



Public Service Commission

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RECEIVED-FPSC
98 NOV -5 PM 12:28
RECORDS AND REPORTING

DATE: NOVEMBER 5, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (WATTS) *CBW MCPB*
 DIVISION OF CONSUMER AFFAIRS (ERDMAN-BRIDGES) *BIB*
 DIVISION OF COMMUNICATIONS (BIEGALSKI) *KCB*

RE: DOCKET NO. 971485-TI - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST PREFERRED CARRIER SERVICES, INC. D/B/A TELEFONOS PARA TODOS AND D/B/A PHONES FOR ALL FOR VIOLATION OF RULE 25-4.118, F.A.C., INTEREXCHANGE CARRIER SELECTION.

AGENDA: 11/17/98 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\971485.RCM

CASE BACKGROUND

On March 22, 1996, the Commission granted Preferred Carrier Services, Inc. d/b/a Telefonos Para Todos and d/b/a Phones For All (PCS) certificate number 4407 to provide intrastate interexchange telecommunications service. PCS reported gross operating revenue of \$2,077,268 and intrastate revenues of \$245,793.19 on its Regulatory Assessment Fee Return for the period January 1, 1997, through December 31, 1997. As a provider of interexchange telecommunications service in Florida, PCS is subject to the rules and regulations of this Commission.

From March 22, 1996, until August 31, 1998, the Division of Consumer Affairs has received a total of 135 complaints against PCS. Of those complaints received, 53 are apparent unauthorized carrier change (slamming) infractions in violation of Rule 25-4.118, Florida Administrative Code.

DOCUMENT NUMBER-DAT#

12449 NOV-5 98

FPSC-RECORDS/REPORTING

Based on the number of apparent slamming violations, staff opened this docket to investigate whether PCS should be required to show cause why it should not be fined or have its certificate canceled, pursuant to Section 364.285, Florida Statutes. However, prior to show cause proceedings, PCS submitted an offer to settle the case. (Attachment A, Pages 4-17)

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission accept the settlement offer proposed by Preferred Carrier Services, Inc. d/b/a Telefonos Para Todos and d/b/a Phones For All to resolve the apparent violations of Rule 25-4.118, Florida Administrative Code, Interexchange Carrier Selection?

RECOMMENDATION: Yes. (Biegalski)

STAFF ANALYSIS: On February 18, 1998, PCS met with staff and addressed its concerns about the apparent violations. On February 26, 1998, PCS provided additional information to staff regarding the slamming complaints. PCS met with staff again on August 10, 1998. On October 29, 1998, PCS submitted its offer to settle. In its settlement offer PCS agreed to do the following:

- PCS will not market long distance services in Florida by written letters of agency for a total of two years. This time period would begin on March 1, 1997 (when PCS voluntarily ceased marketing) and continue through March 1, 1999.
- PCS will make a voluntary contribution of \$50,000 to the General Revenue Fund in five installments of \$10,000. The payments will be due on December 1, 1998, March 1, 1999, June 1, 1999, September 1, 1999, and December 1, 1999.

Staff supports PCS' offer not to market long distance services utilizing written letters of agency for two years. Preferred Carrier Services voluntarily ceased its sweepstakes marketing activity in March of 1997. Due to the fact that Preferred Carrier Services has resolved all outstanding complaints and to date, no new complaints have been received, staff believes it is appropriate to approve PCS' request for the marketing restrictions to be effective from March 1, 1997, to March 1, 1999.

DOCKET NO. 971485-11
DATE: November 5, 1998

The company has satisfactorily addressed each of staff's concerns. Moreover, the company has been very cooperative in resolving all issues. Therefore, staff believes the terms of the settlement agreement as summarized in this recommendation are fair and reasonable, and we support the voluntary contribution to the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes, in the amount of \$50,000.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. With the approval of Issue 1, this docket should remain open pending the remittance of the \$50,000 voluntary contribution. PCS will remit payments of \$10,000 on December 1, 1998, March 1, 1999, June 1, 1999, September 1, 1999 and December 1, 1999. Upon remittance of the final settlement payment, this docket should be closed. The \$50,000 settlement should be forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes.
(Watts)

STAFF ANALYSIS: If the Commission approves the staff recommendation in Issue 1, this docket should remain open pending the remittance of the \$50,000 voluntary contribution. The voluntary contribution will be remitted in installments of \$10,000 due on December 1, 1998, March 1, 1999, June 1, 1999, September 1, 1999, and December 1, 1999. Upon submittance of the final settlement payment, this docket should be closed.

RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ATTACHMENT A
DOCKET NO. 971485-TI
NOVEMBER 5, 1998

STEPHEN A. ECENIA
JOHN R. ELLIS
KENNETH A. HOFFMAN
THOMAS W. KONRAD
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J. STEPHEN MENTON
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OF COUNSEL:
CHARLES F. DUDLEY

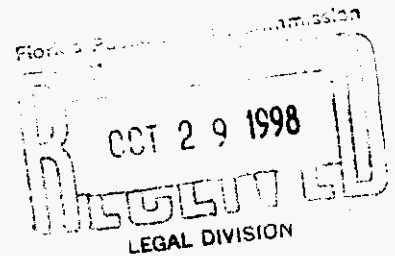
GOVERNMENTAL CONSULTANTS:
PATRICK R. MALOY
AMY J. YOUNG

October 29, 1998

HAND DELIVERY

Martha Carter Brown, Esq.
Division of Legal Services
Florida Public Service Commission
2530 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Re: Preferred Carrier Services, Inc.
Docket No. 971485-TI



Dear Ms. Brown:

This letter presents the third proposal by Preferred Carrier Services, Inc. ("PCS") for settlement of the above-referenced proceeding. PCS' previous settlement proposals dated March 16, 1998 and August 27, 1998 (copies attached), and the facts and justifications stated in support of those earlier proposals, are adopted and incorporated herein in support of this final settlement offer.

INTRODUCTION

On October 14, 1998, staff presented alternatives for settlement including a proposal under which PCS would agree to a payment of \$50,000 over a period of up to eighteen months with PCS' agreement to cease marketing of interexchange services for three years. In responding to staff's proposal and counteroffer for settlement, PCS wishes to clearly distinguish between its current marketing of competing local exchange services and its prior, brief involvement in sweepstakes marketing of interexchange services. PCS currently markets its competing local exchange services under PCS' approved trade names, "Phones For All" and "Telefonos Para Todos."¹ Such marketing

¹Order No. PSC-97-1117-FOF-TP, issued on September 24, 1997, approved the amendment of PCS' IXC certificate No. 4407 to reflect that it was doing business as Phones For

Martha Carter Brown, Esq.
Page 2
October 29, 1998

of local services may also include the provision of interexchange services to local exchange customers. To PCS' knowledge, such marketing of competing local exchange services (at times, packaged with interexchange services) has never been the basis of a complaint to the Commission. In contrast, this docket was opened in response to PCS' brief involvement two years ago in the sweepstakes marketing of interexchange services only, the circumstances of which are detailed in our prior letter dated March 16, 1998 and elaborated on herein. PCS voluntarily ceased marketing of interexchange services in Florida as of March 1, 1997.

As staff is aware, Phones For All, Inc. ("PFA"), as the new owners of PCS' IXC Certificate No. 4407 and ALEC Certificate No. 4682, remains committed to resolving the potential liability of PCS in this proceeding before filing an application for approval of transfer of majority organizational control. As stated in our letter of August 27, 1998, we will continue to work with staff to resolve all outstanding regulatory issues and hope to achieve a resolution of this proceeding prior to filing the application for approval of transfer of majority organizational control.

SETTLEMENT PROPOSAL

In response to staff's proposed settlement alternatives, PCS believes that a fair and equitable settlement of this proceeding would be accomplished by the following:

1. The payment of a voluntary contribution of \$50,000 to the general revenue fund of the State of Florida, with no admission that PCS violated any statute, rule or order of the Commission; and
2. The agreement of PFA, for itself and on behalf of PCS, to continue to not market interexchange services in Florida by written letters of agency for a total of two years, beginning with the date on which PCS voluntarily ceased marketing of interexchange services in Florida, March 1, 1997, and ending on March 1, 1999.
3. The payment of the \$50,000 may be in five monthly installments of \$10,000 each, and with the first payment due on December 1, 1998 and the remaining payments due on March 1, 1999, June 1, 1999, September 1, 1999 and December 1, 1999, and may be prepaid at any time.

All and Telefonos Para Todos.

Martha Carter Brown, Esq.
Page 3
October 29, 1998

JUSTIFICATION FOR PROPOSAL

The reasons and facts stated in support of our August 27, 1998 settlement proposal are restated herein as follows:

1. When the Commission opened this docket and eleven others in November of 1997 to investigate charges of slamming, it had received and forwarded to PCS complaints from 121 customers. All of the 121 complaints were responded to and resolved by PCS prior to the opening of this docket. To PCS' knowledge, none of the eleven other companies had completed their responses to their complainants before their respective dockets were opened.

2. In over 50% of the cases, PCS responded to complaints received from the Commission within four days. PCS' response to each customer included confirmation of a refund or credit reflecting the difference in PCS' rates and the rates of the prior carrier, and for many of the complaints PCS simply wrote a check for the entire amount of the customer's long distance bill for their pertinent period of time.

3. PCS has provided staff with copies of all correspondence concerning the complaints in question and with summaries of all complaints received by month, by date received, and by date responded to, listing each customer by name, by ANI, and by LOA. PCS has provided staff with a set of all refund letters, reflecting credits and payments totaling approximately \$10,000. PCS has provided these materials since October of 1997 promptly, voluntarily and without objection. PCS has expeditiously resolved customer complaints and has fully cooperated with the Commission staff in the investigation of these complaints.

4. The language in PCS' letter of agency in fact complied with former Rule 25-4.118(3), Florida Administrative Code, and thus did not constitute a violation of that rule, much less a "willful" violation as that term is defined in Florida law: "...that the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...."²

5. The facts of this case are unlike those of any of the other eleven slamming dockets opened in November, 1997. Each case should be considered on its own facts and its own merit. Since PCS' first settlement offer was made seven months ago, it has become increasingly clear that the primary goal of these proceedings is deterrence.

²Metropolitan Dade County v. State of Florida, Department of Environmental Protection,
714 So.2d 512 (Fla. 3d DCA 1998).

Martha Carter Brown, Esq.

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October 29, 1998

6. There is simply no deterrence to be accomplished in PCS' case. None of the slamming complaints against PCS involve LOAs signed after the sweepstakes marketing program was voluntarily terminated in February, 1997, with the two exceptions (involving two LOAs signed in March and April of 1997 respectively) discussed in PCS' first settlement proposal. For the past twenty months, and for nine months before this docket was opened, there has been no need or reason for the Commission to act to deter PCS from engaging in the marketing which generated the slamming complaints.

7. To the extent that the payment of a voluntary contribution to the state general revenue fund or a fine is intended to deter future willful violations of Commission rules or orders, such a goal has no application to the facts of this case. Not only would a fine not serve to deter the prospect of future willful violations of Commission rules, but any fine or settlement - - moreover, any fees and expenses incurred to defend a show cause proceeding - - serve only to impose costs on the new owners of a company which is marketing local exchange service, not long distance service.

8. Moreover, the imposition of a fine on PCS serves as a precedent to deter the very type of conduct that the Commission surely wishes to encourage. In this case, PCS voluntarily and proactively, quickly and decisively, policed itself by permanently terminating the sweepstakes marketing activities and resolving the customer complaints prior to the opening of this docket and the threat of Commission action.

9. Additionally, as staff and the Commission have recognized, it is appropriate to consider whether a company has a prior history of slamming complaints. At various times, a respondent has been characterized as a "first time offender" in comments by Commissioners considering a settlement proposal. Conversely, proposed fine amounts have been doubled and tripled for companies which have been the subject of prior show cause proceedings involving slamming complaints.

10. PCS is a first-time and a last-time offender. The sweepstakes marketing program was voluntarily and permanently terminated in February of 1997, has not been used since, and could not be repeated under the Commission's new Rule 25-4.118. All complaints against PCS have long since been resolved.

ADDITIONAL JUSTIFICATION FOR PROPOSAL

11. PCS' August 27, 1998 settlement offer called for the payment of a voluntary contribution of \$25,000 to the general revenue fund of the State of Florida. Staff has confirmed that it will recommend settlement and closure of this docket if PCS is willing to make a contribution of \$50,000 to the general revenue fund and institute the remedial measure of ceasing the marketing of PCS' interexchange services for a period of three years. **PCS voluntarily ceased marketing of its**

Martha Carter Brown, Esq.
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October 29, 1998

interexchange services in Florida as of March 1, 1997. Thus, PCS already has, without any form of prompting from the Commission, stopped marketing its interexchange services in Florida. PCS maintains that such self-instituted remedial measures should be recognized in a positive fashion by the Commission and provide a sound basis for a compromise and resolution of this proceeding. Accordingly, PCS submits that its final offer of \$50,000 and voluntary termination of marketing of interexchange services in Florida for a period of two years, serves the public interest and should be approved by the Commission.

For these reasons, PCS believes that the proposal made in this letter is reasonable and justified. We are hopeful that staff and the Commission will recognize that this proposal has been made in good faith and will find it acceptable and in the public interest.

Please let me know if any additional information is required to allow staff and the Commission to give full and fair consideration to our proposal.

Sincerely,



Kenneth A. Hoffman

KAH/rl

cc: Jeffrey J. Walker, Esq.
Ms. Kelly Biegalski, by hand delivery
Mr. Richard Moses, by hand delivery

STEPHEN A. ECENIA
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GOVERNMENTAL CONSULTANTS:
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March 16, 1998

HAND DELIVERY

Will Cox, Esq.
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Re: Preferred Carrier Services, Inc.
Docket No. 971485-TI

Dear Mr. Cox:

The purpose of this letter is to set forth a proposal for settlement of the show cause proceeding initiated by the Commission against Preferred Carrier Services, Inc. ("PCS"). In the event this matter cannot be settled, nothing contained in this letter should be construed as an admission against interest or a waiver of any and all rights PCS may have should the matter be litigated, including the right to object to the admissibility of this settlement proposal under the Florida Evidence Code.

INTRODUCTION

PCS was granted Interexchange Telecommunications Certificate No. 4407 on March 22, 1996 pursuant to Order No. PSC-96-0311-FOF-TI.¹ PCS currently provides interexchange services to approximately 1,800 customers in the State of Florida.

PCS began a sweepstakes marketing program in Florida in August of 1996. PCS retained Multimedia Information Systems to perform marketing activities for PCS including the sweepstakes

¹Order No. PSC-97-1117-FOF-TP issued on September 24, 1997 acknowledged the amendment of Certificate No. 4407 to reflect that PCS was doing business as Phones for All and Telephonos Para Todos.

Will Cox, Esq.
Page 2
March 16, 1998

program. The first slamming complaints forwarded by the Commission were received by PCS in November of 1996 - - a total of five complaints. Six complaints were received by PCS in December of 1996. Then, in January of 1997, PCS received 18 complaints. At that point, without hesitation or equivocation, Nelson Thibodeaux, the CEO of PCS told PCS's marketing agent to terminate the program and to cease distribution of sweepstakes materials. Thereafter, only two letters of agency ("LOAs") signed in February of 1997 resulted in complaints to the Commission. The last two LOAs which resulted in complaints were dated March 15 and April 24, 1997 and were submitted by PCS's marketing agent in contravention of Mr. Thibodeaux's explicit instructions mandating the termination of the program. PCS responded to those last two LOAs by notifying its billing agent to not accept any further ANIs for processing from its marketing agent.

Apart from the four LOAs discussed above, it appears that the remainder of the 120 slamming complaints forwarded by the Commission to PCS arose out of the sweepstakes marketing program which took place from August 1996 through January 1997. All of the 124 complaints were expeditiously resolved by PCS and all charges to the affected customers resulting from the change to PCS as their interexchange carrier were credited or refunded. PCS responded to and resolved approximately half of these complaints within four days with credit confirmation. Moreover, in many cases, the affected customer received a refund check for 100% of his or her long distance bill.

SETTLEMENT PROPOSAL

PCS maintains that the facts underlying this show cause proceeding are quite different from the slamming cases that the Commission has considered this year. PCS also believes that each case should be considered on its own facts and its own merit. Unlike other cases pending before the Commission, PCS is not guilty of failing to respond to staff inquiries. To the contrary, PCS promptly responded to staff data requests, voluntarily provided additional information to staff, and, perhaps most importantly, expeditiously responded to customers who filed slamming complaints with credits or full refunds.

Contrary to other carriers who are the subject of show cause proceedings, PCS **policed itself**. PCS recognized, after receiving close to 30 slamming complaints in 3 months, that the sweepstakes marketing program was generating hostility from customers (despite the addition of many customers who were and remain satisfied with PCS's service) and was taking up increased amounts of company time to efficiently and effectively respond to the complaints. So PCS stopped the sweepstakes marketing program in February of 1997. Since then and now, when marketing solely long distance services, PCS does so only through Internet advertisements.

These are but a few of the reasons PCS believes that a fair and equitable settlement of this docket should consist of the following:

Will Cox, Esq.
Page 3
March 16, 1998

1. The payment of a fine of \$7,500.00 without admission that PCS violated any statute, rule or order of the Commission; and
2. That any new marketing programs beyond the Internet advertisements currently employed by PCS today for its long distance services be administratively approved by the Commission staff.

In support of its proposal, PCS provides the following detailed justification.

JUSTIFICATION FOR PROPOSAL

1. When the Commission opened this docket and 11 others in November of 1997 to investigate charges of slamming, it had received and forwarded to PCS complaints from 121 customers. All of the 121 complaints were responded to and resolved by PCS prior to the opening of this docket. To PCS's knowledge, none of the 11 other companies had completed their responses to their complainants before their respective dockets were opened.
2. In over 50% of the cases, PCS responded to complaints received from the Commission within four days. PCS's response to each customer included confirmation of a refund or credit reflecting the difference in PCS's rates and the rates of the prior carrier; and for many of the complaints, PCS simply wrote a check for the entire amount of the customer's long distance bill for their pertinent period of time.
3. PCS has provided staff with copies of all correspondence concerning the complaints in question and with summaries of all complaints received by month, by date received, and by date responded to, listing each customer by name, by ANI, and by LOA. PCS has provided staff with a set of all refund letters, reflecting credits and payments totalling approximately \$10,000.00. PCS has provided these materials since October of 1997 promptly, voluntarily and without objection. There are no outstanding requests to PCS for further information. Clearly, PCS has bent over backwards not only to expeditiously resolve customer complaints but to cooperate with the Commission staff.
4. The language in PCS's letter of agency in fact complies with Rule 25-4.118(3), Florida Administrative Code. A copy of PCS's LOA is attached to this letter. There can be no doubt that the language complies with the requirements of the current, existing rule. Despite its compliance with the existing rule, over 100 slamming complaints were received. Obviously, drafting an LOA in compliance with the rule does not eliminate slamming allegations. Presumably, this is an example of why the Commission opened its slamming rulemaking docketing in 1997 to address several problems that are not addressed in the current rule. However, Section 364.285(1), F.S., predicates the imposition of a penalty on a finding of a willful violation of any Commission rule or order. The question is not, as staff has suggested, whether PCS intended to switch the customer's primary

Will Cox, Esq.
Page 4
March 16, 1998

interexchange carrier. The question is whether PCS willfully violated the rule. Here, PCS's LOA was in compliance with the rule. It is inconceivable to suggest that the attached letter of agency demonstrates that PCS intended to violate the rule.

5. As previously suggested and emphasized, PCS voluntarily stopped the sweepstakes program after receiving close to 30 complaints over a 3 month period. PCS policed itself. PCS is a first-time and last-time offender. The sweepstakes marketing program was extinguished in February of 1997 and has not been used since. Further, PCS has no outstanding Commission complaints.

6. To the extent the imposition of a fine is intended to deter future willful violations of Commission rules or orders, such a goal has no application to the facts of this case. As previously mentioned, the sweepstakes marketing program underlying the complaints was voluntarily eliminated by PCS. In essence, a fine would not serve to deter the prospect of future willful violations of Commission rules -- PCS stopped the sweepstakes in February of 1997.

In light of the foregoing, PCS believes that the proposal made in this letter is reasonable and justified. We are hopeful that staff and the Commission will recognize that this proposal has been made in good faith and will find it acceptable and in the public interest.

Please let me know if any additional information is required to allow staff and the Commission to give full and fair consideration to our proposal.

Sincerely,



Kenneth A. Hoffman

KAH/JRE/rl

cc: Jeffrey J. Walker, General Counsel
Mr. Nelson Thibodeaux, Chief Executive Officer
John R. Ellis, Esq.

Cox.Set

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ONLY . . EI



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ATTACHMENT A
DOCKET NO. 971485-TI
NOVEMBER 5, 1998

DATE (REQUIRED) 08/18/96
 NAME José Rafael Caldera
 ADDRESS 6960 NW 136th Street # 523
 CITY Miami Lakes STATE FL ZIP 33015
 HOME PHONE (REQUIRED) (3105) 15112-1810516
 G2-TS-147
 SIGNATURE (REQUIRED) X José R. Caldera

I certify that I am at least 18 years of age. I further understand that I may cancel this agreement at any time. I hereby authorize Preferred Carrier Services, Inc. (PCS) to act as my agent, and to convert the long distance service on my phone listed above from my current carrier to PCS. I understand that this LOA changes my carrier, and that I may designate only one carrier at a time for any 1 number. I understand that I will be billed through my local telephone company by PCS. I understand that my local phone company may assess a charge for my conversion to PCS. If this occurs, PCS will pay me back if I send a copy of my bill to: PCS, 4902 Colleyville Blvd., Suite 108, Colleyville, TX 76034.

RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ATTACHMENT A
DOCKET NO. 971485-TI
NOVEMBER 5, 1998

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GOVERNMENTAL CONSULTANTS:
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August 27, 1998

HAND DELIVERY

Will Cox, Esq.
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850

Re: Preferred Carrier Services, Inc.
Docket No. 971485-TI

Dear Mr. Cox:

This letter supplements and amends the settlement proposal made on behalf of Preferred Carrier Services ("PCS") in my letter to you dated March 16, 1998, and in accordance with our discussions with staff at the settlement meeting held on August 10, 1998.

INTRODUCTION

The facts concerning PCS' brief involvement in sweepstakes marketing of long distance service in Florida, beginning in August of 1996 and terminating in February of 1997 (three months after receiving its first slamming complaint from the Commission and nine months before this docket was opened) are stated in my March 16 letter and were reiterated at our August 10 settlement meeting.

As we discussed with you and other members of the staff at our meeting on August 10, the stock and assets of PCS, including IXC Certificate No. 4407 and ALEC Certificate No. 4682, are now owned by Phones For All, Inc. ("PFA"). As I stated at our August 10 meeting, PCS remains concerned that the pending slamming proceeding may impact its anticipated application for transfer of majority organizational control. We, therefore, have at least preliminarily determined, as we communicated to staff, that we should attempt to resolve the potential liability arising from the instant slamming docket prior to filing an application for approval of transfer of majority organizational control. However, we remain committed to working with staff on all regulatory issues concerning

Will Cox, Esq.
Page 2
August 27, 1998

PCS and invite any comments or concerns staff may have regarding our current course of action in attempting to resolve the slamming complaints prior to filing the application for approval of transfer of majority organizational control.

SETTLEMENT PROPOSAL

As we stated at our August 10 meeting with staff, PCS believes that a fair and equitable settlement of this docket should consist of the following:

1. The payment of a voluntary contribution of \$25,000 to the general revenue fund of the State of Florida with no admission that PCS violated any statute, rule or order of the Commission;
2. The agreement of PFA, for itself and on behalf of PCS, to not market local exchange or long distance service by sweepstakes promotions; and
3. The agreement of PFA, for itself and on behalf of PCS, that any new marketing of long distance service be administratively approved by the Commission staff.

JUSTIFICATION FOR PROPOSAL

1. When the Commission opened this docket and eleven others in November of 1997 to investigate charges of slamming, it had received and forwarded to PCS complaints from 121 customers. All of the 121 complaints were responded to and resolved by PCS prior to the opening of this docket. To PCS' knowledge, none of the eleven other companies had completed their responses to their complainants before their respective dockets were opened.
2. In over 50% of the cases, PCS responded to complaints received from the Commission within four days. PCS' response to each customer included confirmation of a refund or credit reflecting the difference in PCS' rates and the rates of the prior carrier, and for many of the complaints PCS simply wrote a check for the entire amount of the customer's long distance bill for their pertinent period of time.
3. PCS has provided staff with copies of all correspondence concerning the complaints in question and with summaries of all complaints received by month, by date received, and by date responded to, listing each customer by name, by ANI, and by LOA. PCS has provided staff with a set of all refund letters, reflecting credits and payments totaling approximately \$10,000. PCS has provided these materials since October of 1997 promptly, voluntarily and without objection. PCS has expeditiously resolved customer complaints and has fully cooperated with the Commission staff in the investigation of these complaints.

Will Cox, Esq.
Page 3
August 27, 1998

4. The language in PCS' letter of agency in fact complied with Rule 25-4.118(3), Florida Administrative Code. A copy of PCS' LOA is attached to this letter. There can be no doubt that the language complied with the requirements of the current, existing rule, and thus did not constitute a violation of the rule, much less a "willful" violation as that term is defined in Florida law: "...that the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...."¹

5. The facts of this case are unlike those of any of the other eleven slamming dockets opened in November, 1997. Each case should be considered on its own facts and its own merit. Since PCS' first settlement offer was made five months ago, it has become increasingly clear that the primary goal of these proceedings is deterrence. For example, staff's July 9, 1998 recommendation in the AT&T docket expressed the concern "...that AT&T's current level of apparent violations will continue, absent additional action by the Commission to increase AT&T's economic incentive to investigate how its slams occur and to fix those problems."

6. There is simply no deterrence to be accomplished in PCS' case. None of the slamming complaints against PCS involve LOAs signed after the sweepstakes marketing program was voluntarily terminated in February, 1997, with the two exceptions (involving two LOAs signed in March and April of 1997 respectively) discussed in PCS' first settlement proposal. For the past eighteen months, and for nine months before this docket was opened, there has been no need or reason for the Commission to act to deter PCS from engaging in the marketing which generated the slamming complaints.

7. To the extent that the payment of a voluntary contribution to the state general revenue fund or a fine is intended to deter future willful violations of Commission rules or orders, such a goal has no application to the facts of this case. Not only would a fine not serve to deter the prospect of future willful violations of Commission rules, but any fine or settlement - - moreover, any fees and expenses incurred to defend a show cause proceeding - - serve only to impose costs on the new owners of a company which is marketing local exchange service, not long distance service. As we discussed at our August 10 meeting, the new owners of PCS have new business goals and objectives for the company with the focus on the provision of competing local exchange services - - services which, to our knowledge, have generated no customer complaints.

8. Moreover, the imposition of an excessive fine on PCS would serve as a precedent to deter the very type of conduct that the Commission surely wishes to encourage. In this case, PCS voluntarily and proactively, quickly and decisively, policed itself by permanently terminating the

¹Metropolitan Dade County v. State of Florida, Department of Environmental Protection, 23 Fla. L. Weekly D.1393, 1394 (DCA 3d Opinion filed June 10, 1998).

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sweepstakes marketing activities and resolving the customer complaints prior to the opening of this docket and the threat of Commission action.

9. Additionally, as staff and the Commission have recognized, it is appropriate to consider whether a company has a prior history of slamming complaints. At various times, a respondent has been characterized as a "first time offender" in comments by Commissioners considering a settlement proposal. Conversely, proposed fine amounts have been doubled and tripled for companies which have been the subject of prior show cause proceedings involving slamming complaints.

10. PCS is a first-time and a last-time offender. The sweepstakes marketing program was voluntarily and permanently terminated in February of 1997, has not been used since, and will not be repeated under PCS' settlement proposal. All complaints against PCS have long since been resolved.

In light of the foregoing, PCS believes that the proposal made in this letter is reasonable and justified. We are hopeful that staff and the Commission will recognize that this proposal has been made in good faith and will find it acceptable and in the public interest.

Please let me know if any additional information is required to allow staff and the Commission to give full and fair consideration to our proposal.

Sincerely,



Kenneth A. Hoffman

KAH/JRE/knb

cc: Jeffrey J. Walker, Esq.
John R. Ellis, Esq.
Ms. Kelly Biegalski, by hand delivery

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