

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause) DOCKET NO. 921250-TI
proceedings against CHERRY) ORDER NO. PSC-93-0865-PHO-TI
PAYMENT SYSTEMS, INC. d/b/a) ISSUED: June 9, 1993
CHERRY COMMUNICATIONS for)
violation of Rule 25-4.118,)
F.A.C., Interexchange Carrier)
Selection.)
_____)

Pursuant to Notice, a Prehearing Conference was held on May 27, 1993, in Tallahassee, Florida, before Commissioner Julia L. Johnson, as Prehearing Officer.

APPEARANCES:

MICHAEL J. HAYES, Esquire, ROBERT M. CUSHING, Esquire, Gardner, Carton & Douglas, 321 North Clark Street, Chicago, IL 60610-4795, and ROBERT L. SHEVIN, Esquire, Stroock and Stroock and Lavan, 200 South Biscayne Blvd., Miami, FL 33131-2385
On behalf of Cherry Payment Systems, Inc. d/b/a Cherry Communications.

CHARLES W. MURPHY, Esquire, Tracy Hatch, Esquire, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0863
On behalf of the Commission Staff.

DAVID SMITH, Esquire, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32399-0862
On behalf of the Commissioners.

PREHEARING ORDER

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. On December 11, 1992, this docket was opened to address slamming complaints which had been filed with our Division of Consumer Affairs against the Company. On February 22, 1993, we issued Order No. PSC-93-0269-FOF-TI, requiring Cherry to show cause why it should not be fined or have its certificate revoked for violation

03-09-93

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 I subsequently issued an Order Establishing Preliminary Issues for Hearing. The Company moved for reconsideration of my Order establishing Preliminary Issues and to strike certain issues set forth in that Order. Upon reconsideration I denied the Company's Motion.

II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183(2), Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

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

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the

confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Commission Clerk's confidential files.

Post-hearing procedures

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. The rule also

provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

III. PREFILED TESTIMONY AND EXHIBITS

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

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

IV. ORDER OF WITNESSES

<u>WITNESS</u>	<u>APPEARING FOR</u>	<u>ISSUES NOS.</u>
David Giangreco	Cherry	All
Robert Bevilacqua	Cherry	All
Rochelle Fishman	Cherry	All
Nancy Pruitt	Staff	1, 2, 3, 4, 5, 6, 7, 8, 9

<u>WITNESS</u>	<u>APPEARING FOR</u>	<u>ISSUES NOS.</u>
Rick Moses	Staff	1, 6, 7, 8, 9
Deda G. Sheffield	Staff	2, 3, 6, 8, 9
Roberta M. Ferguson	Staff	1, 2, 3, 5, 6, 8, 9

V. BASIC POSITIONS

CHERRY'S BASIC POSITION: The Commission's Order issued February 22, 1993 initiating show cause proceedings against Cherry stems from Cherry's rapid expansion into the telecommunications industry and Cherry's initial problems with MATRIX Telecom and Network Solutions, Inc. These problems have been well documented in Cherry's Formal Response to the Order Initiating Show Cause Proceedings and the refiled testimony of David Giangreco, Cherry's President, and it is unnecessary to once again justifiably assert blame in these directions.

Cherry truly believes that since the filing of Cherry's Formal Response to the Order Initiating Show Cause Proceedings, Cherry has implemented procedures which have resulted in strict compliance with all industry rules and regulations. Specifically, the centralization and consolidation to two (2) offices has ensured better management and control of Cherry's employees. In addition, Cherry's use of compliance monitors and mandatory management and employee agreements even further deters noncompliance. Lastly, the evolution of the scripts for telemarketers and third-party verifiers has prevented discrepancies and assisted consumers in clearly understanding the services offered by Cherry. These procedures will prevent unauthorized switches from occurring in the future.

Moreover, Cherry asserts that since it has only received a deminimus number of complaints stemming from the period (origination date) subsequent to the filing of its Formal Response to the Order Initiating Show Cause Proceedings, regarding improper switching -- both originating out of jurisdictions other than Florida -- Cherry's recently implemented procedures are effective. Nonetheless, Cherry understands the Commission's dilemma of receiving numerous complaints from Cherry's activity prior to March

16, 1993, and assures the Commission that restitution of all affected consumers is occurring.

Accordingly, Cherry respectfully submits that its certificate to provide interexchange telecommunications service should not be cancelled and that it should not be fined since Cherry's present policies and procedures have proven to be effective and all alleged improper switches from its previous activity should be apparent on or before June 18, 1993.

STAFF'S BASIC POSITION: Staff's basic position is that it is not in the public interest for Cherry Payment Systems, Inc. d/b/a Cherry Communications to operate in Florida. Cherry's Certificate of Public Convenience and Necessity (No. 3134) should be cancelled.

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

VI. ISSUES AND POSITIONS

ISSUE 1: Has Cherry Payment Systems violated Rule 25-24.470(1), F.A.C.?

CHERRY'S POSITION: Cherry denies violation of Rule 25-24.470(1), F.A.C.

STAFF'S POSITION: Cherry Communications has violated Rule 25-24.470(1), Florida Administrative Code.

ISSUE 2: Has Cherry Payment Systems violated Rule 25-4.118(1), F.A.C.?

CHERRY'S POSITION: Cherry has not intentionally violated Rule 25-4.118(1), F.A.C. Within the past several months it has come to the attention of Cherry's corporate management that, in the course of its activities some of Cherry's employees engaged in improper solicitation techniques. Cherry affirmatively asserts that its management was unaware of such conduct and that said conduct was neither solicited, known, condoned nor encouraged by Cherry management. Accordingly, Cherry's management did not intentionally cause the long distance phone service of Floridians to be switched.

In every instance where a customer has complained of an unauthorized switch, Cherry has initially responded with a letter and a \$12.00 check to reimburse the consumer for service charges and the inconvenience of the switch. In addition, when Cherry is provided with the appropriate documentation Cherry will rerate the calls made while a customer of Cherry.

In addition to reimbursing a consumer for an improper switch (see answer to Issue of Fact (3), every complaint received from the Commission has been forwarded to the law firm of Gardner, Carton & Douglas. Gardner, Carton & Douglas has investigated each and every complaint pursuant to a detailed protocol -- developed by Cherry -- resulting in customer contact and comments which are entered into a database. This database is used by Cherry to identify problems and patterns and illustrates Cherry's continuing efforts to improve its compliance systems.

Cherry is aware that unauthorized carrier switches or slams arose out of problems created by Cherry's salesman who acted improperly. However, Cherry affirmatively asserts that this improper conduct was neither solicited, known, condoned nor encouraged by Cherry management. In addition, once it came to the attention of Cherry's management that Cherry's salesmen engaged in improper conduct, Cherry terminated their employment. In fact, Cherry has prosecuted a sales person for grossly unethical conduct and is presently processing additional complaints against terminated employees.

STAFF'S POSITION: Cherry Communications has violated Rule 25-4.118(1), Florida Administrative Code.

ISSUE 3: Has Cherry Payment Systems violated Rule 25-4.118(2), F.A.C.?

CHERRY'S POSITION: Cherry has not intentionally violated Rule 25-4.118(2), F.A.C. Within the past several months it has come to the attention of Cherry's corporate management that, in the course of its activities some of Cherry's employees engaged in improper solicitation techniques. Cherry affirmatively asserts that its management was unaware of such conduct and that said conduct was neither solicited, known, condoned nor encouraged by Cherry management. Accordingly, Cherry's management did not intentionally cause the long distance phone service of Floridians to be switched.

In every instance where a customer has complained of an unauthorized switch, Cherry has initially responded with a letter and a \$12.00 check to reimburse the consumer for service charges and the inconvenience of the switch. In addition, when Cherry is provided with the appropriate documentation Cherry will rerate the calls made while a customer of Cherry.

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Cherry is aware that unauthorized carrier switches or slams arose out of problems created by Cherry's salesman who acted improperly. However, Cherry affirmatively asserts that this improper conduct was neither solicited, known, condoned nor encouraged by Cherry management. In addition, once it came to the attention of Cherry's management that Cherry's salesmen engaged in improper conduct, Cherry terminated their employment. In fact, Cherry has prosecuted a sales person for grossly unethical conduct and is presently processing additional complaints against terminated employees.

STAFF'S POSITION: Cherry Communications has violated Rule 25-4.118(2), Florida Administrative Code.

ISSUE 4: Has Cherry Payment Systems violated Rule 25-4.043, F.A.C.?

CHERRY'S POSITION: Cherry denies that it has violated Rule 25-4.043, F.A.C.

STAFF'S POSITION: Cherry Communications has violated Rule 25-4.043, Florida Administrative Code.

ISSUE 5: Has any Cherry Payment Systems sales procedure been effective at deterring slams?

CHERRY'S POSITION: Cherry's present system of verification of sales complies with -- and goes beyond -- the rules and regulations of the Florida Public Service Commission. Specifically, although the rules and regulations of the FCC and Florida Public Service Commission do not require signed Letters of Agency to be verified independently, a customer Service representative of Cherry verifies every LOA before a PIC is submitted to a LEC. With respect to telemarketing sales, a third-party verifies the consent of the consumer to switch his/her long distance service to Cherry. In addition, Cherry's telemarketed customers are randomly contacted (1 out of 5) by a employee of Cherry's third-party verifier to ensure that the individual truly wants to be a Cherry customer. Once again, this additional effort by Cherry is not required by the rules and regulations of the FCC or Commission.

Cherry presently has in effect a sales and verification process effective at eliminating unauthorized switches as illustrated by the number of complaints alleging improper switching stemming from the period subsequent to the implementation of the numerous procedures described in Cherry's Basic Position Statement. Indeed, since the implementation of the aforementioned procedures, Cherry has received only a deminimus number of complaints.

STAFF'S POSITION: No Cherry Communications' sales procedure has been effective in deterring slams by that company.

ISSUE 6: Has Cherry Payment Systems engaged in unethical marketing practices in Florida?

CHERRY'S POSITION: Cherry has not authorized, condoned or intended to participate in unethical marketing practices in Florida.

Cherry is aware that unauthorized carrier switches or slams arose out of problems created by Cherry's salesman who acted improperly. However, Cherry affirmatively asserts that this improper conduct was neither solicited, known, condoned nor encouraged by Cherry management. In addition, once it came to the attention of Cherry's management that Cherry's salesmen engaged in improper conduct, Cherry terminated their employment. In fact, Cherry has prosecuted a sales person for grossly unethical conduct

and is presently processing additional complaints against terminated employees.

STAFF'S POSITION: Cherry Communications has engaged in unethical marketing practices in Florida.

ISSUE 7: Was Cherry Payment Systems' Florida IXC application accurate?

CHERRY'S POSITION: One entry on Cherry's application was inaccurate but unknown until advised by PSC staff in early May 1993. There was no intentional deception and the application was corrected by letter dated May 14, 1993 from Cherry's CEO to Mr. Tribble at the PSC.

STAFF'S POSITION: There are serious inaccuracies in Cherry Communications' Florida IXC application.

ISSUE 8: Is it in the public interest for Cherry Payment Systems to operate in Florida?

CHERRY'S POSITION: Yes, it is Cherry's position that it is in the public interest for Cherry to operate in Florida. Cherry's venture into the telecommunications industry has provided healthy competition in the Florida long distance arena. Specifically, Cherry's contractual relationships with WILTEL and U.S. Sprint Communications has bestowed Floridians with the opportunity to save approximately ten (10%) percent on their long distance telephone bills, while being provided with quality long distance service.

STAFF'S POSITION: It is not in the public interest for Cherry Communications to operate in Florida.

ISSUE 9: What penalty is appropriate in this case?

CHERRY'S POSITION: Cherry asserts that when it solicited customers in Florida it did so through a large volume of calls made by Cherry telemarketers to consumers of Florida. Cherry regrets that in a few instances, compared to the number of Floridians contacted by Cherry, consumers of Florida had their long distance carriers switched without proper authorization. Accordingly, Cherry submits

that a suspension of its Certificate and a fine is unnecessary and punitive in nature.

Cherry sincerely believes that its business procedures in Florida are fully consistent with the requirements of all federal and state law regulations. In addition, Cherry regrets that Floridians have had their long distance carriers switched without proper authorization. In any event, in every instance where a customer has complained of an unauthorized switch, Cherry has reimbursed the switch consumer for his/her service charges incurred.

Moreover, Cherry submits that the procedures instituted in 1993 will preclude unauthorized switches from occurring in the future. In addition, the strict policies that the company has instituted governing its telemarketers will protect against any future forms of misrepresentation. Accordingly, Cherry affirmatively asserts that the aforementioned policies and procedures effectively demonstrate why Cherry should not be subject to monetary sanctions.

STAFF'S POSITION: Cherry Communications' Certificate of Public Convenience and Necessity should be revoked.

VII. EXHIBIT LIST

<u>WITNESS</u>	<u>I.D. NO.</u>	<u>DESCRIPTION</u>
David Giangreco	DG-1	Cherry Payment Systems, Inc.'s Group Exhibit of documents dealing with its incorporation
	DG-2	Telecommunications Service Agreement Between Cherry and MATRIX Telecom
	DG-3	Complaint at Law Brought by Cherry against Jennifer Hutzler (United States District Court for the Northern District of Illinois, Eastern Division)
	DG-4	Telemarketing Script(s)

<u>WITNESS</u>	<u>I.D. NO.</u>	<u>DESCRIPTION</u>
David Giangreco	DG-5	Inbound Service Agreement between Cherry and Telemedia Resource Consultants, Inc.
	DG-6	Third-Party Verifier Script(s)
	DG-7	Cherry's Management Agreement
	DG-8	Cherry's Employee Agreement
Rochelle Fishman	RF-1	Inbound Service Agreement between Cherry and Telemedia Resource Consultants, Inc.
Deda G. Sheffield	DGS-1	Composite Exhibit of Deda G. Sheffield
Rick Moses	RAM-1	Cherry's Application for a FPSC Certificate
	RAM-2	Cherry's Application to Register in Florida as a Foreign Corporation
	RAM-3	Judgment Order Sentencing James R. Elliott for Wire Fraud
	RAM-4	Illinois Corporate Records
Nancy Pruitt	NP-1	December, 1992 Complaints
	NP-2	January-April, 1993 Complaints
	NP-3	Pre-Certified Complaint Response
	NP-4	Letter of Agency
	NP-5	Matrix Response
	NP-6	Slamming Response
	NP-7	Marketing Response
	NP-8	Sales/Marketing Ad

<u>WITNESS</u>	<u>I.D. NO.</u>	<u>DESCRIPTION</u>
Nancy Pruitt	NP-9	Cherry Complaints in Tennessee
	NP-10	Cherry Complaints in Louisiana
	NP-11	Page 27, May 1993, "Consumer Reports"
	NP-12	Cherry Complaints in Arkansas
	NP-13	Page 15, NARUC No. 12-1993
	NP-14	Cherry Complaints in Alabama
	NP-15	Cherry Complaints with FPSC
	NP-16	Portion of Florida Foreign Corporation Filing
	NP-17	IXC Application

VIII. PROPOSED STIPULATIONS

The parties agree that for purposes of this proceeding if a party means to do an act, as opposed to meaning to violate a rule, then there is intent.

IX. PENDING MOTIONS

1. Cherry has filed a Motion to Accept Settlement Offer which will be addressed by the Commission at the June 8, 1993 Commission Agenda Conference.

2. Cherry's May 15, 1993 Motion for Reconsideration and to Strike was denied by Order No. PSC-93-0805-PCO-TI issued on May 25, 1993. The Company has filed a Request that the Commission reconsider the Prehearing Officer's decision to allow Issue 7 in this proceeding.

3. A Notice of Intent to seek Confidential Classification was filed on May 10, 1993 by WilTel on behalf of Cherry regarding information contained in the Testimony of Roberta M. Ferguson.

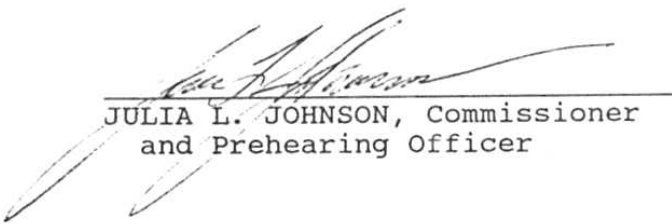
X. RULINGS

Cherry's Motion to file by June 7, 1993, testimony and exhibits regarding issues 1, 4, 6, 7, was granted. Staff reserves right to rebut.

It is therefore,

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

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 9th day of June, 1993.



JULIA L. JOHNSON, Commissioner
and Prehearing Officer

(S E A L)

CWM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.