role is advisory to the Commission. When initialing the staff recommendation to the Commission, the "hat" which staff counsel wore (along with numerous other staff members) was that of advisory staff. Although the Company questions whether staff counsel was able to successfully make the transition from party/advocate (during the hearing) to advisory staff (post hearing), the Company acknowledges the two roles. Regarding its post hearing, nonparty status, we note that staff is not substantially effected by a Commission decision and that it can neither file motions for reconsideration nor appeal Commission decisions. The recommendation which staff filed in this proceeding was a post hearing advisory memorandum. In that memorandum, staff made recommendations to the Commission based upon the record of the proceeding. Rule 25-22.056(4), Florida Administrative Code, upon which the Company relies as authority, only applies to "Post Hearing Filings When Hearing is Conducted by a Hearing Officer." Since this case was considered by a Commission Panel, and not by a Hearing Officer, it does not appear that Cherry's arguments in this regard are relevant.

Clearly, the Company is dissatisfied with the varied roles of staff counsel in proceedings before the Commission. However, the role played by staff counsel in the instant proceeding is consistent with that role in every proceeding before a Commission Panel. The Company asserts that staff counsel abrogated his duty by not insuring that all the facts touching on the general public interest were clearly brought before the Commission for consideration. In this regard, we observe that although the Company attributed issue numbers to its Proposed Findings of Fact, it largely failed to explain how those Proposed Findings related to the issues before the Commission. Finally, we note that statements attributed to staff counsel by Cherry are nonrecord and are not even purported by the Company to be quotations.

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[6] In the instant case, such participation was not limited to the Division of Consumer Affairs.

Upon review, we find that it was appropriate to rely upon staff's advisory memorandum in reaching our decision.

B. Rule 25-22.059

The Company argues that it is prejudiced by the failure of the Order to meet the requirements set forth in Rule 25-22.059, Florida Administrative Code. Cherry asserts that the Order failed to: reflect appearances entered at the hearing; include a statement of issues; contain designated Findings of Fact except those proposed by the Company; contain Conclusions of Law; contain a statement of final Commission action.

Initially, we observe that the Order was amended by Order PSC-93-1374A-FOF-TI to reflect the participation of Commissioner Clark, and to include the appearances of counsel.

We note that it has always been Commission practice to include Conclusions of Law and Findings of Fact throughout its analysis set forth in an Order. The Company's Proposed Findings of Fact are addressed in the Order at Section VII. Proposed Findings of Fact. Analysis of the Company's Proposed Conclusions of Law is set forth at pages 3 through 12 of the Order as follows:

1. Hearsay: (Cherry's Post Hearing Filing pp. 9-17) (Order pp. 3-5);

2. Direct Testimony of Roberta Ferguson: (Cherry's Post Hearing Filing pp. 17-19) (Order pp. 5-8);

3. Cherry's investigation of Complaints: (Cherry's Post Hearing Filing pp. 19-20) (Order pp. 8-9);

4. Revocation of Certificate: (Cherry's Post Hearing Filing pp. 21-24) (Order pp. 9-11)

5. Willful: (At various places in its Post Hearing Filing, Cherry raised legal argument regarding the willfulness of its actions in the alleged violations) (Order pp. 11-12).

We agree that the Company's Proposed Conclusions of Law are not set forth in the Order by number as are its Proposed Findings of Fact. This is because, taken as a whole, the 62 numbered paragraphs do not appear to represent anything more than routine legal argument. (See eg., Proposed Conclusions of Law numbered 13, 23, and 61). While Cherry asserts that we "virtually ignored" its

Conclusions of Law, we believe that the Company's legal arguments are appropriately addressed in the Order.

The title of the Order which is: "Order revoking Certificate No. 3134 and Requiring Cherry to Notify its Customers of Revocation," along with similar language included in analysis and ordering paragraphs leaves little doubt as to the Commission's final action.

We agree that a statement of the issues is not set forth in the Order. The subjects of each issue are merely recounted as headings throughout the decision. While this would appear to be substantial compliance with the Rule, the Company has raised this as a concern and we shall further amend Order No. PSC-93-1374-FOF-TI to include the issues at the appropriate locations in the Order as follows:

insert: "Has Cherry Payment Systems violated Rule 25-24.470(1), F.A.C?" at subsection IV. A. "Rule 25-24.470(1), Florida Administrative Code" (Order p. 12;

insert: "Has Cherry Payment Systems violated Rule 25-4.118(1), F.A.C?" at subsection IV.B. "Rule 25-4.118(1), Florida Administrative Code" (Order p. 13);

insert: "Has Cherry Payment Systems violated Rule 25-4.118(3), F.A.C?" at subsection IV.C. "Rule 25-4.118(2), Florida Administrative Code" (Order p. 14);

insert: "Has Cherry Payment Systems violated Rule 25-4.043, F.A.C?" at subsection IV.D. "Rule 25-4.043, Florida Administrative Code" (Order p. 15);

insert: "Has any sales procedure been effective at deterring slams?" at subsection V.A. "Effectiveness of Cherry in Deterring Slams" (Order p. 16);

insert: "Has Cherry Payment Systems engaged in unethical marketing practices in Florida?" at subsection V.B. "Marketing Practices" (Order p. 17);

insert: "Was Cherry Payment Systems' Florida IXC application accurate?" at subsection V.C. "IXC Application" (Order p. 18);

insert: "Is it in the Public interest for Cherry Payment Systems to operate in Florida?" at subsection V.D. "The Public Interest" (Order p. 19);

insert: "What penalty is appropriate in this case?" at Section VI. "PENALTY" (Order p. 20)

Upon review, with the amendatory Order which has already been issued and the further amendment to specifically recount the issues, the Order meets the requirements of Rule 25-22.059, Florida Administrative Code.

C. Revocation of Certificate

Cherry substantially recounts arguments set forth in its "Proposed Conclusions of Law" which were addressed in the Order at subsection II. B. 4. Revocation of Certificate.[7] The Company avers that the standard of review of an order revoking a certificate of authority is whether there is competent substantial evidence to support the Commission's Finding that (1) the company "willfully violated" a rule or order of the Commission and (2) the Company no longer serves "the public interest." Cherry concludes that there is not evidence of willful violation in the record. The Company also asserts that because "the four elements necessary to grant a certificate were not expressly considered on the record, Cherry's certificate should not be revoked." (Emphasis original)

We observe that in the instant Motion the Company relies on Section 364.337(2), Florida Statutes, which lists the public interest criteria to be considered by the Commission in granting a certificate as follows:

> (1) the number of firms providing the service; (2) the geographic availability of the service from other firms; (3) the quality of service available from alternative suppliers; (4) the effect on telecommunications service rates charged to customers of other companies; and (5) any other factors that the PSC considers relevant to the public interest. (Emphasis added)

However, the Company ignores the existence of the 5th element which is appropriate for the Commission to consider in making a public interest determination. Moreover, we found willful violations of each Rule which was at issue in this proceeding and also found that the Company's application for certificate contained

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[7] Other relevant analysis was set forth throughout the Order including, but not limited to: Section VI. PENALTY; SECTION III. "WILLFUL"; Section IV. VIOLATIONS; subsection V.C. IXC Application; and subsection V.D. The Public Interest.

inaccuracies.[8] Upon review, we find that the decision to revoke Cherry's certificate meets the appropriate legal standards.

D. Hearsay

Cherry recounts legal argument from its Proposed Conclusions of Law which were addressed in the Order at Section II.B.1. Hearsay. It is Cherry's contention that the evidence upon which we relied regarding slamming activities consists entirely of hearsay. The Company argues that as such, the evidence relied upon cannot support a finding that Cherry engaged in "improper slamming activities."

Initially, we observe that the evidence regarding slamming activities, including citations to the record, are discussed in this Order supra at subsections IV. B-C. To reiterate, in direct testimony, in response to a question regarding "unhappy or angry clientele" the Company's witness discussed several problems and then concluded: "We also had complaints from individuals who had been switched from their carrier either without their knowledge or consent." (Emphasis supplied) The testimony is not that the individuals alleged that they had been switched but that the switches had in fact occurred. It is made in the context of a follow up to the Company's previous question regarding customer service problems. The nature and extent of Cherry's admitted slams are explained and supplemented by record evidence which, as noted, is discussed in this Order supra.

In rearguing its case regarding hearsay, the Company largely questions the weight which we assigned to the record evidence in making a decision. Upon reconsideration, the evidence against Cherry regarding slamming activities does not consist entirely of hearsay as asserted by the Company. Indeed, the aforementioned admission is itself enough to support a Finding that Cherry slammed customers. Other evidence, whether it is characterized as hearsay, nonhearsay, or a hearsay exception, merely supplements and explains the Company's admitted slams.

E. Testimony of Roberta Ferguson

Cherry asserts that we improperly admitted the prefiled direct testimony of Ms. Ferguson into evidence. Cherry notes that at

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[8] The Order addressed the issue of willfulness as it applies to this record at Section III. "WILLFUL".

hearing, it objected to our admitting into evidence the prefiled direct testimony of Ms. Ferguson, arguing that this testimony is replete with redactions of crucial information relating to alleged customer complaints against Cherry. We overruled the Company's objections and stated in the Order that Cherry "was on notice regarding the parameters of the testimony" and that in any event Cherry "failed to use its available discovery tools to ascertain potential strengths or weaknesses of her testimony." Thus, we reasoned that "[i]n view of Cherry's failure to make any effort to obtain the information in question, which was readily available to it, it appears that Cherry does not come to this argument with clean hands."

Cherry asserts that we failed to address the real issue which it contends is whether our staff violated Rule 25-22-.035(3), Florida Administrative Code. That Rule provides that:

> Generally, the Florida Rules of Civil Procedure shall govern in proceedings before the Commission under this part, except that the provisions of these rules supersede the Florida Rules of Civil Procedures where a conflict arises between the two.

Cherry quotes Rule 1.080 (b) of the Florida Rules of Civil Procedure as follows:

> When service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the Court....

Cherry argues that while it is alleged that Wiltel provided an unredacted copy of Ms. Ferguson's testimony to Cherry's CEO, neither the staff nor Wiltel provided the unredacted testimony to Cherry's attorney who needed the information to effectively prepare the Company's case. Cherry argues that its attorney did not obtain the redacted information until mid-day at hearing.

Accordingly, Cherry concludes that staff violated Commission Rules by failing to provide Cherry with crucial information needed to effectively prepare its case. The Company asks us to strike Ms. Ferguson's testimony or, at a minimum, to strike the redacted portions of Ms. Ferguson's testimony which were admitted into evidence at hearing.

We observe that Rule 25-22-.035(3), Florida Administrative Code incorporates the Florida Rules of Civil Procedure "generally" and provides that when there is a conflict between the two, the

Commission's rules supersede the Florida Rules of Civil Procedure. In this case, staff had conflicting obligations under the rules regarding the confidential treatment of documents and service of documents. Upon reconsideration, we find that the prefiled direct testimony of Ms. Ferguson, including the redacted portions, was appropriately entered into evidence.

Therefore, it is

ORDERED by the Florida Public Service Commission that the Company's "uncontested" Proposed Findings of Fact do not represent the only facts upon which the Commission can base its decision. It is further

ORDERED that review of Cherry's Proposed Findings of Fact complied with Commission post hearing rules. It is further

ORDERED that, upon reconsideration, Proposed Finding 1 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 3 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 6 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 8 is denied. It is further

ORDERED that, upon reconsideration Proposed Finding 9 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 10 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 11 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 12 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 13 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 18 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 19 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 20 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 21 is denied. It is further

ORDERED that, upon reconsideration, we approve Proposed Finding 22 with the qualifications set forth in the body of this Order. It is further

ORDERED that, upon reconsideration, Proposed Finding 28 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 29 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 33 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 35 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 39 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 41 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 42 is denied. It is further

ORDERED that, upon reconsideration, Proposed Finding 43 is denied. It is further

ORDERED that the reconsideration format requested by Cherry is denied. It is further

ORDERED that, upon reconsideration, Cherry willfully violated Rule 25-24.470 (1), Florida Administrative Code. It is further

ORDERED that, upon reconsideration, Cherry willfully violated Rule 25-4.118 (1), Florida Administrative Code. It is further

ORDERED that, upon reconsideration, Cherry willfully violated Rule 25-4.118 (2), Florida Administrative Code. It is further

ORDERED that upon reconsideration, Cherry willfully violated Rule 25-4.043, Florida Administrative Code. It is further

ORDERED that, upon reconsideration, no Cherry sales procedure has been effective in deterring slams. It is further

ORDERED that, upon reconsideration, Cherry engaged in unethical marketing practices in Florida. It is further

ORDERED that, upon reconsideration, Cherry's Florida IXC application was not accurate. It is further

ORDERED that, upon reconsideration, it is not in the public interest for Cherry to operate in Florida. It is further

ORDERED that, upon reconsideration, revocation of Cherry's certificate is the appropriate penalty in this case. It is further

ORDERED that it was appropriate to rely on staff's advisory memorandum in reaching a decision. It is further

ORDERED that Order No. PSC-93-1374-FOF-TI, is hereby amended to specifically recount the issues which were before the Commission as set forth in the body of this Order. It is further

ORDERED that, upon reconsideration, the decision to revoke Cherry's certificate complied with the appropriate legal standards for revocation of a certificate. It is further

ORDERED that the evidence against Cherry regarding slamming activities does not consist entirely of hearsay. It is further

ORDERED that the prefiled direct testimony of Ms. Ferguson was properly admitted into evidence. It is further

By ORDER of the Florida Public Service Commission, this 31st day of January, 1994.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

CWM

NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 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 after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.