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FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

MAY 7, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (STOVER) *MS MB*
DIVISION OF COMMUNICATIONS (PRUITT) *VP ATT*
DIVISION OF CONSUMER AFFAIRS (DUREIN) *CSA 20*

RE: DOCKET NO. 970420-TI - BUSINESS DISCOUNT PLAN, INC. -
INITIATION OF SHOW CAUSE PROCEEDINGS FOR VIOLATION OF
RULES 25-4.118, FLORIDA ADMINISTRATIVE CODE,
INTEREXCHANGE CARRIER SELECTION, AND 25-4.043, FLORIDA
ADMINISTRATIVE CODE, RESPONSE TO COMMISSION STAFF
INQUIRIES

AGENDA: MAY 19, 1997 - REGULAR AGENDA - SHOW CAUSE - INTERESTED
PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\970420.RCM

CASE BACKGROUND

Trans National Telephone, Inc. was granted Certificate No. 3548 to provide intrastate interexchange telecommunications service on May 4, 1994. The certificate was amended on March 23, 1995 by Order No. PSC-95-0406-FOF-TI to reflect a name change to Business Discount Plan, Inc. (BDP).

In 1995, there were no valid unauthorized carrier change (slamming) complaints logged to BDP in the Division of Consumer Affairs.

In 1996, 41 consumer complaints logged to BDP were closed in the Division of Consumer Affairs as slamming in apparent violation of Rule 25-4.118, Florida Administrative Code. In 40 of the cases BDP did not respond to the Commission staff inquiries in a timely manner as required in Rule 25-4.043, Florida Administrative Code.

DOCUMENT NUMBER-DATE

04502 MAY-75

FPSC-RECORDS/REPORTING

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During the first two months of 1997, 35 BDP cases were closed in the Division of Consumer Affairs as slamming. In 32 of the cases BDP did not respond to the Commission staff inquiries in a timely manner as required in Rule 25-4.043, Florida Administrative Code. Fourteen cases had not been closed as of March 1, 1997.

DISCUSSION OF ISSUES

ISSUE 1: Should Business Discount Plan, Inc. be ordered to show cause why it should not be fined \$25,000 pursuant to Section 364.285, Florida Statutes, for violation of Rule 25-4.118, Florida Administrative Code, Interexchange Carrier Selection, or have its Certificate No. 3548 canceled, or both?

RECOMMENDATION: Yes. Any collected fine monies should be forwarded to the Office of the Comptroller for deposit in the state General Revenue Fund pursuant to Section 364.285(1), Florida Statutes.

STAFF ANALYSIS: Between April 24, 1996 and February 28, 1997, the Division of Consumer Affairs received 90 complaints from consumers concerning unauthorized carrier changes. As of March 1, 1997, 76 of the cases were closed as being in violation of Rule 25-4.118, Florida Administrative Code. In each case, the unauthorized change involved telemarketing with third party verification.

Rule 25-4.118, Florida Administrative Code, states, in pertinent part:

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

(2) A certified IXC that will be billing in its own name may submit a PIC change request, other than a customer initiated PIC change, directly or through another IXC, to a LEC only if it has certified to the LEC that at least one of the following actions has occurred prior to the PIC change request:

(c) the customer's requested change is verified through a qualified, independent firm which is unaffiliated with any IXC;

(6) The IXC shall provide the following disclosures when soliciting a change in service from a customer:

- (a) Identification of the IXC;
- (b) That the purpose of visit or call is to solicit a change of the PIC of the customer;
- (c) That the PIC cannot be changed unless the customer authorizes the change.

Business Discount Plan, Inc. responded to the slamming complaints by stating, "BDP, Inc. instructs its independent sales agents to identify the company name and to advise that the company is a reseller of the AT&T's DNS product. To ensure compliance, every sale is verified by an independent verifier pursuant to the provisions of 47 C.F.R. Section 64.1100(c)." Some taped conversations with customers and independent third party verifiers were provided by BDP. However, from reviewing the tapes staff believes the verifiers sound more like telemarketers than independent third party verifiers and that they appear to be providing misleading information.

On September 30, 1996, Ben Heaton, owner of Benco Exports, Inc., advised staff that his long distance service was switched from AT&T without authorization. He stated that he was contacted in May by someone representing AT&T. BDP's report dated December 6, 1996, indicated telemarketing with verification. BDP's supplemental report dated January 8, 1997, provided a verification tape. On the tape the customer asked, "This is AT&T, right?" The verifier answered, "I work with quality control but this will keep you 100% with the AT&T network." The customer responded, "I don't want to be monkeying around with my phone, because I've had AT&T forever and I don't want anybody else." (Attachment A, pages 9-11)

On October 11, 1996, Mr. Geobel Quiros, owner of Mr. Boat Wax, advised the Commission that his service was switched from AT&T without authorization. He said a representative identified the company as AT&T and asked if he wanted to get his long distance charges on one bill. BDP's report dated November 1, 1996, indicates telemarketing and verification. The supplemental report dated January 8, 1997, provided a verification tape. On the tape the customer stated, "I don't want to change from AT&T." The verifier responded, "We're not changing your service. Okay. I guarantee, we're not changing your service." (Attachment B, pages 12-15)

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On October 2, 1996, Ms. Vera Hall contacted the Commission and advised that the service of Playground Upholstery had been switched without authorization. BDP's report dated December 9, 1996, indicated telemarketing and verification. The supplemental report dated January 8, 1997, provided a verification tape. On the tape the verifier asked, "You can okay the discount plan?" Later the customer asked, "This isn't changing our long distance company, is it?" The verifier asked, "Who's your long distance company now?" The customer responded, "AT&T." The verifier answered, "You'll remain on the AT&T Network with business discount plan rates. Your billing is going to go through a third party billing service, the Business Discount Plan, which is going to combine your billing onto your Centel invoice." (Attachment C, pages 16-22)

On October 3, 1996, Mr. Jim Conkel contacted the Commission and advised that the service of Wood Floral Products had been switched without authorization. BDP's report dated December 6, 1996, indicated telemarketing with verification. A supplemental report dated January 8, 1997, provided a verification tape. On the tape the customer said, "I do want to ask one question." The verifier responded, "Okay." The customer continued, "This is AT&T, not a subsidiary, not a nothing? This is AT&T, correct?" The verifier replied, "Who me, ma'am? I do not work for AT&T. As Stanley might have told you, I work for Quality Control, Inc. ... Let me let you know who I am ma'am, a third party verification company ... rate plan gives you a 20% discount ... this is to keep you on the AT&T network, okay." The customer responded, "Okay, we will not be switched off anything?" The verifier answered, "No lady, you will be remaining on the AT&T network and BellSouth is your local company. Okay?" The customer then stated, "Right. Okay, that's fine. I just wanted to make sure, I mean absolutely sure of that, because we were switched at one time and I do not want that to happen again." The verifier replied, "Right. This is not to switch. This is to keep you on the network." (Attachment D, pages 23-28)

On December 18, 1996, Pam Baldree, secretary/treasurer of Carnley Electric, Inc., reported that USBI was billing on behalf of BDP for her company's long distance service without authorization. BDP's report dated January 22, 1997, indicated telemarketing with verification. A supplemental report dated February 10, 1997 provided a verification tape. On the tape the customer stated, "I don't quite understand. We're not going to be getting no extra charges or anything like that." The verifier responded, "No." The customer continued, "This is just to get our bill put on our BellSouth bill?" The verifier answered, "Exactly, right, and also that \$5 service charge that you have been paying, that will be

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reduced as well to \$3.78 on the business discount plan." (Attachment E, pages 29-30)

On October 31, 1996, Mr. John Zillioux contacted the Commission and reported that his service was switched without authorization. The company's report dated January 8, 1997, provided a verification tape. A subsequent report dated January 16, 1997, provided a credit amount and indicated "that the matter has been resolved." On the tape the verifier stated, "This is strictly a rebilling situation. It has nothing to do with your service or long distance carrier." (Attachment F, pages 31-35)

On November 19, 1996, Ms. Deborah Gray Mitchell contacted the Division of Consumer affairs about the unauthorized change in her long distance carrier. The BDP report dated January 22, 1997, indicated telemarketing and verification. The supplemental report dated February 10, 1997, provided a verification tape. A copy of the report was mailed to Ms. Mitchell on February 26, 1997. A follow-up letter, dated March 4, 1997, from the customer was received. Ms. Mitchell stated in her letter that after hearing the verification tape, "I recall that conversation, but at no time did I think that I was changing my long distance service." Ms. Mitchell further stated in her letter that she disagreed with the BDP report that said that telemarketers are to advise consumers that BDP is a reseller of AT&T's DNS product. "My complaint with them and their sales pitch is that at no time did they tell me that they are a 'reseller of AT&T's DNS product,' as their attorney's letter states. What they did tell me several times is that their long distance service was through the AT&T network, and that they were offering me a savings of 20% through their business discount plan." She goes on to say, "I was duped." (Attachment G, pages 36-52)

Staff intends to bring to the Commission for discussion our intent to propose rules on fines relating to slamming activities. However, in the interim, this recommendation is consistent with previous decisions in Docket Nos. 970097-TI, Initiation Of Show Cause Proceedings Against Integrated Teleservices, Inc., For Violation Of Rule 25-24.490, Florida Administrative Code, Customer Relations; Rules Incorporated, And Rule 25-4.043, Florida Administrative Code, Response To Commission Staff Inquiries, and 960186-TI, Investigation Of MCI Telecommunications, Inc. Marketing Practices. Based on the number of consumer complaints the Commission has received and BDP's written responses and verification tapes, staff believes that BDP does not have adequate safeguards to protect consumers from being switched without authorization. Accordingly, staff believes there is sufficient cause to order BDP to show cause why it should not be

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fined, or have its certificate canceled, or both, for the apparent violations of Rule 25-4.118, Florida Administrative Code, Interexchange Carrier Selection. Pursuant to Section 364.285, Florida Statutes, BDP should be ordered to show cause in writing within 20 days of the order why it should not be fined in the amount of \$25,000, or have its certificate canceled, or both.

ISSUE 2: Should Business Discount Plan, Inc. be ordered to show cause why it should not be fined \$25,000 pursuant to Section 364.285, Florida Statutes, for violation of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, or have its certificate canceled, or both?

RECOMMENDATION: Yes. Any collected fine monies should be forwarded to the Office of the Comptroller for deposit in the state General Revenue Fund pursuant to Section 364.285(1), Florida Statutes.

STAFF ANALYSIS: During 1996 and the first two months of 1997, 76 consumer complaints against BDP were closed in the Division of Consumer Affairs as violations of Rule 25-4.118, Florida Administration Code, Interexchange Carrier Selection. In 72 of these cases Business Discount Plan, Inc. did not respond to the Commission staff inquiries in a timely manner.

Rule 25-4.043, Florida Administrative Code states:

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.

On October 2, 1996, Ms. Vera Hall contacted the Commission and advised that the service of Playground Upholstery had been switched without authorization. That same day the Division of Consumer Affairs faxed an inquiry to BDP, requesting a response by October 17. No response was received. On October 23 a reminder fax was sent to BDP requesting a reply by October 29. No response was received. On November 5 a certified letter was sent to BDP reminding the company that Rule 25-4.111 states in part, "Each telephone utility shall make a full and prompt investigation of all complaints and service requests made by its customers, either directly to it or through the Commission and respond to the initiating party within fifteen (15) days." The

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return receipt, signed by a BDP agent on November 12, was returned to the Division of Consumer Affairs on November 18. A report, dated December 9, was received on December 16. A supplemental report, dated January 8, 1997, with verification tape was received January 14, 1997. (Attachment C, pages 16-22)

On October 3, 1996, Mr. Jim Conkel of Wood Floral Products contacted the Commission concerning unauthorized switching. That same day an inquiry was faxed to BDP, requesting a response by October 18. No response was received. On October 23 a reminder fax was sent requesting a reply by October 29. No response was received. On November 4 a certified letter was sent. The return receipt showed delivery date of November 7. A report, dated December 6, was received on December 16. A supplemental report with tape was received January 14, 1997. (Attachment D, pages 23-28)

On December 18, 1996, Ms. Pam Baldree of Carnley Electric contacted the Commission concerning unauthorized switching. That same day an inquiry was faxed to BDP requesting a response by January 9, 1997. A report, dated January 22, was received January 30. A supplemental report with tape was received February 14, 1997. (Attachment E, pages 29-30)

On February 3, 1997, Ms. Sandy Nichols of Nichols Brothers contacted the Commission concerning an unauthorized switch in service. An inquiry was faxed to BDP requesting a response by February 18. No response was received. On February 19 a reminder fax was sent requesting a reply by February 25. No response was received. A certified letter requesting the report was sent on February 28, 1997. (Attachment H, pages 53-55)

By Section 364.285, Florida Statutes, the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Bartow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as BDP's conduct at issue here, would meet the standard for a "willful violation."

Staff believes that BDP's apparent conduct in switching PICs without customer authorization and failing to timely respond to staff inquiries has been "willful" in the sense intended by

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Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule."

Accordingly, staff recommends that the Commission find that BDP's apparent violations of Rule 25-4.043, Florida Administrative Code, rise to the level warranting that a show cause order be issued. BDP should be ordered to show cause in writing within 20 days of the effective date of the order why it should not be fined in the amount of \$25,000 for the apparent violations of Rule 25-4.043, Florida Administrative Code, Response to Commission Staff Inquiries, or have its certificate canceled, or both. This amount is consistent with a recent Commission decision in Docket 970097-TI. Pursuant to Section 364.285, Florida Statutes, the fine should be forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of the show cause proceeding.

STAFF ANALYSIS: If the Commission approves Issue 1 or 2, this docket should remain open pending resolution of the show cause proceeding.