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January 21, 1998

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re Docket No. [REDACTED]

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the First Motion to Compel Against LCI by the Attorney General and the Citizens. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

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CJB bsr
Enclosures

Since ely,

Charles J. Beck
Deputy Public Counsel

DOCUMENT NUMBER - DATE
[REDACTED] JAN 21 98
FPSC - RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause)
proceedings against LCI)
International Telecom Corp. for)
violation of Rule 25-4.118,)
F.A.C., Interexchange Carrier)
Selection.)
/

Docket No. [REDACTED]

Date Filed: January 21, 1998

**FIRST MOTION TO COMPEL AGAINST LCI
BY THE ATTORNEY GENERAL AND THE CITIZENS**

Robert A. Butterworth, Attorney General ("Attorney General"), and the Citizens of Florida, by and through Jack Shreve, Public Counsel ("Citizens"), move the Commission to enter an order requiring LCI International Telecom Corp ("LCI") to fully answer the first set of interrogatories to LCI by the Attorney General and the Citizens of Florida filed on December 9, 1997 ("interrogatories") and to provide all of the documents requested in the first set of requests for production of documents to LCI by the Attorney General and the Citizens of Florida ("request for documents") filed on December 9, 1997, as more fully set forth in this motion

BACKGROUND

1 On October 22, 1997, the Attorney General and the Citizens of Florida filed a complaint against LCI for violation of rule 25-4118, Florida Administrative Code, by changing the presubscribed interexchange carrier of David Howe without authorization

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The complaint further requested the Commission to impose a penalty of \$25,000 on LCI for violation of that rule.

2. LCI responded on December 3, 1997, by filing an answer and requesting a hearing. While LCI admitted that a Mr. Howe's PIC was changed by LCI without authority from Mr. Howe, it claimed that the unauthorized change occurred as a result of processing an LOA which appeared on its face to be valid. It further denied that the forgery of the customer's signature by an independent contractor can be attributed to LCI or that the forgery constituted actions of LCI. In addition, LCI claimed that it did not know and had no reason to know that a forgery had occurred when it processed what appeared to be a valid letter of authorization. In essence, LCI argued that the unauthorized PIC change was not the result of a willful or intentional action by LCI, and, accordingly there was no basis for imposing a fine upon LCI for the unauthorized PIC change.

PENALTIES

3. Penalties for violation of Commission Rule 25-4 188(1) are governed by Section 364.285, Florida Statutes (1997), which states in part:

"(1) The Commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or have willfully violated any lawful rule or order of the Commission or any provision of this chapter a penalty for each offense of not more than \$25,000 . . ."

Thus, in order to impose a penalty, the Commission must find that a company either "refused to comply with" a lawful rule or that a company "willfully" violated a rule.

4. The Florida Supreme Court has defined the term "willful" as follow:

"A thing is willfully done when it proceeds from a conscious motion of the will intending the result which actually comes to pass. It must be designed or intentional and may be malicious, though not necessarily so. "Willful" is sometimes used in the sense of intentional, as distinguished from "accidental," and, when used in a statute affixing a punishment to acts done willfully, it may be restricted to such acts as are done with an unlawful intent."

Jersey Palm-Gross, Inc., v. Paper, 658 So.2d 531 (Fla. 1995), quoting *Chandler v. Kendrick*, 145 So. 551, 552 (1933). The willfulness, however, need not be an intent to violate a rule. The term "willfully," without more, indicates only that a person must have intended to do the act and serves to distinguish that conduct from accidental behavior or strict liability crimes. *Reliance Insurance Company v. Lazzara Oil Company*, 601 So.2d 1241 (Fla. 2d DCA 1992). As applied in this case, it need not be shown that LCI intended to violate the PSC rule, it is only necessary to show that the action of changing a subscriber's presubscribed interexchange carrier was done "willfully "

5 "Willfulness" is therefore used in the sense of being intentional, as distinguished from accidental. The question of intent is one of fact and is to be gathered from the circumstances surrounding the entire transaction. *Jersey Palm-Gross, Inc*

DISCOVERY

6. After receiving LCI's answer denying that it had "willfully" changed David Howe's presubscribed carrier, the Attorney General and the Citizens served our first set of requests for production of documents and first set of interrogatories to LCI on December 9, 1997. Much of this discovery was directed to the issue of whether LCI's actions were "willful." On January 8, 1998, LCI served its response and objections to this discovery.

INTERROGATORY NO. 2

7. The second interrogatory by the Attorney General and the Citizens asked the following: For the calendar years 1994, 1995, 1996, and for the first six months of 1997, please provide separately for Florida alone and the nation as a whole

(a) the number of complaints known to LCI where a customer alleged that the customer had been slammed by LCI, its distributors, sales representatives, or contractors

(b) the number of complaints known to LCI where a customer alleged that the customer had been slammed by your distributor American Communications Network, Inc., sales representatives associated American Communications Network, Inc., contractors associated with American Communications Network, Inc., or sub-contractors associated with American Communications Network, Inc

8. LCI objected to Interrogatory No. 2 to the extent that it asked for information for the nation as a whole, as opposed to information specific to LCI's operations in Florida, and refused to provide the nationwide information. Since LCI has denied that the slamming of David Howe was "willful" as opposed to "accidental," the information about slamming complaints for all of LCI's operations, whether in Florida or in other states, is necessary in order to show the knowledge that LCI had that its contractors were switching customers' presubscribed interexchange carriers without authority from those customers. We expect that this information will show a long history of complaints to LCI, providing knowledge that its practices and procedures were inadequate to verify whether customers were actually authorizing a change of carriers or not. Since LCI has put at issue whether its actions were "willful," it cannot be heard to complain about providing information showing its knowledge about complaints from customers showing that customers were being slammed regularly and in large numbers. The Commission should require LCI to answer Interrogatory No. 2 for the nation as a whole.

DOCUMENT REQUEST NO. 4

9. Document Request No. 4 asked the following: Please provide all documents in your possession, custody or control created on or after January 1, 1994, related to eliminating or reducing slamming of customers by LCI, its distributors, sales representatives, contractors, or sub-contractors.

10. LCI objected to the request to the extent that it asked for documents

outside LCI's activities related to Florida. As discussed previously, LCI has raised an issue about whether its actions were "willful," and willfulness need not be an intent to violate a rule. Instead, it goes to the company's knowledge that it was changing subscribers' presubscribed interexchange carriers without authorization. This request for documents related to the actions LCI considered to eliminate or reduce slamming. It may be, for example, that LCI considered a number of actions that would have reduced or eliminated slamming, but choose not to do so because of cost or other factors. Such documents go directly to the "willfulness" of LCI's actions in allowing processes and procedures that it knew would result in the slamming of customers. The Commission should require LCI to produce all such documents, whether related to Florida or related to its operations as a whole.

DOCUMENT REQUEST NOS. 5, 6, and 7

11. Document Request Nos. 5, 6, and 7 follow:

(5) Please provide all documents in your possession, custody or control discussing the cost or effectiveness of third party verification.

(6) Please provide all documents in your possession, custody or control discussing the possible use of third party verification.

(7) Please provide all work papers or other documents used to provide the estimates requested in interrogatories #3 and #4

12 In each instance, LCI objected in total to these requests for documents.

claiming that such information was not relevant to any issue in this case and was not designed to lead to the discovery of admissible evidence. These discovery requests are intended to seek information related to alternatives or possible courses of action that LCI could have taken to reduce or eliminate slamming. For example, if LCI could have conducted third party verification to reduce or eliminate slamming, but decided not to do so because of cost or other factors, this would show that LCI's action were "willful" by purposely using processes which they knew would result in the slamming of customers. The Commission should require LCI to produce each of the documents requested in these three requests for production of documents.

DOCUMENT REQUEST NOS. 8 & 9

13. Document requests 8 and 9 follow:

(8) Please provide the most recent report and tracking data identified in response to interrogatory 5.

(9) Please provide all documents in your possession custody or control related to Michael Chambers.

14. In each instance, LCI objected to the request to the extent that it sought information unrelated to LCI's Florida operations. For the same reasons as stated earlier, nationwide information will be relevant to show the willfulness of LCI's actions in this case. The response to document request no. 8 will show extent of knowledge by LCI to which its processes and procedures were resulting in the slamming of customers

repeatedly and in large volumes across the country. In the case of Michael Chambers (the contractor who slammed David Howe), this information will be specifically relevant to LCI's knowledge regarding the actions of Michael Chambers. For example, if LCI knew that Michael Chambers had slammed customers in other states before slamming Mr. Howe, this evidence would be highly relevant to LCI's willfulness in this case.

INTERROGATORIES NOS. 3 & 4

15. Interrogatories nos. 3 and 4 asked the following:

(3) Please provide your best estimate of the cost per sale to use third party verification to verify sales by distributors, sales representatives, contractors, or sub-contractors switching a customer's primary interexchange carrier to LCI.

(4) Please provide your best estimate of the cost per sale to have an employee of LCI verify sales to customers by distributors, sales representatives, contractors, and sub-contractors switching a customer's primary interexchange carrier to LCI.

16. In both instances, LCI objected in total to these requests, claiming the requests were not relevant to any issue before the Commission and were not designed to lead to the discovery of admissible evidence. The response to these interrogatories go to the willfulness of LCI's actions. If, for example, the company could have used third party verification or its own staff to verify PIC changes by customers but decided not to do so because of cost or other reasons, this information would be highly relevant to the willfulness of LCI's actions in this case which allowed a customer to be slammed. The Commission should require LCI to answer both of these interrogatories.

REQUEST FOR RELIEF

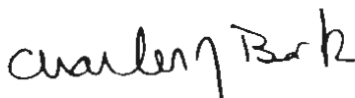
17 For the foregoing reasons, the Attorney General and the Citizens request the Commission to issue an order requiring LCI to fully answer Interrogatories 2 through 4 and to provide all of the document requested in the requests for production of documents nos. 4 through 9.

Respectfully submitted,

MICHAEL A. GROSS
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CERTIFICATE OF SERVICE
Docket No 971403-TI & 971487-TI

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U S

Mail or hand-delivery to the following parties on this 20th day of January, 1998

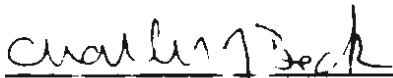
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