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January 27, 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. 971492-TI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the First Motion to Compel Against AT&T by the Attorney General and the Citizens of Florida. 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.

Sincerely,

Charles J. Beck  
Deputy Public Counsel

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- DAP 1 \_\_\_\_\_
- DMU \_\_\_\_\_
- DTR \_\_\_\_\_
- EAG \_\_\_\_\_ CJB:bsr
- LEG 2 \_\_\_\_\_ Enclosures
- ENH \_\_\_\_\_
- OPD \_\_\_\_\_
- OCF \_\_\_\_\_
- OSD 1 \_\_\_\_\_
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

DOCUMENT NUMBER-DATE

01469 JAN 27 98

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause )  
proceedings against AT&T )  
Communications of the Southern )  
States, Inc. and d/b/a Connect )  
N' Save for violation of Rule )  
25-4.118, F.A.C., Interexchange )  
Carrier Selection. )  
/

Docket No. 971492-TI  
Date Filed: January 27, 1998

**FIRST MOTION TO COMPEL AGAINST AT&T  
BY THE ATTORNEY GENERAL AND THE CITIZENS OF FLORIDA**

Robert A. Butterworth, Attorney General ("Attorney General"), and the Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, move the Florida Public Service Commission to issue an order requiring AT&T Communications of the Southern States, Inc. ("AT&T") to fully answer the interrogatories, and provide all requested documents, as more fully described in this motion.

**BACKGROUND**

1. On October 31, 1997, the Attorney General and the Citizens filed a complaint against AT&T alleging that AT&T had violated Rule 25-4.118, Florida Administrative Code, by switching the primary interexchange carrier of Mr. Robert Flint without his authorization. The complaint asked the Commission to impose a penalty of \$25,000 on AT&T pursuant to Section 364.285(1), Florida Statutes (1995) for this violation.

DOCUMENT NUMBER-DATE  
01469 JAN 27 88  
FPSC-RECORDS/REPORTING

2. AT&T filed its answer on November 24, 1997, denying that Mr. Flint's primary interexchange carrier was changed without his authorization. AT&T further alleged that it should not be penalized for a violation of Rule 25-4.118(1), F.A.C.

3. On December 16, 1997, the Attorney General and Citizens served our first set of requests for production of documents and first set of interrogatories to AT&T. AT&T filed responses and objections to these discovery requests on January 15, 1998.

**PENALTIES FOR VIOLATION OF COMMISSION Rule 25-4.118(1)**

4. The penalties for violation of Commission Rule 25-4.118(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 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. By filing a denial to the complaint, AT&T has put at issue whether it violated the Commission's rule "willfully."

5. The Florida Supreme has defined the term "wilful" as follows:

"A thing is willfully done when it proceeds from 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 wilfully, it may be restricted to such acts as are done with an unlawful intent."

*Jersey Palm-Gross, Inc. v. Pater*, 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 AT&T intended to violate the Commission's rule; it is only necessary to show that the action of changing Mr. Flint's presubscribed interexchange carrier without authority was done "willfully."

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

### **DISCOVERY REQUESTS**

7. After receiving AT&T's answer denying that it had changed Mr. Flint's presubscribed interexchange carrier without authority and denying that a penalty should be imposed, the Attorney General and the Citizens served our first set of requests for

production of documents and first set of interrogatories to AT&T. Much of this discovery was directed to the issue of whether AT&T's actions were "willful."

### **AT&T'S OBJECTIONS**

8. AT&T's response and objections to the first request for production of documents sets forth a litany of objections almost verbatim to those it raised in docket no. 970882-TI. Those same objections were denied in Commission Order No. PSC-97-1563-PCO-TI issued December 12, 1997.<sup>1</sup> Since AT&T continues to raise those objections, those objections are addressed again in the following pages.

9. AT&T objects to the definitions of "you," "your," "company," and "AT&T" used in the request for production of documents. Definition number 2 of the request for production of documents stated by the terms "you" and "your" meant AT&T Communications of the Southern States, Inc., and AT&T Corporation, collectively, together with its officers, employees, consultants, agents, representatives, attorneys (unless privileged), and any other person or entity acting on behalf of AT&T. In this proceeding, AT&T Communications of the Southern States, Inc. and AT&T Corporation "acted as one" for the purpose of changing Mr. Flint's primary interexchange carrier. In fact, the actual persons involved in these actions, according to AT&T, were employees of contractors whose contract was with AT&T Corporation -- not with AT&T Communications of the

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<sup>1</sup>Motions for reconsideration of that order were filed by some parties, but have since been withdrawn.

Southern States. Thus, it was AT&T Corporation that was acting on the behalf of AT&T Communications of the Southern States, Inc. in procuring customers for AT&T Communications of the Southern States. Further, in response to a notice of deposition of the corporation AT&T Communications of the Southern States, Inc., the company produced an employee of AT&T Corporation, not AT&T Communications of the Southern States, Inc. From all available evidence, it appears that AT&T Corporation is fully in charge of procuring, and is responsible for, the customers to whom AT&T Communications of the Southern States provides long distance service in Florida.

10. Rule 1.350, Florida Rules of Civil Procedure (adopted by Commission Rule) allows requests for documents in the possession, custody or control of the party to whom the request is directed. Persons or entities acting on behalf of AT&T Communications of the Southern States, Inc., are within the "control" of the company. This includes AT&T Corporation. In addition, when two companies "act as one," discovery is permissible. *Medivision of East Broward County, Inc. vs. Department of Health and Rehabilitative Services*, 488 So.2d 886 (Fla. 1st DCA 1986). See also *Michelin Tire Corporation vs. Susan Ann Roose*, 531 So.2d 361 (Fla. 4th DCA 1988). AT&T Communications of the Southern States, Inc., must therefore produce document by persons and entities acting on its behalf, and this includes AT&T Corporation. AT&T 's objections should be denied.

11. AT&T also objected both in its response to the requests for production of documents and its response to the interrogatories that it would not provide any information

except with regard to regulated Florida intrastate operations. Information from areas other than Florida intrastate operations is highly relevant to the question of whether AT&T's actions were "willful." For example, suppose that AT&T's nationwide response shows that it receives ten of thousands slamming complaints per year but has chosen to ignore available practices which would reduce or eliminate slamming. Such information would be highly prohibitive of the fact that it is "knowingly" or "willfully" allowing the change of subscribers' interexchange carriers without authority from subscribers. We expect that the nationwide information will show a long history of complaints to AT&T, providing knowledge that its practices and procedures were inadequate to verify whether customers were actually authorizing a change of carriers or not. AT&T's denial of any "willful" unauthorized changes to customers' primary interexchange carrier puts at issue its knowledge about the adequacy of its procedures and whether it purposefully decided to turn a blind eye at the problem. AT&T's objection to providing nationwide information in both its response to interrogatories and in its response to the requests for production of documents should be denied.

12. AT&T objected to each and every request and instruction to the extent that such requests or instructions called for information exempt from discovery by virtue of various privileges. AT&T identified no such documents and gave no specific examples of where such privileges might apply. This objection should be denied unless and until AT&T can identify specific documents to which it applies. Once AT&T specifically identifies such documents, the Attorney General and the Citizens will then decide whether to seek an *in*

*camera* inspection of those documents to determine the extent and validity of any claimed privilege.

13. AT&T also objected to every request insofar as the request was vague, ambiguous, voluminous, overly broad, imprecise, or utilized terms that are subject to multiple interpretations but not properly defined or explained. However, AT&T provided no example whatsoever of any case where a request for documents fell within that objection. This type of boilerplate objection is improper because AT&T does not identify any request to which the objection relates or show how any request comes within the parameters of the objection. The objection should therefor be denied.

14. AT&T objected to every request insofar as the request was not reasonably calculated to lead to the discovery of admissible evidence and not relevant to the subject matter of this action. However, AT&T provided no example whatsoever of where this objection applied. Since AT&T could provide no specific example of where this objection might apply, the objection should be denied.

15. AT&T objected to the instructions, definitions or requests insofar as they seek to impose obligations on AT&T which exceed the requirements of the Florida Rules of Civil Procedure or Florida law. Like other objections, this boilerplate objection provided no specific example or any instance where this objection might apply. Since AT&T was



unable to provide any specific example or describe where it might apply, the objection should be denied.

16. AT&T further objected to providing information to the extent that such information is already in the public record before the Florida Public Service Commission. The rules of discovery do not provide such an exemption from discovery. This invalid objection must be denied.

17. AT&T objected to each and every request, general instruction, or definition insofar it was unduly burdensome, expensive, oppressive, or excessively time consuming to comply with as written. Like many of AT&T's objections, AT&T provides no example of where this objection might apply. Since AT&T was unable to identify any instance where this would apply, the objection should be denied.

18. AT&T objected to each and every request to the extent that the information constituted trade secrets. With respect to its claim of privilege, AT&T must identify the document or documents it claims to be privileged, and at that point the Attorney General and the Citizens will decide whether to seek an *in camera* inspection of the documents to determine the validity or extent of the privilege. AT&T's objections should be denied.

19. In response to request for production of documents no. 3, AT&T again raised its objection of providing documents only to the extent they related to regulated Florida

intrastate operations. This request related to documents reflecting communications between AT&T and its contractors involved in this case. It is absolutely necessary to obtain all such documents between AT&T and its contractors regarding slamming because such documents will show the willfulness of AT&T's actions. For example, if AT&T knew that its contractors were repeatedly slamming customers and did not take actions to correct such problems, this would show AT&T's willfulness in allowing customers to be slammed. This objection, like the general objection to providing nationwide information, should be rejected by the Commission.

20. Document request no. 7 requested AT&T to provide all documents discussing or identifying discipline of employees of AT&T, as well as employees of the contractors, related to slamming. AT&T objected to providing the names of employees of AT&T or contractors in relation to this request. AT&T must not be allowed to withhold documents because of this objection. The disciplining of employees of AT&T and its contractors again goes to the knowledge by AT&T that its practices and procedures were allowing customers to be slammed. The names of such employees may lead to the discovery of admissible evidence, because such employees may have valuable evidence regarding the knowledge of AT&T concerning slamming. AT&T's objection should be denied.

### **REQUEST FOR RELIEF**

21. The Attorney General and the Citizens respectfully request the Commission to order AT&T to produce all of the documents requested in the first set of requests for


production of documents to AT&T filed on December 16, 1997. In addition, we request the Commission to order AT&T to fully answer the first set of interrogatories to AT&T filed on December 16, 1997, without limiting their responses to Florida intrastate operations alone.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Docket No. 971492-TI

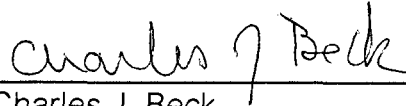
I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail  
or hand-delivery to the following parties on this 27th day of January, 1998.

Michael A. Gross  
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