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**ORIGINAL**

RASHAD EL-AMIN  
PRESIDENT

KENT R. SPUMLER  
DIRECTOR

January 22, 1998

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



Re: PUBLIC COMMENT on Proposed Rules 25-4.110 and 25-4.118, F.A.C.

Dear Director of Appeals:

FLORIDA LEGAL SERVICES represents low-income Floridians. Our clients are harmed by the deceptive and unfair practice of improperly switching customers' telephone service, known as "slamming," and the unauthorized addition of charges to their phone bills, known as "cramming." 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.

Background

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 last 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) (state consumer protection laws are not so preempted). 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 Florida Public Service Commission's current "slamming" rule, Rule 25-4.118, F.A.C., mirrors the existing FCC rule, and, at best, has been erratically enforced. The 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 exchange companies (LECs) 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 authority 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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## Proposed rules

FLORIDA LEGAL SERVICES fully urges the Commission to adopt the proposed rules.

The proposed rules contain several measures specifically designed to deter "slamming" that provide customers with meaningful protections against the practice. In the proposed rules:

1. Section (12) of Rule 25-4.110, Customer Billing for Local Exchange Telecommunications Companies, is created to require LECs to notify customers that they may withhold consent to third party carrier changes. Section (12) reads:

(12) The customer must be notified on his first bill and annually thereafter that a PFC Freeze is available and may contact the provider to obtain FORM PSC/CAP 2 (XX/XX). A copy of FORM PSC/CAP 2 (XX/XX), which is incorporated into this rule by reference, may be obtained from the Commission's Division of Consumer Affairs. Existing customers must be notified by January 1, 1999, and annually thereafter that a PFC Freeze form is available and may contact the provider to obtain FORM PSC/CAP 2 (XX/XX).

2. Several changes, taken together, provide customers with an opportunity to refuse to ratify carrier changes made without their consent, and to withhold their consent to carrier switches for the future. Sections (11) and (12) of Rule 25-4.118, Local, Local Toll, or Toll Provider Selection, are created to read:

(11) During telemarketing and verification, the customer must be informed that a PFC Freeze is available.

(12) Upon completion of the verification process outlined in this section, the provider must send a letter notifying the customer that it will be providing [i]his service.

Section (13) of Rule 25-4.110, Customer Billing for Local Exchange Telecommunications Companies, is created to read:

(13) The customer must be given notice on the first or second page of his next bill in conspicuous bold face type when his provider of local, local toll, or toll service has changed.

and Section (8) of Rule 25-4.118, Local, Local Toll, or Toll Provider Selection, is amended to read:

(8) Charges for unauthorized provider changes and all charges billed on behalf of the unauthorized provider for the first 90 days or first three billing cycles, which ever is longer, shall be credited to the customer by the company responsible for the error within 45 days of notification.

3. Finally, Section (10) of Rule 25-4.110, Customer Billing for Local Exchange Telecommunications Companies, is created to provide the PSC, and customers, with recourse against the full range of deceptive practices that may be used as part of "slamming" during communications with customers. Section (10) reads:

(10) During telemarketing and verification, no misleading or deceptive references shall be made while soliciting for subscribers.

Under the proposed rules, the customer is given notification by the local exchange company in the first bill, and annually thereafter, that consent to future changes of carriers through third parties may be withheld. This is new and important. Customers are for the first time given an opportunity to express whether consent to third party carrier transfer should be inferred by the LEC. The proposed rules provide that LECs must now have a legally recognizable basis on which to initiate carrier switches requested by third parties.

The provider that is seeking the customer's business must notify the customer that ratification of a proposed transfer of carriers may be withheld, and must provide notice to the customer that the transfer of service has occurred. The customer is given an opportunity, the longer of 90 days or three billing periods, in which to withhold ratification. This ratification period is necessary because service may be switched without any customer contact at all, and because the notification rules may not be fully complied with. These provisions implement basic contract law, which requires actual or reasonable apparent authority for a contract to be valid. Also important, the new provisions provide carriers with the appropriate financial incentives to ensure that carrier changes are authorized. In fairness, a carrier who has cause to contest a customer's assertion that a change was unauthorized should be given an opportunity, if they do not already have one, to do so before the PSC, and, if they prevail, to have the charges credited back to the customer's account. Finally, the proposed rules extend the general law against deceptive practices (at last) to the solicitation of carrier changes. This is very long overdue.

#### Other related concerns

There are a number of concerns related to "slamming" and "cramming" that are not addressed by the proposed rules that FLORIDA LEGAL SERVICES believes should be addressed at the appropriate time, either in the current series of rule making, or at a later time. These concerns are:

1. Customers should be informed of their option to authorize third party carrier changes, or to decline to do so, when they sign up for local service, much like they are given a number of other choices at that time. This procedure brings the matter to the customer's direct attention and requires the customer to make a definite choice about the practice that the LEC, the customer, and competing providers can rely on in later transactions. Statements in bills about the availability of PIC freezes seem to us to be a weaker substitute, since most customers read simply the amount due on their bills, not the fine print.

In order to include this query in customers' applications for service from LECs, Rule 25-4.107, Information to Customers, should be amended. The amendment should read as follows:

**25-4.107 Information to Customers.**

(1) Each company shall provide such information and assistance as is reasonable to assist any customer or applicant in obtaining telephone service adequate to his communication needs. At the time of initial contact, each local exchange telecommunications company shall advise the person applying for or inquiring about residential or single line business service of the rate for the least expensive one party basic local exchange telephone service available to him unless he requests specific equipment or services. As part of the initial application for service, and thereafter upon customer request, each LEC shall provide the applicant or customer with information, drafted by or approved by the Commission, on customer authorization of third parties to initiate LP, LTP and IXC carrier change requests with the LEC; and shall permit the applicant or customer to designate the classes of carriers for which the LEC may not rely upon representations by others that the customer's authorization has been given. Existing customers' requests for changes in authorization shall be handled in conformance with Rule 25-4.118. Persons who became customers of a LEC prior to the effective date of these requirements shall receive from the LEC no later than January 1, 1999, as part of a billing mailing, a notice, drafted by or approved by the Commission, of their right to inform the LEC of classes of carriers for which representations by others of the customer's authorization for carrier change requests may not be accepted by the LEC, and that contains a reply form to the LEC on which customer may designate any such limitations in authority. Each company shall inform all persons applying for residential service of the availability of the company's installment plan for the payment of service connection charges. The information will be provided at the time of initial contact and shall include, but not be limited to, information on rate amounts and installment time periods and procedures. Upon customer request, the person shall also be given an 800 number to call to receive information on the "No Sales Solicitation" list offered through the Department of Agriculture and Consumer Services, Division of Consumer Services. In any discussion of enhanced or optional services, each service shall be identified specifically, and the price of each service shall be given. Such person shall also be informed of the availability of and rates for local measured service, if offered in his exchange. Local exchange telecommunications companies shall submit copies of the information provided to customer service representatives to the Division of Communications for prior approval.

2. Provider changes should be made reasonably verifiable, and the contracts' key terms should be disclosed to customers. The verification requirements in the proposed rules make improvements over existing procedures, but still may result in many proffered subscription agreements that are unprovable at law. The proposed rules greatly improve the written means of initiating provider changes by requiring customer signatures, §25-4.118(2)(d) (3) and (5), although disclosure of terms is required only under subsection (2)(d). Written and oral proofs of carrier changes are required to be held by providers for a period of one year by proposed new

subsection (6). Yet the oral records of proving the contracts will be available only to the providers, and there do not appear to be adequate safeguards in place to assure that the oral records will be reliable. Until essentially "electronic signatures" can be made reliable, and available to customers as well as providers, the PSC should not permit their continued use as proofs of subscription agreements.

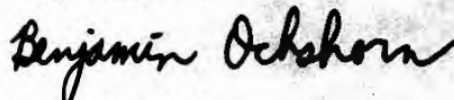
The proposed rules also do not contain uniform requirements that telecommunications carriers disclose the key terms of the contracts that they are attempting to induce customers to enter into. Such terms include billing rates and procedures, late payment procedures, terminations of service, and other conditions of service. The lack of disclosure of key terms will lead to customers being uninformed, deceived, and taken advantage of. The terms of the subscription agreements should be reduced to writing and provided to customers no later than their first bill, within the three-bill period for refusing to ratify the new service, so that customers are given an opportunity to know the terms of the service that they are receiving.

An even better procedure, which we believe that the PSC should adopt, is to require that such contract offers be reduced to writing and approved by customers prior to their use of new providers, in order for the contracts to be enforceable and their terms legally binding. Florida Statutes §501.059(5)(b)(1) provides that for telemarketing contracts made in Florida, as a general rule, "A contract made pursuant to a telephonic sales call shall be reduced to writing and signed by the consumer." FLORIDA LEGAL SERVICES believes that, at this time, the disclosure and verification requirements of §501.059(5)(b)(1) should be applied to telemarketing conducted by or on behalf of telecommunications carriers. Rationales that have been offered for not extending this general rule, such as customer expectations about the use of telephonic communications to switch carriers, industry practices, or the supposed unreliability of written documents, have been considered, but they are belied by the general Florida law on contracts, and by the extent and depth of customers' concerns about "slamming." Basic contract law requires that there be reasonably provable evidence of assent to a contract, and that the terms of a contract be disclosed and assented to in order to be legally binding.

3. The inclusion of a new provision in the proposed rules prohibiting misleading or deceptive references while soliciting for subscribers is an important first step, and the proposed rules also specifically proscribes, at §25-4.118(4), sending inducements to subscribe with letters of agency, but the Commission really does need to proscribe unfair and deceptive practices generally for utilities under its jurisdiction. All other state regulatory agencies have as part of their duties the enforcement of such a proscription. Because of this, regardless of how telecommunications companies and other utilities may be treated in other forums, Florida residents expect the PSC to exercise this same authority as part of its oversight of utilities. In telecommunications, with the effective removal of rate regulation and the proliferation of competing companies all seeking subscriber business, it is important to enable the PSC to be able to address unfair and deceptive practices when they occur, without having to undergo a rule making process each time abuses occur in a new area.

**FLORIDA LEGAL SERVICES** would like to thank the Commission for its fine work so far in addressing the important consumer issues of "slamming" and "cramming," and to particularly thank the PSC staff for its drafting of the proposed rules. We look forward to these proposed rules being adopted; our other related concerns being addressed; and continuing to work with the PSC in instituting appropriate consumer protection regulation of utilities that do business in Florida.

Respectfully submitted,



**Benjamin Ochshorn**  
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