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Sprint

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March 16, 1998

Ms. Blanca S. Bayo, Director
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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970882-TI

Re: Post Hearing Comments of Sprint-Florida, Incorporated

Dear Ms. Bayo:

Enclosed for filing is the original and fifteen (15) copies of Sprint-Florida, Inc.'s Post Hearing Comments.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

Charles J. Rehwinkel

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2 Enclosures

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION ORIGINAL

In re: Proposed Rule 25-24.845, F.A.C., Customer Relations; Rules Incorporated and Proposed Amendments to Rules 25-4.003, F.A.C., Definitions; Rules 25-4.110 F.A.C., Customer Billing; Rules 25-4.118, F.A.C., Interexchange Carrier Selection; Rules 25-24.490 F.A.C., Customer Relations; Rules Incorporated.	Docket No. 970882-TI Filed: March 16, 1998

POSTHEARING COMMENTS OF SPRINT-FLORIDA

COMES NOW Sprint-Florida, Incorporated ("Sprint-Florida") and files these post hearing comments in the above styled matter.

I. Introduction.

After considering the presentations at the hearing held in this docket, Sprint-Florida, files these comments. The company's basic position in this rulemaking remains that a single nationwide regime of "slamming" rules would provide the most efficient manner of attacking a problem that has existed in the Florida marketplace as well as in every other state. Sprint-Florida nevertheless recognizes that the Commission is likely to adopt some

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additional rules to curb slamming[1].

Sprint-Florida's comments fall into two categories. One addresses non-controversial technical adjustments to the proposals. These were discussed at hearing. These adjustments would accomplish the stated intent of the proposed rules, yet allay concerns about unintended interpretations The second category involves changes to the proposal that should be made for more substantive reasons. Sprint-Florida's primary focus there is on the so-called "90 day credit back" proposal in rule 25-4.118(8). As to the other areas of concern to Sprint-Florida, the company offered the testimony of Dwane Arnold. Mr. Arnold's original testimony was limited to a few areas of concern -- the largest of which was the bill block option which the Commissioners deleted from consideration in this docket. Sprint-Florida's position on the areas other than the 90 day credit back provision remains as stated in Mr. Arnold's testimony the prehearing filings of January 15, 1998 and January 28, 1998 and two data request responses. Sprint-Florida still stands behind the positions and factual representations of those filings.

The rule proposals and associated issues are addressed as follows.

II. Specific FPSC Rule Proposals.

Issue 1. Should the Commission adopt Rule 25-24.845, Florida Administrative Code?

[1]In these comments, Sprint-Florida uses the term "unauthorized carrier change" or "UCC" to denote the phenomenon that the Commission seeks to address.

Position: Sprint-Florida, does not oppose adoption of these proposed rule amendments if it is determined by the Commission that additional rules are necessary; however, as stated above, Sprint-Florida, Inc. believes that consistency in rulemaking across jurisdictions would be preferable.

Issue 2. Should the Commission adopt the proposed amendments to Rule 24-4.003, Florida Administrative Code?

Position: Sprint-Florida, does not oppose adoption of these proposed rule amendments if it is determined by the Commission that additional rules are necessary; however, as stated above, Sprint-Florida, Inc. believes that consistency in rulemaking across jurisdictions would be preferable.

Issue 3. Should the Commission adopt the proposed amendments to Rule 25-4.110, Florida Administrative Code?

Position: Sprint-Florida, Inc. does not oppose adoption of these rule amendments as proposed except that addition of the certificate number (Proposed rule 25-4.110 (10) (a)) and type of service notification to the bill (Proposed rule 25-4.110 (10) (b)) will provide little if any value, while adding significant cost. Technical corrections are needed.

Sprint-Florida submitted the testimony of Dwane Arnold on this issue and the Commission heard testimony from other parties that indicated that the cost of the proposal could outweigh the benefit sought to be derived. Sprint-Florida proposes that the option be given for companies to adhere to an FPSC requirement that the certificate number be provided prior to any LEC billing for an interexchange carrier. Mr. Arnold testified that this could be accomplished without having to incur the cost of designing into the bill format the actual printout of the certificate number. (Arnold Tr. 670). So long as the certification is a requirement for billing, the Commission's public protection mission is substantially fulfilled.

Two technical changes are also recommended to the proposed rule 25-4.110 based on discussion at the hearing. First, regardless of the form of the billing presentation changes being considered in proposed rule 25-4.110, the effective date should be changed to give companies time to design, implement and test modifications. At hearing, Staff witness Taylor suggested that six months after adoption would be a reasonable time. (Taylor, Tr. 175) Sprint-Florida would propose that Mr. Taylor's suggestion be adopted. Since the order noticing adoption of the rule is scheduled to be issued on May 29, 1998, the effective date of the rule and upon filing with the Secretary of State, any rules will become effective 20 days thereafter. Under these circumstances January 1, 1999 would be a reasonable deadline for making the billing system changes if ordered in the rule. If the proposed language is adopted, Sprint-Florida recommends the following revision[2]:

> (10) After January 1, 199[redacted], all bills produced shall clearly and conspicuously display the following information for each service billed in regard to each company claiming to be the customer's presubscribed provider for local, local toll, or toll service:

The second technical change would be to proposed rules 25-4.110(13) to recognize that legitimate timing problems could occur between the physical switching of carriers and the printing of the bill. (Taylor, Tr. 178-179) For this reason, Sprint-Florida proposes that the following adjustments be made to the proposal if the concept of notification is adopted by the Commission. Sprint-Florida recommends the following revision:

> (13) [redacted] occurs, if possible, and no

[2]Changes are [redacted]; additions are in *italics*.

[redacted] he customer must be given notice on the first or second page [redacted] in conspicuous bold fact type when his provider of local, local toll, or toll service has changed.

This adjustment will insure that a company does not become subject to sanctions if a change occurs prior to a billing cutoff date, but after the time for noticing of a change in providers can be included on the bill.

Issue 4. Should the Commission adopt the proposed amendments to Rule 25-4.118, Florida Administrative Code?

Position: Sprint-Florida, does not oppose adoption of the PIC change requirements in the proposed rule which should be implemented with the following exceptions:

Proposed rule 25-4.118 (2) (b) (2), Florida Administrative Code:

Position: Sprint-Florida also opposes the proposal that would require audio recording verification of inbound customer initiated calls because evidence suggests that very few slamming complaints result these calls. The cost of implementing such a requirement would far outweigh the benefits.

Proposed rule 25-4.118, (2) (d) 5, Florida Administrative Code:

Position: Sprint-Florida does not support the proposed rule that would require the customer to return a signed postcard in the event PIC change verification occurred via the welcome package option.

As testified to by Mr. Arnold, Sprint's experience with this process would indicate that implementation of this proposed rule would result in customer confusion and cause unnecessary delays in the PIC change process. Additionally, the process may result in customer dissatisfaction and make entry into the market difficult for competitive providers. Sprint-Florida believes that there would be a large percentage of consumers who would

not return the postcard for various reasons such as forgetting to send the card or not realizing the card must be returned to effect the change.

Proposed Rule 25-4.118, (8), Florida Administrative Code:

Position: Slamming claimants should only be relieved paying for that portion of the charges exceeding the rates of their previous carrier for calls actually incurred by the customer during the time they were assigned to an unauthorized carrier. As proposed the rule is unlawful and provides incentives for bogus slamming complaints.

Discussion:

The most troubling aspect of the proposed rules that will still be under consideration post-hearing is the concept that just by complaining, a customer could receive free service for 90 days (or more if billing is less frequently than monthly), when service is provided by an unauthorized provider. This proposal has several deficiencies. First, it is contrary to the concept that the customer making the calls intends to dial the number, complete a toll call and pay for the call. Second, the implementation of the proposed rule would occur with no definition of "slamming" or "customer of record." Third, the Commission is without adequate information to determine whether the proposal is cost-effective. Fourth, the proposed rule would amount to imposition of fines that are not authorized and in a manner that does not afford the accused due process. Fifth, the proposed rules would amount to the prohibited awarding of damages to customers. Finally, the proposal would likely lead to fraud, additional customer complaints before the FPSC and a virtual cottage industry of intercompany dispute resolution before the Commission.

As to the first problem (*quantum meruit* issue), no one has contended that the customer that is the victim of an unauthorized change is induced to make calls that they would not otherwise have made. The calls that would make up the proposed free service are all calls that the customer assumedly intends to make and has every intention to pay for. The existing rules recognize this and require that the incremental difference -- if any -- be absorbed by the offender. This places the customer in a made-whole position as far as the prices he pays for the services that the Commission has authority over. Any windfall enrichment of the customer by fiat of the FPSC would place the Commission in the position of either awarding damages to a customer or in redefining the price (in the form of value of service) for toll service. This damages aspect of the proposed rule was alluded to in staff testimony. (Erdman-Bridges, Tr. 73-74). Either purpose is not lawful. The Commission should refrain from adopting this proposal for this reason alone.

Assuming that it would be otherwise proper to implement the proposal, the lack of key definitions in the proposed rule will deprive parties of notice as to when a compensable UCC occurs. Abundant testimony was given that there is no agreement regarding whom the customer of record is in a household situation. (Taylor, Tr. 123-134; Poucher, Tr. 235-241). At hearing the terms "slam" and "slamming" were used with varying degrees of precision and intent. It is not clear when at is intended by the term. The phrases are not used in the proposed rule, but it is this activity that is sought to be prevented and punished. Sprint-Florida submits that if any penalties are to be provided for a UCC, that the definition provided by

Sprint-Florida witness Arnold is the most reasonable and objective:

> My definition of slamming would be the purposeful and intentional change of a customer's preferred carrier without their knowledge and consent.

(Arnold Tr. 669). This would remove inadvertent slams from creating potential liability. Of course, Sprint-Florida contends that the only authorities the agency has for imposing penalties are those authorized in s. 364.285, Fla. Stat., as discussed below.

Another reason why the 90 day free service proposal should not be adopted is that the agency is without any information regarding the cost to affected companies. The Statement of Estimated Regulatory costs (SERC) filed in the docket candidly indicates that the cost could be substantial, but that it is unquantifiable. The Commission has no record to the contrary. As discussed at hearing and under the proposal, customers who know, but choose to ignore the fact that the wrong carrier is providing service could make toll calls with impunity for free throughout the 90 day period. As drafted, the proposal would make LEC responsible for the unauthorized toll service for <u>both</u> customers if a transposition error occurred in a LEC initiated switch. Each customer would have service with an "unauthorized provider" One for the customer who made the unfulfilled request and one for the unwitting customer who had his provider changed. In no event would a willful or fraudulent UCC have occurred. Yet the LEC could be liable in an open-ended amount for potentially both customers' toll bills. The

Commission cannot quantify this liability and therefore cannot accurately assess the cost effectiveness of the proposal. Lack of such information does not allow the Commission to meet its obligations under s. 120.54(1)(d) to choose the alternative that is the least costly and achieves the regulatory objectives. Since the regulatory objective here is to cut down on UCCs and make customers whole, the proposal cannot be evaluated fairly against the existing rule and other measures that are clearly within the FPSC's authority.

The proposal would constitute an impermissible fine for activity that may not be willful. Staff witness Erdman-Bridges agreed with Commissioner Garcia that the proposed rule could be viewed as punitive, i.e. fines. The following exchange is illustrative:

> COMMISSIONER GARCIA: To see [sic] degree, though, the concept of the rule is sort of to punish the companies also from doing this again.
>
> WITNESS ERDMAN-BRIDGES: That's correct too. That's a good point.

(Tr. 75). Commissioner Clark also recognized that the proposal involved the concept of imposition of sanctions in a discussion of staff discretion to define the "customer of record" on a case-by-case basis:

> COMMISSIONER CLARK: Let me just say that's an important point. *If you are going to apply sanctions*, I think you have to be extremely careful as to whether or not the rule has been violated and it can't be left to discretion. In this one instance we're going to say that the spouse could authorize it, and in another one we're going to say that they can't. But I think you can have

> different requirements for residential and different requirements for business. I think there's nothing wrong with saying to a business you need to indicate to the phone company who has the authority to change -- make any changes to your phone service. And you might have a different standard for residential. But I'm -- *the fact that we're going to impose sanctions*, and the fact we're going to, I hope, be very vigorous in our enforcement of the rule requires us to be precise.

(Tr. 133-134) (Emphasis added). What is clear in the proposal is there are no standards, nor is a hearing contemplated.

Even if the action that results in a UCC were to be willful, the monetary award of free service would not fall within the provisions of s. 364.285, Fla. Stat. which is the only authorization for the Commission to impose fines or sanctions. Such fines can only be imposed after an opportunity for hearing. That statute allows fines to be imposed only if a willful violation occurs. Even if the FPSC concludes that it does have the authority to impose the open-ended "fines" under this section, the question exists as to whether the procedure for imposition comports with due process.

In *Cherry Communications v. Deason*, 652 So. 2d 803 (Fla. 1995) the Florida Supreme Court noted that in a quasi-judicial disciplinary proceeding, that stated that the normal functions of staff must be bifurcated into an advisory and prosecutorial role. Although *Cherry* involved a license revocation, imposition of fines, being disciplinary in nature would seem to fall within the *Cherry* holding. Of course, the exact nature of staff involvement in the determination under proposed rule 25-4.118(8) is not clear. Nevertheless, to the extent that the staff would make determinations of whether the crediting of toll charges occurs within 45 days, the proposed language

would seem to imply an adjudicatory role. This does not seem to comport with the thrust of the *Cherry* holding. If the staff is to have a role, it cannot involve initial determination of customer credits. If the Commissioners are to be involved, the credits cannot be finally imposed within the 45 days, if ever. If nothing else, the Commission will likely be creating hundreds of hearing opportunities.

To the extent that the proposal is intended to provide compensation to customers for their time or inconvenience in straightening out UCC problems, the awarding of damages would be occurring. The record indicates that such compensation is one of the purposes behind the rule proposal. (Erdman-Bridges, Tr. 74). Clearly a purpose of the proposed rule would be to approximate the time -- that admittedly has a value -- spent by the customer. The Commission has consistently recognized that is has no authority to award damages. In the BellSouth arbitration cases (Dockets 960833-TP, 960846-TP and 960916-TP) in Order No. PSC-96-1579-FOF-TP, issued December 31, 1996, the Commission stated:

> We lack the authority to award money damages. *Southern Bell Telephone and Telegraph Company v. Mobile America Corporation*, 291 So.2d 199, 202 (Fla. 1974). If we cannot award money damages directly, we cannot do so indirectly by imposing a liquidated damages arrangement on the parties.

Order No. PSC-96-1579-FOF-TP. Any "damages" that the FPSC does have authority to award would be necessarily limited to the amount of any overcharge. Current rules recognize this.

Virtually every industry commentator expressed grave concerns about the potential for fraud and abuse if the credit back is made to the customer. Sprint-Florida submits that the elimination of one set of problems (slamming complaints) will be replaced (if at all) with a whole new set of disputes regarding claims between companies and customers and companies and companies. This is not to suggest that the Commission should shy away from a solution because the task would be difficult. Although there appeared to be some consensus that the number of complaints could increase rather than decrease. Mr. Taylor did express a hope that the measure would eliminate slamming complaints. (Taylor, Tr. 148). Sprint-Florida would agree that this could occur if the measure was legal and the standards for the credit back could be objectively and fairly spelled out. What's more likely is that the possibility of thousands of dollars in gain to customers could be an overwhelming and powerful incentive for some to game the system.

In sum, Sprint-Florida contends that the legal deficiencies of the 90 days credit back proposal coupled with the enormous potential for fraud should cause the FPSC to be hesitant to attempt to implement this particular provision. There are other proposals in this docket that are on solid legal ground that will go a long way toward reducing UCCs. Implementation of a draconian measure that may ultimately lead to constitutional claims of confiscation will likely entangle the Florida Commission in lengthy proceedings that will detract from the agency's efforts to eliminate slamming problems.

Proposed Rule 25-4.118(13) (technical change)

A technical change is needed to clarify the intent that the documentation to be provided pursuant to a customer inquiry must come from the party that submitted the change request. See discussion by Staff witness Taylor. (Taylor, Tr. 177-178). Sprint-Florida recommends the following revision to proposed rule 25-4.118(13):

(13) A provider must provide the customer a copy of the authorization it relies upon for the switch *in submitting the* [redacted] within 15 days of request.

Proposed Rule 25-4.118 (14), Florida Administrative Code:

Position: Sprint-Florida believes that for LECs there is no evidence in this record that demonstrates that additional answer time requirements would be cost effective in addressing slamming and cramming. Clearly, there is no evidence to support the value of twenty-four hour mechanized answering.

Issue 5. Should the Commission adopt the proposed amendments to Rule 25-24.490, Florida Administrative Code?

Position: Sprint-Florida takes no position on this issue.

III. Public Counsel/Attorney General Proposals.

Sprint-Florida urges this Commission to refrain from adopting the proposals of the Public Counsel and Attorney General except to the extent they are included in the proposals that the Commission has proposed and then only to the extent that the parties have not demonstrated legal or practical problems with the proposed rules. Furthermore, to the extent that the Commission has not performed an SERC on the proposals that are separate and distinct from the FPSC proposals, adoption of these proposals may not meet the requirements of the statute.

Respectfully Submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 970882-TI

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 16th day of March, 1998 to the following:

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