ORIGINAL

AT&T

Marsha E. Rule
Attorney

Suite 700
101 N. Monroe St.
Tallahassee, FL 32301
904 425-6365
FAX: 904 425-6361

February 5, 1998

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

Dear Mrs. Bayo:

Re: **Docket No. 971492-TI**

You will find enclosed an original and fifteen (15) copies of AT&T's Request for Oral Argument for filing in the above-referenced docket.

You will also find enclosed fifteen (15) copies of AT&T's Response in Opposition to First Motion to Compel filed by the Attorney General and Citizens of Florida and Request for Protective Order which was filed yesterday without the referenced attachment.

Copies of the foregoing are being served on the parties of record in accordance with the attached certificate of service.

Yours truly,

Marsha E. Rule

ACK
AFA
APP
CAF 1
CMU 2
CTR
EAG
LEG Pellegrini
LIN
OPC
RCH
SEC 1
WAS
OTH

mr
Enclosures
cc: Parties of Record

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against AT&T 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
	)	Filed: February 5, 1998

AT&T's REQUEST FOR ORAL ARGUMENT

Comes now AT&T Communications of the Southern States, Inc., (AT&T) and files this Request for Oral Argument of its Response in Opposition to the First Motion to Compel Against AT&T by the Attorney General and the Citizens of Florida, pursuant to Rule 25.22.058, F.A.C. AT&T further asks that the Commission accept this Request, which is filed one day late. For cause, AT&T shows as follows:

1. In responding to discovery requests from Public Counsel in this docket, AT&T objected to providing information not relating to its Florida regulated intrastate operations. In its Motion to Compel such information, Public Counsel raises arguments with regard to the legal standard to be used in determining whether AT&T acted "willfully" in connection with alleged violations of Rule 25-4.118, F.A.C., on the grounds that nationwide slamming information is relevant as to this issue. In particular, Public Counsel argues that experience with slamming complaints in other states is could show that AT&T "has chosen to ignore available practices which would reduce or eliminate slamming". AT&T responded that such information has no possible relevance to a proceeding designed to determine whether it complied with existing Commission rules.

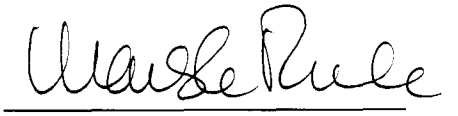
2. Additionally, AT&T has objected to production of information that is privileged attorney-client communication and attorney work product, and has further objected to production of names of individuals who may have been disciplined in connection with alleged unauthorized conversions. AT&T believes the legal implications of such discovery requests should be fully explored by the Commission before it orders parties to produce such information, particularly when doing so may subject AT&T to litigation.

3. The legal issues and arguments raised by the parties are complex and the implications of the Commission's decision go beyond the parties' discovery dispute. In fact, the Commission's decision regarding this discovery issue could influence or determine the legal standard it will apply in deciding AT&T should be penalized for alleged rule violations, as well as the scope of this show cause proceeding. Oral argument will ensure that the Commission has a full understanding of the significant and complex issues necessary to reach a reasoned decision in this case.

4. AT&T further requests that the Commission accept this Request, which inadvertently is filed one day late. AT&T has consulted with the Office of the Public Counsel, and is authorized to represent that there is no objection to such late filing. Further, AT&T notes that LCI International Telecom Corp. has filed a Motion for Oral Argument in Docket No. 971487-TI, based on a similar discovery dispute. AT&T asks that the Commission hear oral argument on both discovery issues at the same time.

WHEREFORE, AT&T respectfully requests the Commission to grant this Request and set the issue for oral argument.

Respectfully submitted this 5th day of February, 1998.



Marsha Rule
101 N. Monroe St.
Suite 700
Tallahassee, FL 32301
(850) 425-6364
(850) 425-6361 (fax)

ATTORNEY FOR AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. mail this 5th day February, 1998, to:

Charles J. Beck
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee FL 32399-1400

Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
PL-101, The Capitol
Tallahassee, FL 32399-1050

John Bowman
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee FL 32399-0850

Marsha E. Rule

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against AT&T 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
	)	Filed: February 4, 1998

AT&T's RESPONSE IN OPPOSITION
TO FIRST MOTION TO COMPEL
FILED BY THE ATTORNEY GENERAL AND CITIZENS OF FLORIDA
AND
REQUEST FOR PROTECTIVE ORDER

Comes now AT&T Communications of the Southern States, Inc., (AT&T) and files this Response in Opposition to the First Motion to Compel Against AT&T by the Attorney General and the Citizens of Florida. For cause, AT&T shows as follows:

1. On December 16, 1997, the Office of the Public Counsel (OPC), on behalf of the Attorney General (AG) and Citizens of Florida, served upon AT&T its First Set of Requests for Production of Documents (Nos. 1-13) and First Set of Interrogatories in this docket.

2. AT&T responded to such interrogatories and document requests, and in connection with such responses, objected to certain instructions, definitions, and specific interrogatories or document requests. Public Counsel's Motion to Compel is based those objections. AT&T will respond to each ground for the Motion to Compel.

3. Definitions of "you", "your", "company" and "AT&T" and instruction in interrogatories and document requests that "unless otherwise stated, all document requests relate to your experience nationwide with slamming – not just in Florida":

AT&T has objected to Public Counsel's attempt to expand the scope of this proceeding far beyond AT&T's regulated Florida intrastate operations by treating AT&T Communications of the Southern States, Inc. and AT&T Corporation as one and the same. AT&T Communications of the Southern States, Inc., is the carrier certificated and regulated by the Florida Public Service Commission. Attempts to reach farther than the regulated Florida operations carried out pursuant to such certification are simply beyond the scope of the Commission's jurisdiction. By this objection, however, AT&T does not mean to suggest that the Commission or Public Counsel may not inquire into those policies, practices and procedures of AT&T Corporation that dictate or are directly connected with the regulated operations; indeed, AT&T has responded to interrogatories and produced voluminous documentation from AT&T Corporation. Nor has AT&T objected to producing documents or information obtained from entities acting on its behalf in connection regulated Florida operations, but has instead requested and produced such documents and information. Rather, AT&T objects to responding to interrogatories and producing documents that bear no relationship to Florida regulated intrastate operations. Such material is neither relevant nor material, is not reasonably calculated to lead to the discovery of admissible evidence, and further would be burdensome to develop.

4. Public Counsel argues that information from other jurisdictions is probative as to whether AT&T acted "knowingly" or "willfully" in processing certain PIC changes. In response, AT&T adopts and incorporates herein by reference the response of LCI International Telecom Corp. ("LCI") to the First Motion to Compel by the Attorney General and Citizens filed on February 4, 1998 in Docket No. 971487-TI, attached

hereto. As shown therein, Public Counsel's interpretation and application of this terms is not only erroneous and overreaching, but the information sought is irrelevant. In the Motion to Compel, Public Counsel argues nationwide slamming information could show that AT&T "hs chosen to ignore available practices which would reduce or eliminate slamming" and that "such information would be highly probative" with regard to whether AT&T acted "knowingly" or "willfully". The possible existence of such "available practices" has no relevance whatsoever to a proceeding designed to determine whether AT&T complied with the Commission's existing Rule 25-4.118, F.A.C. This rule does not require companies to pursue all possible means of reducing slamming complaints; rather, it specifies that a company must take one of four listed actions in order to proceed with a PIC change. AT&T's failure to take steps not required by rule cannot possibly prove or in any way be indicative of a rule violation.

5. Information protected by privilege:

AT&T objected to production of documents and interrogatories to the extent they call for privileged information. The undersigned attorney attests that the only documents and information withheld by virtue of this objection are exempt pursuant to the attorney-client privilege or constitute attorney work product. AT&T has not identified such documents and information, and submits that the Commission has never required attorneys to itemize their correspondence with their clients nor to identify their work product. Should the undersigned identify any other documents or information that it believes is exempt from discovery pursuant to any other privilege, it will identify such documents or information as requested.

6. With regard to the allegations and argument in paragraphs 13, 14, 15, 16, 17, 18, and 19 of Public Counsel's motion, AT&T has withheld no documents or information pursuant to these objections (except insofar as such documents and information relate to non-jurisdictional operations) and therefore believes Public Counsel's motion to be moot with regard to these issues.

7. Documents discussing or identifying discipline of employees of AT&T and contractors:

AT&T has produced such documents, but has redacted the names of any individuals who may have been the subject of planned or actual discipline. Such information is likely to subject AT&T to litigation regarding invasion of privacy, potential defamation actions, and possible claims under various collective bargaining agreements. It is unduly burdensome to require AT&T to subject itself to this liability, particularly when the issue is whether AT&T has complied with the Commission's slamming rules, not whether it disciplined particular employees.

WHEREFORE, AT&T respectfully requests the Commission to deny Public Counsel's Motion to Compel and enter a protective order ruling that AT&T need not respond to the document requests and interrogatories as outlined herein.

Respectfully submitted this 4th day of February, 1998.

Marsha Rule
101 N. Monroe St.
Suite 700
Tallahassee, FL 32301
(850) 425-6364
(850) 425-6361 (fax)

ATTORNEY FOR AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. mail this 2nd day February, 1998, to:

Charles J. Beck
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee FL 32399-1400

Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
PL-101, The Capitol
Tallahassee, FL 32399-1050

John Bowman
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee FL 32399-0850

Marsha E. Rule

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceeding against LCI International Telecom Corp for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection.	)	Docket No. 971487-TI
	)	Filed: February 4, 1998

LCI's RESPONSE TO THE FIRST MOTION TO COMPEL BY THE ATTORNEY GENERAL AND THE CITIZENS

Pursuant to Rule 25-22.034, Florida Administrative Code, LCI International Telecom Corp ("LCI"), through its undersigned counsel, hereby responds to the First Motion to Compel filed by the Attorney General ("AG") and the Office of Public Counsel ("OPC"). LCI requests the Commission to deny the motion and enter an order ruling that OPC and AG are not entitled to certain discovery requests that are the subject of the Motion to Compel. In support, LCI states as follows:

BACKGROUND

1. This docket was initiated by a complaint filed by OPC and AG against LCI on October 22, 1997. Based upon statements made by Mr. David Howe during one of the rule development workshops, OPC and AG alleged in the Complaint that LCI changed Mr. Howe's PIC to LCI without authorization from Mr. Howe, and asked the Commission to impose a fine of $25,000 on LCI for violation of Rule 25-4.118, Florida Administrative Code. In its Answer, LCI acknowledged that Mr. Howe had not authorized the PIC change, but denied that LCI had willfully violated Rule 25-4.118. LCI explained that LCI's action was based on a letter of authorization ("LOA") bearing Mr. Howe's signature that LCI received from an independent contractor. LCI had

every reason to believe the LOA was valid at the time it processed the PIC change. LCI did not know that the independent contractor had forged Mr. Howe's name on the LOA, thereby exceeding the scope of authority conferred on him by LCI, and violating the terms of the distributor's contract with LCI as well as LCI's express policy regarding unauthorized changes of carriers.

2. On December 9, 1997, OPC and AG served their Request for Production of Documents and First Set of Interrogatories on LCI. LCI provided answers and documents responsive to certain of the discovery requests, and objected to others. The requests to which LCI objected included requests for information pertaining to complaints in jurisdictions other than Florida, as well as information relating to the cost of third-party verification. The primary basis for LCI's objections is that the requested information is not relevant to any issue pending before the Commission; nor are the requests reasonably calculated to lead to the discovery of admissible evidence.

3. On January 21, OPC and AG filed the Motion to Compel.

WITHDRAWAL OF OBJECTION TO DOCUMENT REQUEST NOS. 8 AND 9 AND MOOTING OF INTERROGATORY NO. 2

4. In Document Request No. 8, OPC and AG asked LCI to provide the most recent tracking report and tracking data identified in response to Interrogatory No. 5. The copy of the report that LCI provided to OPC/AG was redacted to show only Florida-specific information. In their motion, OPC/AG seek the entire report. LCI has decided to provide a copy of the unredacted report. (Like the redacted report, this document will be subject to the confidentiality mechanism of Rule 25-22.006, Florida

Administrative Code, which LCI will invoke with an appropriate request for confidential classification and temporary protective order). In Interrogatory No. 2, OPC/AG asked LCI to provide the number of allegations of unauthorized changes LCI has received nationwide. To the extent the information requested in Interrogatory No. 2 exists, it is contained in the report which LCI has decided to provide to OPC and AG. Therefore, OPC's Motion to Compel an answer to Interrogatory No. 2 will be mooted by LCI's decision to provide the report. In Document Request No. 9, OPC/AG asked for all documents relating to Michael Chambers, the independent contractor responsible for the change of Mr. Howe's service to LCI. LCI withheld several LOAs that do not relate to Florida. However, LCI has decided to withdraw its objection, and provide the LOAs to OPC/AG under the existing mechanism for guarding confidentiality of certain discovery documents.

5. LCI emphasizes that, in determining to withdraw its objection to OPC/AG's request to see the unredacted report of complaints of unauthorized PIC changes in all jurisdictions, LCI does not accede to -- and in fact disputes -- the overreaching and untenable interpretation of the scope of the Commission's authority to levy fines contained in the Motion to Compel, which OPC and AG offered as a rationale in support of the motion. LCI responds to that proffered interpretation below.

GENERAL RESPONSE

6. A patently erroneous construction of Section 364.285, Florida Statutes, pervades the Motion to Compel. While LCI submits that, for reasons shown below, the disposition of the Motion to Compel does not turn on OPC/AG's overreaching

interpretation, the motion is so permeated with the argument that LCI feels compelled to respond to it.

7. Section 364.285, Florida Statutes, is the source of the Commission's power to impose a penalty for violation of its rules or orders. It states, in pertinent 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..."

8. At the outset of their motion, OPC and AG fairly characterize the statute when they state:

> "Thus, in order to impose a penalty, the Commission must find that a company 'refused to comply with' a lawful rule or that a company 'willfully' violated a rule."
>
> Motion to Compel, page 3

9. OPC and AG next provide an appropriate definition of "willful" when they quote from Jersey Palm-Gross, Inc. v. Paper, 658 So.2d 531 (Fla. 1995):

> "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., at page 534

10. However, having acknowledged the strictures and limitations of the statute, OPC and AG immediately launch into an attempt to escape them:

> "The willfulness, however, need not be an intent to violate a rule... In this case, it need not be shown that LCI intended to violate the PSC's rules; it is only necessary to show that the action of changing a subscriber's presubscribed interexchange carrier was done "willfully."
>
> Motion to Compel at page 3.

11. When the Legislature refers in a statute to the willful violation of a rule, order, or statute, one would think that the Legislature means a willful violation of a rule, order, or statute. Yet, OPC and AG claim to have divined a very different intent. In the space of seven lines on one page, OPC and AG formulate the conclusion that Section 364.285, Florida Statutes, means exactly the opposite of what the Legislature says it means! In order to reach their conclusion, OPC and AG must ignore the overriding principles of statutory construction, pertinent case law, and common sense.

PRINCIPLES OF STATUTORY CONSTRUCTION

12. The paramount principle of statutory construction is that where the meaning of language is plain, one must give effect to that plain meaning:

> "[O]ne of the most basic rules of statutory construction, which is peculiarly applicable here ... [is] that a legislative word ... must be given its ordinary and commonly accepted meaning, as it is used in the particular statutory context."

Capital National Financial Corporation v. Department of Insurance and Treasurer, 690 So.2d 1335 (Fla. App. 3 Dist. 1997), quoting Hancock Adver., Inc. v. Department of Transportation, 549 So.2d 1086, 1088 (Fla. 3d DCA 1989).

In this case, the Legislature could not have been more clear. As OPC/Ag's own case citation points out, the plain meaning of the word "willful" is "intentional." In the statute, the word "willfully" indisputably modifies "violate," and the subjects of the violation that can be the subject of a fine are specified to be lawful rules, orders, or provisions of Chapter 364. To assert that there need be no intent to violate Rule 25-4.118 to warrant the imposition of a fine is to fly impermissibly in the face of the plain meaning of the clear language chosen by the Legislature.

13. A second fundamental principle of statutory construction that applies to this situation, and that was ignored by OPC/AG, is that provisions imposing penalties are to be construed narrowly:

> "When a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of a strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes."
>
> City of Miami Beach v. Galbut, 626 So.2d 192 (Fla. 1993)

Or, said differently:

> "Now the Legislature has command of its own language when it enacts laws, and highly regulatory and penal laws ought not to be extended by construction."
>
> Brown v. Watson, 156 So. 327 (Fla. 1934) at p. 330; see also Florida Industrial Commission v. Manpower, 91 So.2d 197 (Fla., 1953)

OPC and AG instead impermissibly attempt to expand the scope of the penal provisions through their argument. Further, the degree of the extension seen in the argument they bring to bear here is only the tip of the impermissible iceberg. There

would be no logical way to confine OPC/AG's expansive approach to Section 364.285, to the subject of unauthorized changes. The penal provisions of Section 364.285, Florida Statutes relate -- not only to unauthorized changes of carriers -- but to all lawful rules and orders of the Commission and all of Chapter 364! Under the approach of OPC and AG, with respect to each rule, each order, each subsection of the chapter, any unintended omission -- no matter how innocuous -- would be as actionable as the most grievous, deliberate and intentional flaunting of authority. If the Legislature had intended this expansive meaning, it simply would not have included the word "willfully, because there would be no need to distinguish between those violations that are subject to a penalty and those that are not.

ANALOGOUS CASE LAW SUPPORTS THE VIEW THAT THE LEGISLATURE INTENDED TO INCLUDE ONLY INTENTIONAL VIOLATIONS WITHIN THE SCOPE OF SECTION 364.285, FLORIDA STATUTES

The case cited by OPC and AG does not support their proposition.

In the Motion to Compel, OPC and AG claim the case of Reliance Insurance Company v. Lazzara Oil Company, 601 So.2d 1241 (Fla. 2d DCA 1992), bears on this case. OPC and AG are comparing apples with oranges in more ways than one.

The Reliance case involved Section 934.03, Florida Statutes, which states:

> "[A]ny person who ... [w]illfully intercepts ... any wire or oral communication ... shall be guilty of a felony of the third degree ... [unless] all of the parties to the communication have given prior consent to such interception."

In Reliance, an insured had been accused of the criminal act of intercepting and recording telephone conversations without the knowledge of the other party, who filed

a suit for damages. The insured filed a declaratory judgment action to establish the scope of its coverage under the insured's general liability insurance policy. The policy covered "personal injury," but excluded injury arising out of the willful violation of penal statutes. The insured argued that, because there had been no intent to cause harm or to violate the law, its interception of calls was not "willful" within the meaning of Section 934.03, Florida Statutes. The lower court agreed and found coverage. On appeal, the reviewing court reversed, and held that coverage was excluded. However, the case does not support OPC/AG's argument.

First, the application of "willful" depends on the context in which it is used. United States v. Sanchez-Corcino, 85 F.3d 549 (11th Cir. 1996). In the Reliance case, the context was one of a special area of criminal jurisprudence. Specifically, the case presented an example of "general intent crimes," to which the law ascribes the rather unique assumption that the intent to do the act is equivalent to the intent to cause the harm which grows out of the act[1]. The court was careful to note that it was construing "willful" in ... "the criminal law context in which it was used." There is no such context in this case.

OPC/AG's "reliance" on the Reliance case is flawed for a second reason. In Reliance, the court stated:

> "in general intent statutes words such as 'willfully' or 'intentionally,' without more, indicate only that the person must have intended to do the act and serve to distinguish

[1] Even in the criminal context, aside from such "general intent" crimes, willful" is frequently defined to mean the accused must know of the requirement and deliberately violate it. See United States v. Sanchez-Corcino, supra.

that conduct from accidental (noncriminal) behavior or strict liability crimes."

Reliance, at p. 1242 (emphasis supplied)

This is the language upon which OPC and AG seized. Again, this case does not involve a "general intent crime." However, perhaps equally important is that OPC and AG overlooked the fundamental difference in the way Chapter 934, Florida Statutes, (the statute involved in Reliance) and Section 364.285, Florida Statutes, are structured. In Reliance, the statute penalized a willful interception ... i.e., specific conduct. The court said one need only intend to "do the act," i.e., intercept a telephone call, to break the law. On the other hand, Section 364.285 governs the willful violation of (or refusal to comply with) a regulatory requirement (rule, order, or statute). To transpose the quoted observation in Reliance to this case without distortion, it is necessary to recognize that in this case the "act" that must be done "intentionally" is the violation of a rule, order, or statute! Adjusted to account for the difference in statutory structure, the counterpart statement of the Reliance principle in this situation would be: "One need only intentionally violate a rule, order or statute to break the law." When one substitutes "willful violation of rule" for "willful interception," which must be done to have a logically consistent comparison, it is clear that OPC/AG receive no aid from Reliance.

Pertinent case law supports the view that a "willful" violation is one that is deliberate and intentional. There are many examples of cases that construe the meaning of "willful" violations under circumstances that are far more analogous to those of this case than Reliance, supra. Consistently, in such cases, courts have

construed the term "willful" in statutes imposing fines for willful violations in a manner that recognizes the "deliberate" and "intentional" connotation of the word. For instance, the case of County Canvassing Board, etc., v. Lester, 118 So. 201 (Fla. 1928), involved a statute providing that any candidate "refusing or willfully failing" to obey certain provisions would not be allowed to have his name printed in the official ballot. The issue in the case was whether a particular failure was "willful" within the meaning of the statute. The court stated:

> "In construing statutes of a penal or quasi penal nature, however, a clear distinction is recognized between a mere 'failure' and a willful failure.' As used in such statutes, a 'willful failure' to obey is almost universally held to mean something more than a mere inattentive, inert, or passive omission. 'Willful,' when used in such statutes, denotes some element of design, intention, or deliberation, a failure resulting from an exercise of the will, or a purpose to fail. A 'willful failure' denotes a conscious purpose to disobey, a culpable omission, and not merely innocent neglect. A failure without any element of intention, design, or purpose, and resulting merely from innocent neglect, is not a 'willful' failure. Every voluntary act of a person is intentional, and therefore in a sense willful, but, generally speaking, and usually when considering statutes of the character mentioned, a voluntary act becomes 'willful' in law only when it involves some degree of conscious wrong on the part of the actor, or at least, culpable carelessness on his part, something more than a mere emission to perform a previously imposed duty."
>
> "[3] The allegations of the bill with reference to Nuccio's failure to file the statement of campaign workers shows no more than a mere passive, inert, or inattentive omission to file the statement within the time prescribed by the statute."
>
> "It is clear to us that the mere passive and inert omission from June 16th to August 21st to file the statement, unattended by any other circumstances tending to indicate

> 'willfulness' or a 'refusal' as those terms are understood in this connection, does not constitute such an unreasonable delay and such an utter disregard of the law as to amount to a 'refusal' or 'will failure' to act, particularly since approximately two months still intervened before the time for printing the ballots for the general election."

Similarly, in Sanders v. Florida Elections Commission, 407 So.2d 1069 (Fla. App. 4th DCA, 1981), a candidate distributed a delivery of sample ballots without opening the package to ensure they carried the required message, "Paid political advertisement..." which was required by Section 106.143, Florida Statutes.

Section 106.143(4), Florida Statutes, states:

> "Any person who willfully violates the provisions of this section is subject to the civil penalties prescribed in § 106.143."

The Florida Elections Commission fined the candidate $500, on the basis that the error could have been prevented by greater diligence. It opined that the "voluntary," "intentional" distribution of the samples without due care constituted a "willful violation" of Section 106.143, Florida Statutes. On appeal, the court disagreed. Citing County Canvassing Board, supra, it held that a "careless and negligent failure" to comply with Section 106.143, Florida Statutes, does not constitute a "willful" violation within the meaning of that statute. See also Six Mile Creek Kennel Club v. State Racing Commission, 161 So. 58 (Fla. 1935). Without conceding in any way that any basis exists in fact to support OPC/AG's argument as it relates to LCI, these cases demonstrate that the theory underlying OPC/AG's interpretation of "willful" in this context has no basis in law.

14. LCI submits that OPC and AG have offered an untenable interpretation of the scope of Section 364.285, Florida Statutes. However, it is important to note that the interpretation they proffer is not necessary to the effective enforcement of the rule against unauthorized changes, because the real problem that needs to be addressed is the proliferation of deceptive practices that do satisfy the definition. In testimony pending in Docket No. 97088-TI, a Staff witness makes the point that fully 75% of slamming complaints stem from such deceptive practices as telemarketing abuses and misleading LOAs. LCI submits that PIC changes secured by a carrier knowingly through the carrier's deceptive practices that involve misleading customers, constitute willful violations of the rule prohibiting unauthorized changes and are subject to the penalties of Section 364.285, Florida Statutes.[2]

While LCI therefore disputes the definition of "willful" offered by OPC and AG, it is not necessary for the Prehearing Officer to accept or reject that interpretation to dispose of the pending motion. Even under their interpretation, OPC and AG would not be entitled to the discovery that is the subject of the Motion to Compel. This is true of Document Request Nos. 4, 5, 6, and 7, as well as Interrogatory Nos. 3 and 4.

[2] LCI submits, however, that a forgery committed by an independent contractor of a carrier is a fraud on the carrier as well as the customer. Because such a forgery exceeds the scope of the authority conferred by the carrier, it is not a willful violation by the carrier.

The discovery requests state as follows:

Production of Documents:

4. 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 subcontractors.

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 No. 3 and No. 4.

Interrogatories:

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 subcontractors 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 subcontractors switching a customer's primary interexchange carrier to LCI.

15. With respect to all of these discovery requests, the theory of OPC and AG is that the information they seek may show that LCI chose not to institute measures (specifically, third party verification) that might have reduced the number of slamming complaints. The crux of the Motion to Compel is contained in the following excerpts:

> "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 chose not to do so because of cost or other factors.

Motion to Compel, at p. 6

And:

"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."

Motion to Compel, at p. 2

And:

"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 actions were "willful" by purposely using processes which they knew would result in the slamming of customers."

Motion to Compel, p. 7

Very simply, with this argument OPC/AG are not entitled to the discovery they seek because with this argument they are attempting to amend the rule, not enforce it. Rule 25-4.118 states:

"(1) The primary interexchange company (PIC) of a customer shall not be changed without the customer's authorization. A local exchange company (LEC) shall accept PIC change requests by telephone call or letter directly from its customers.

(2) A LEC shall also accept PIC change requests from a certified interexchange company (IXC) acting on behalf of the customer. A certified IXC that will be billing customers in its 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:

(a) the IXC has on hand a ballot or letter from the customer requesting such change; or

(b) the customer initiates a call to an automated 800 number and through a sequence of prompts, confirms the customer's requested change; or

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

(d) the IXC has received a customer request to change his PIC and has responded within three days by mailing of an information package that includes a prepaid, returnable postcard and an additional 14 days have passed before the IXC submits the PIC change to the LEC. The information package should contain any information required by Rule 25-4.118(3)."

(emphasis supplied)

16. In the rule, the Commission specifies the measures it deems necessary for carriers to assure that PIC changes are authorized. By its terms, the rule requires that a carrier implement only one of the prescribed procedures. LCI adhered to the rule. During the period covered by the Staff's recommendation in Docket No. 971487-TI, and including the transaction involving Mr. Howe, LCI changed a customer's PIC only after receiving a Letter of Authorization, which it had every reason to believe was validly signed by the customer. Essentially, OPC and AG are arguing that they can prove LCI violated the rule by demonstrating that LCI omitted a measure the rule does not require! The argument collapses of its own weight. If OPC and AG wish to argue that a carrier should have an LOA and third party verification (or other confirmation measures not now required by rule), they should

present that argument in the pending rulemaking docket, not in a case involving whether the requirements of the existing rule were met.

CONCLUSION

For the reasons stated above, LCI requests the Commission to deny the Motion to Compel and enter an order ruling that LCI need not respond to the items in the First Motion to Compel Against LCI by the Attorney General and the Citizens that are identified above.

Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525

Attorney for LCI International
Telecom Corp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **LCI's** foregoing **Response to the First Motion to Compel by the Attorney General and the Citizens** has been furnished by Hand Delivery this **4th** day of **February, 1998:**

John Bowman
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 390-M
Tallahassee, Florida 32399-0850

Charles J. Beck
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
107 West Gaines Street
Collins Building, Room 332B
Tallahassee, Florida

Joseph A. McGlothlin

Joseph A. McGlothlin