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FLORIDA PUBLIC SERVICE COMMISSION
DIVISION OF APPEALS

RASHAD EL-AMIN
PRESIDENT

KENT R. SPUHLER
DIRECTOR

September 17, 1997

Director of Appeals
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0862

Re: PUBLIC COMMENT on Docket 970642-TI
Proposed amendments to Rule 25-4.118, F.A.C.

Dear Director of Appeals:

FLORIDA LEGAL SERVICES represents low-income Floridians. We appreciate the opportunity that the Florida Public Service Commission has provided to hear public comment on its proposed amendments to Rule 25-4.118, F.A.C., that are intended to address the deceptive and unfair practice of improperly switching customers' telecommunications service, known as "slamming." The continuity of telephone service is a vital and necessary link for everyday maintenance, and even survival, for many low-income Floridians, especially because many of our clients are disabled, elderly, or raising small children.

Currently, there is a gap in the laws regulating deceptive and unfair practices in the area of telecommunications that is a major contributing factor to the prevalence of "slamming." Long distance carriers have asserted, as recently as earlier this year, that state consumer protection laws are preempted from governing their conduct by the federal Communications Act of 1934 and pursuant federal common law, *see, Lipcon v. Sprint*, 962 F.Supp. 1490 (S.D.Fla. 1997). The Federal Communications Commission's rule on "slamming," 47 C.F.R. Parts 64.1100 and 64.1150, promulgated pursuant to the Act, provides for consumer protections that are widely acknowledged to be inadequate. The PSC's current "slamming" rule, Rule 25-4.118, F.A.C., mirrors the existing FCC rule, and, at best, has been erratically enforced. The PSC rule further may make long distance telephone service changes an activity "regulated" by the Commission, and hence not covered by the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 et seq. Fla. Stat. §501.212(4). Local service companies are granted exemption from the Florida Deceptive and Unfair Trade Practices Act, and the Florida telemarketing statute, Fla. Stat. §501.059, because the Legislature chose to leave the regulation of these companies' deceptive and unfair practices to the discretion of the PSC. Fla. Stat. §§501.212(4) and 501.059. The Commission currently does not regulate local service "slamming," albeit, until recently, there was little reason to.

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The PSC's proposed amendments to Rule 25-4.118, F.A.C., make several positive strides toward addressing "slamming." The proposed amendments appear to implicitly follow the holding of *Lipcon v. Sprint*, 962 F.Supp. 1490 (S.D.Fla. 1997), that state law may, under 47 U.S.C. §414, include consumer protections for telecommunications beyond those implemented pursuant to the Communications Act of 1934. The proposed amendments provide for consumer protections in addition to those found in the FCC "slamming" rule and the FCC's currently pending proposed amendments. The proposed amendments to Rule 25-4.118, F.A.C., also exercise the Commission's latent jurisdiction over local service "slamming," and address several particular deficiencies in the existing FCC "slamming" rule, such as proposing that "welcome packages" mailed to certain consumers whose long distance service has been scheduled to be switched through telemarketing calls, must be opened, signed and returned by consumers in order for the service changes to be effective.

There are a number of commonly used means of regulating deceptive and unfair practices that should to be added to the proposed rule, though, in order for the new rule to be effective. These measures are:

1. A requirement that service changes comply with the rule for the resulting contracts to be valid and enforceable. The "slamming" rule should provide that contracts made pursuant to the rule have to be formed by service changes that comply with the requirements of the rule in order to be valid and enforceable. This addresses consumer concerns about being required to pay for service they didn't want, and, even more importantly, provides the necessary incentive for sellers of telecommunications services to assure that they and their agents comply with the rule. Florida's telemarketing statute, Fla. Stat. §501.059, has this requirement, as do most consumer protection statutes, and Florida's common law.

The currently proposed rule does not require that changes in telecommunications service comply with the rule in order for the resulting contracts to be valid and enforceable. In place of this requirement, the proposed rule requires of telecommunications companies merely that they receive certifications from their solicitors that the rule has been complied with. This is a "don't kiss, don't tell" escape hatch for sellers of telecommunications services that encourages rule violations. We feel that it has no place in a consumer protection rule.

2. A requirement of reliable consumer verification of changes in telecommunications service. There should be some action required of consumers that reasonably would make an unsophisticated consumer aware that he or she is changing telecommunications service. Customers may expect their *existing* telecommunications providers to provide changes in service through customer-initiated telephone calls. In such cases, customers who have indicated in writing that they would like this convenience should be able to have it, provided that appropriate verification procedures are used, and that customers

who have had their service wrongfully changed have an adequate opportunity to be made whole for the transgressions. These are the procedures used by mutual funds, for example, to permit telephone transactions. Telecommunications service deserves a similar level of reliability measures.

Telecommunications service changes that result from contact between consumers and telecommunications companies or their agents, that is initiated by the companies or agents, or by non-customers, should have more certain customer verification. Because of the nature of telecommunications service, we believe that written verification should be required. In some other consumer transactions, such as the issuance of credit cards, for example, the initial use of the credit card or other service is sufficient opportunity for a consumer to verify that he or she has ordered the card or service. With telecommunications service, though, there often is no initial notice that the consumer actually is aware of. The first bill, typically a month and a half after service has commenced, commonly is the first notification even a sophisticated consumer would have of an unwanted new service. Written verification requirements, such as those described in Rules 25-4.118(2)(a) and (d), F.A.C., as optional verification procedures, therefore should be utilized in non-customer initiated telecommunications service change requests in order to assure actual initial verification and adequately protect against "slamming."

The other two optional verification procedures in proposed Rule 25-4.118(2), F.A.C., appear to us to be inherently prone to fraud and abuse. We recommend eliminating them. Within subsection (2), option (b) would permit solicitors to fraudulently assert that contact was customer-initiated, and the option's only verification is telephone conversation tapes that, even if kept, may easily be fabricated, since all consumers would be recorded doing, under the proposed rule, apparently is acknowledging a series of statements made by company representatives. Option (c) basically permits "independent, unaffiliated" firms to do the same thing. The separate corporate structure of these firms offers no assurance of increased reliability, given that the firms are compensated directly by the telecommunications companies based upon the number of their confirmations. These means of verification, in addition, provide no cooling off period for consumers to reflect on the sales pitches that they have received, and to gather additional information, before deciding whether to switch their telecommunications services.

3. A requirement of disclosure of the important terms of the new service, including termination provisions. This is important for all consumers of telecommunications services, even for customers who request service changes of their existing providers. The written verification procedures in proposed Rules 25-4.118(2)(a) and (d), F.A.C., provide much of this information. There needs to be two improvements in these disclosures, though, in order for the requirements to be effective. First, the provisions relating to the clarity of the disclosures in letters of agency, contained in proposed sections 25-4.118(3) and (4), should be extended to the customer change requests

described in section 25-4.118(2)(d), and should be reviewed by the Commission to determine whether further development of the disclosures, perhaps through standardized forms, should be undertaken. Second, consumers should be clearly informed of the termination provisions of the service, particularly as telecommunications companies seek to use credit-based criteria for determining cut-offs. Especially for low-income consumers, information about customer rights and opportunities for catching up with past due payments is critical to being able to make informed decisions about telecommunications services.

With these recommended changes, the proposed "slamming" rule will be an effective deterrent to this abusive practice. In addition to adopting these changes, FLORIDA LEGAL SERVICES strongly recommends that the Commission separately draft and pass a rule similar to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 et seq., to give the Commission, and aggrieved consumers, adequately broad capability to address deceptive and unfair practices in the telecommunications area. Deceit and artifice are resilient and steadfast, endlessly creative and reinventive of themselves. Rifle-shot approaches to addressing them, aimed only at particular transgressions, have invariably failed to limit their overall occurrence, as Justice England noted in his concurring opinion in *Department of Legal Affairs v. Rogers*, 329 So.2d 257 (Fla.1976), at page 268:

> [T]he "laundry list" form of prohibited marketplace activities was present in the law of Florida for years before the little FTC act [Fla. Stat. §501.201 et seq.] was enacted [footnote omitted]. It was wholly inadequate for its intended purposes, despite the presence of both criminal and administrative sanctions.

Deceptive and unfair practices that are singled out may be reduced, but often they merely mutate, to assert themselves in new and unexpected ways. Only through broad authority to address these practices may the Commission, and consumers, be able to keep up with, and contain these abuses.

Respectfully submitted,

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