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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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Initiation of Show Cause Proceeding)
Against Excel Telecommunications,)
Inc. for Violation of Rule 25-4.118,)
Florida Administrative Code,)
Interexchange Carrier Selection)

DOCKET NO.: 971490-TT

FILED: 8-11-98 RECORDS AND REPORTING

EXCEL TELECOMMUNICATIONS, INC.'S
ANSWER TO ORDER TO SHOW CAUSE

Subject to its Motion for More Definite Statement filed this date, Excel Telecommunications, Inc. (Excel), pursuant to Rule 25-22.037(1) Florida Administrative Code, hereby files its Answer to Order to Show Cause, Order No. PSC-98-1000-SC-TI. Excel reserves the right to modify or supplement its Answer as appropriate upon a ruling by the Commission.

I. INTRODUCTION

1. The Show Cause Order alleges 37 willful violations of Rule 25-4.118, Florida Administrative Code, with respect to conversions of a customer's preferred interexchange carrier (PIC), and proposes that Excel be fined \$1,100,000 for these alleged willful violations. The Show Cause Order requires that Excel's answer contain "specific allegations of fact and law." [Order, p. 5]

2. The Commission's Show Cause Order lacks the very specificity the Commission would require of Excel in response. For example, the Show Cause Order does not identify 34 of the 37 alleged willful violations, and for the other three does not state specifically why it believes the alleged unauthorized conversions amount to willful violations of Rule 25-4.118. Thus it is difficult to know the specific allegations of material fact and law upon which the Commission proposes this enforcement action. In short, Excel is

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placed in the difficult position of having to respond specifically to general conclusions based on distortions of its record and hazy articulations of non-rule policy.

3. The Commission's Show Cause Order is both inadequate and inappropriate. It is inadequate because it fails to fairly inform Excel of the specific elements of the Commission's enforcement action against it. It is inappropriate because it is designed to shift to Excel the burden of coming forward with evidence and to prove generally that "it has . . . taken adequate steps to prevent unauthorized carrier changes and to ensure compliance with the Rules of the Florida Public Service Commission." [Order, page 2] The Commission has the burden of proving by clear and convincing evidence each of the alleged violations, and meeting that burden must begin with a specific statement of each allegation.

II. GENERAL DENIALS

4. As a general denial, Excel states that it has neither refused to comply with nor willfully violated any rule or order of the Commission, including Rule 25-4.118. Moreover, if the Show Cause Order intends to make the general allegation that Excel's marketing and PIC conversion practices are so "inadequate" as to warrant a fine of \$1,100,000, then the Order makes that allegation in disregard of facts known to the Commission.

5. The Commission is aware that Excel has made an extraordinary effort to prevent unauthorized PIC conversions and that it is an industry leader in ethical business practices generally and in avoiding unauthorized conversions specifically. Moreover, the

Commission has endorsed the use of some of Excel's key procedures for avoiding unauthorized PIC conversions. As one example only, during the past two years Excel has used two operators to input the data from each LOA to protect against entry errors and has had in place a discrete organization and protocols to investigate unauthorized PIC conversions. In the settlement of another show cause proceeding,¹ the Commission has accepted as part of the stipulation the company's commitment to improve its system by using a double-entry system and by establishing an analagous investigation unit. In accepting this and similar settlements of other show cause proceedings, the Commissioners routinely compliment the companies for improving their systems to avoid unauthorized PIC conversions. The Commission thus broadly castigates Excel for its "inadequate measures" while complimenting other companies for beginning to use of some of those measures.

6. The Commission apparently justifies its finding of "inadequate measures" and the proposed sanctions based on the number of PIC conversion complaints it has received against Excel. The Commission, however, is aware that the number of complaints about unauthorized conversions is statistically insignificant when compared to the number of conversions effected by Excel. Moreover, the Commission does not mention in the Show Cause Order this and other information that reflects favorably upon Excel. In sum, the Commission is informed of Excel's exemplary processes for and

¹ See, e.g. Docket No. 971484-TI, Order No. PSC-98-0879-AS-TI, (Sprint Settlement).

excellent record in avoiding unauthorized conversions yet omits this relevant information in the Show Cause Order thus distorting both the facts and the nature of Excel's performance.

III. Specific Denials

7. As noted above and in the motion for a more definite statement, the Show Cause Order alleges that Excel effected the unauthorized PIC conversions of 37 customers, but identifies only three. Moreover, in identifying the three alleged unauthorized conversions, the Commission does not provide sufficient detail or explanation as to why it specifically believes each alleged violation was willful.

8. Excel denies the allegation that Excel switched the long distance service of Mr. John Wood without his authorization in willful violation of Rule 25-4.118. Excel is without knowledge as to the timing and content of Mr. Wood's communications with the Commission staff and thus can neither deny nor admit factual allegations with respect to these communications. Excel is without conclusive knowledge as to whether the LOA was forged and thus can neither deny nor admit that factual allegation.

9. Excel denies the allegation that Excel switched the long distance service of Ms. Nancy Peterson without her authorization in willful violation of Rule 25-4.118. Excel is without knowledge as to the timing and content of Ms. Peterson's communications with the Commission staff and thus can neither deny nor admit factual allegations with respect to these communications. Excel is without conclusive knowledge as to whether the LOA was forged and thus can

neither deny nor admit that factual allegation.

12. Excel denies the allegation that Excel switched the long distance service of Ms. Betty Smith without her authorization in willful violation of Rule 25-4.118. Excel is without knowledge as to the timing and content of Ms. Smith's communications with the Commission staff and thus can neither deny nor admit factual allegations with respect to these communications. Excel is without conclusive knowledge as to whether the LOA was forged and thus can neither deny nor admit that factual allegation.

10. With respect to the remaining 34 alleged unauthorized PIC conversions, Excel reiterates that it has neither refused to comply with nor willfully violated any rule or order of the Commission, including specifically Rule 25-4.118.

Responses in the Nature of Affirmative Defenses

11. Under Section 364.285, Florida Statutes, the Commission's authority to impose penalties is limited to situations in which a carrier has refused to comply with or has willfully violated a lawful rule, order or provision of Chapter 364. Excel has neither refused to comply with nor willfully violated any rule or order of the Commission.

12. Excel submits that in every instance identified in Order No. PSC-98-1000-SC-TI, it has met the requirements of Rule 25-4.118, Florida Administrative Code, in that it obtained diligently and in good faith the type of confirmation required by the rule.

13. The action contemplated by the Commission is arbitrary, capricious, and discriminatory, in that it is based on the number

of complaints received, without taking into account the size or volume of overall activity.

14. Without waiving its right to have each allegation upon which it proposes to base a penalty considered by the Commission prior to the issuance of the Order to Show Cause and to a delineation containing the requisite specificity of each allegation against it, Excel states the time frame relating back to April 1996, is inconsistent with Rule 25-4.118, which requires that LOAs and ballots be kept for only one year. It is unreasonable, inequitable, and arbitrary to reach back further than the time frame established to govern the maintenance of records of confirmation.

15. For the reasons set forth in Excel's Motion for More Definite Statement, which is incorporated by reference, the allegations of Order No. PSC-98-1000-SC-TI are insufficient to place Excel on notice of the charges against it.

16. With respect to the Commission's characterization of an unauthorized conversion as a violation of Rule 25-4.118 that "continues" as contemplated by Section 364.285, Florida Statutes, Excel denies this statutory interpretation and alleges that the Commission's declaration of this interpretation amounts to unlawful application of non-rule policy.

17. With respect to the Commission's characterization of "willful" as intended by Section 364.285, Florida Statutes, to mean any "willful act," whether or not there was a willful intent to violate a rule, order, or provision of Chapter 364, Florida Statutes, Excel

denies that the statutory construction claimed by the Commission in its Order is valid. Specifically, Excel denies that the Legislature intended "willful" to mean an intent to do an act as opposed to the intent to do an act coupled with the purpose to disobey the rule, and further states that if this were the case, there would have been no reason for the Legislature to include the word "willful" in the statute at all, because - under the Commission's interpretation' there would be no need to distinguish between those violations that are subject to a penalty and those that are not. Excel denies that Order No. 24306, in which the Commission offered the same construction, supports the Commission's proffered interpretation, and further states that reference to settled case law shows the Commission's contention is untenable. Case law establishes the principles that a legislative word is to be given its plain and ordinary meaning as it is used in the statutory context; that punitive statutes are not to be extended by construction, but instead are to be narrowly construed; and that, when used in the context of the type of violation that is subject to a penalty, "willful" means "conscious wrong" or "purpose to disobey" Capital National Financial Corporation v. Department of Insurance and Treasurer, 690 So.2d 1335 (Fla. App. 3d Dist. 1997); Brown v. Watson, 156 So. 327 (Fla. 1934); and County Canvassing Board, etc. v. Lester, 118 So. 201 (Fla. 1928); Sanders v. Florida Elections Commission, 407 So.2d 1069 (Fla. App. 4th DCA, 1981).

18. With respect to the Commission's characterization of "willful" as intended by Section 364.285, Florida Statutes, to mean any

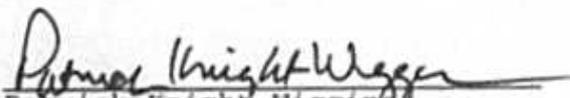
"willful act," whether or not there was a willful intent to violate a rule, order, or provision of Chapter 364, Florida Statutes, Excel reiterates its denial of this statutory interpretation and alleges that the Commission's declaration of this interpretation amounts to unlawful application of non-rule policy.

19. The Commission relies in part on a settlement in Docket No. 950468-TI in charging Excel with willful violations and in proposing severe fines. The Commission's mechanical reliance on the settlement is arbitrary, capricious and discriminatory because the Commission ignores the circumstances of that settlement, the content of the settlement order, the specific denial of liability by Excel, and the no finding of liability by the Commission. Moreover, the Commission's use of the settlement is the result of unlawful non-rule policy that treats prior settlements as "the first bite of the apple," i.e., as a previous finding of liability justifying the conclusion that later alleged violations are willful and that fines for the alleged violations must be greater than for those of "first time offenders."

20. In charging Excel with willful violations and in proposing severe fines, the Commission relies in part on Excel's "direct marketing approach," which uses exclusively written LOAs for soliciting new business. The Commission thus would hold Excel to a different and higher standard than other carriers based on the method of marketing. The application of this different and higher standard is arbitrary and capricious. In addition, the

Commission's use of this standard is the result of unlawful non-rule policy.

Respectfully submitted, this 11th day of August, 1998.

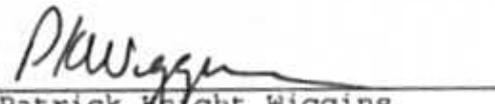

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Telecommunications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 11th day of August, 1998, to the following:

Cathy Bedell
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850


Patrick Knight Wiggins