

RUTLEDGE, ECENIA, UNDERWOOD, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION  
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA  
JOHN R. ELLIS  
KENNETH A. HOFFMAN  
THOMAS W. KONRAD  
MICHAEL G. MAIDA  
J. STEPHEN MENTON  
R. DAVID PRESCOTT  
HAROLD F. X. PURNELL  
GARY R. RUTLEDGE  
R. MICHAEL UNDERWOOD

POST OFFICE BOX 551, 32302-0551  
215 SOUTH MONROE STREET, SUITE 420  
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788  
TELECOPIER (850) 681-6515

OF COUNSEL:  
CHARLES F. DUDLEY

GOVERNMENTAL CONSULTANTS:  
PATRICK R. MALOY  
AMY J. YOUNG

**ORIGINAL**

November 16, 1998

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center, Room 110  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

RE: Docket No. 971492-TI

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of AT&T Communications of the Southern States, Inc. and d/b/a Connect 'N Save are the Original and fifteen copies of AT&T's Preliminary Response to Order to Show Cause, Motion for Extension of Time and Petition for Formal Administrative Hearing.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

J. Stephen Menton

- ACK \_\_\_\_\_ RECEIVED & FILED
- AFA \_\_\_\_\_
- APP \_\_\_\_\_ *Max*
- CAF \_\_\_\_\_ 1
- CMU \_\_\_\_\_ JSM/knb
- CTR \_\_\_\_\_ Enclosures
- EAG \_\_\_\_\_ cc: All Parties of Record
- LEG \_\_\_\_\_ 1
- LIN \_\_\_\_\_ 5
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC \_\_\_\_\_ 1
- WAS \_\_\_\_\_

DOCUMENT NUMBER-DATE

12836 NOV 16 88

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

|                                  |   |                          |
|----------------------------------|---|--------------------------|
| In re: Initiation of show cause  | ] | Docket No. 971492-TI     |
| proceedings against AT&T         | ] |                          |
| Communications of the Southern   | ] | Filed: November __, 1998 |
| States, Inc. and d/b/a           | ] |                          |
| Connect 'N Save for violation of | ] |                          |
| Rule 25-4.118, F.A.C.,           | ] |                          |
| Interexchange Carrier Selection. | ] |                          |

---

**PRELIMINARY RESPONSE TO ORDER TO SHOW CAUSE,  
MOTION FOR EXTENSION OF TIME AND PETITION FOR  
FORMAL ADMINISTRATIVE HEARING**

AT&T Communications of the Southern States, Inc. and d/b/a Connect 'N Save ("AT&T"), by and through its undersigned counsel, respectfully submits this preliminary response to the Order to Show Cause issued in this matter on October 27, 1998. AT&T is continuing to pursue settlement negotiations with Staff in an effort to resolve the issues raised in this docket without the need for formal legal proceedings. In the event that on-going settlement negotiations are not successfully concluded, AT&T requests that this matter be transferred to the Division of Administrative Hearing for a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes and Rule 25-22.0355, Florida Administrative Code, and that AT&T be granted an opportunity to supplement this response to the Order to Show Cause after the factual predicate for the Order has been fully revealed. As the basis for its response and the requests set forth herein, AT&T states:

DOCUMENT NUMBER-DATE

12836 NOV 16 88

FPSC-RECORDS/REPORTING

1. AT&T is an intrastate interexchange telecommunications service provider in Florida and is subject to the rules and regulations of this Commission.

2. All pleadings, motions, discovery, staff recommendations, orders, correspondence and other documents filed or served in this proceeding should be served on the following on behalf of AT&T:

KENNETH A. HOFFMAN  
J. STEPHEN MENTON  
Rutledge, Ecenia, Underwood, Purnell  
& Hoffman, P.A.  
P.O. Box 551  
215 S. Monroe Street, Ste. 420  
Tallahassee, FL 32302  
(850) 681-6788 (telephone)  
(850) 681-6515 (telecopier)

3. On October 27, 1998, the Commission issued an Order to Show Cause directing AT&T to set forth in writing within 21 days the reasons why it should not be fined \$30,000 for each of 183 complaints of alleged slamming. AT&T would be substantially impacted by the Commission's proposed imposition of a fine for alleged slamming violations.

4. On September 25, 1998, AT&T submitted a good faith offer to resolve the allegations of slamming violations. AT&T's settlement offer included, among other things, a proposal to implement mechanisms to minimize the risk of slamming violations in the future and a voluntary payment in excess of prior settlements between the Public Service Commission and other interexchange telecommunications service providers accused of similar slamming violations in Florida. In its September 29, 1998 Memorandum, Staff has

acknowledged the benefits and appropriateness of the proposed remedial mechanisms to cure future problems and expedite resolution of customer complaints. At this point, the parties have been unable to reach a resolution as to an appropriate monetary settlement.

5. The Order to Show Cause only sets forth facts related to 7 of 183 allegations of slamming. The factual basis for each of the alleged slamming incidents is unique and still in the process of being investigated. AT&T reserves the right to supplement this response after identification by the Commission of the specific incidents which are the basis for the proposed imposition of sanctions.

6. AT&T continues to negotiate in good faith in an attempt to resolve the matters raised in this docket in a fair and responsible manner consistent with the settlements negotiated by the Commission with other carriers charged with similar violations.

7. AT&T denies that the Order to Show Cause sets forth a legally sufficient basis for the imposition of a fine of the magnitude proposed in the Order.

8. Section 364.285, Florida Statutes authorizes the Commission to impose sanctions for a "willful" violation of the Commission's rules or orders. AT&T denies that there is competent, substantial evidence of a willful violation of any statute, rule, or order of the Commission by AT&T or any employee or agent acting within the scope of his authority. The Florida courts have recognized that the use of the word "willful" in a statute demonstrates the legislature's intention that "more than mere knowledge or awareness of a requirement is necessary in order to impose sanctions." A "willful" violation requires that

the act be intentional and accompanied by the "actor's intent and purpose that the prohibited conduct take place." See, Thunderbird Drive-In Theater, Inc. v. Reed, 571 So.2d 1341, 1344 (Fla. 4<sup>th</sup> DCA 1990), rev. den., 577 So.2d 1328 (Fla. 1991); Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512 (Fla. 3<sup>rd</sup> DCA 1998). In Metropolitan Dade County, the court held that "willful" means "that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...." 714 So.2d at 516 - 517.

9. Sanctions imposed by the Commission can only be premised upon evidence of a lack of due diligence in addressing known problems or insuring compliance by employees. See, Metropolitan Dade County; supra; accord, Pic N' Save v. Department of Business Regulation, 601 So.2d 245 (Fla. 1<sup>st</sup> DCA 1992). AT&T acted with reasonable diligence to insure compliance by its employees through frequent instruction and direct supervision.

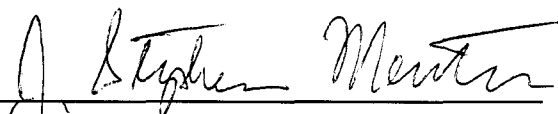
10. AT&T's LOA Forms contain text which is clearly legible and printed in compliance with Rule 25-4.118(3)(b), Florida Administrative Code. AT&T's LOAs are not misleading and comply with the requirements of the applicable rules.

11. Forgery or similar criminal or fraudulent conduct by independent contractors acting outside the scope of their authority cannot serve as a basis for finding a willful violation on the part of AT&T.

12. The proposed penalty in the Order to Show Cause is not consistent with the Commission's treatment of other carriers involved in prior show cause proceedings. The Commission's rules do not provide a basis for differentiating between the severity of alleged slamming violations or for imposing penalties against AT&T which are disproportionate to the penalties imposed against other similarly situated interexchange telecommunication service providers. Furthermore, the Commission's rules do not provide any notice or guidance for increasing or augmenting penalties because of prior slamming violations. AT&T has offered to settle the allegations set forth in this docket on terms that are more severe than settlements entered into by the Commission with other carriers faced with similar charges.

13. By filing this Response, AT&T does not admit to any violations of any statute, Commission Order, or any rule or regulation. In the event that a settlement cannot be successfully negotiated, AT&T requests that this matter be transferred to the Division of Administrative Hearings for assignment to an Administrative Law Judge to conduct a formal administrative hearing to resolve the disputed issues of fact which are the basis for the Order to Show Cause. Upon such transfer, AT&T requests the opportunity to supplement this response to address any specific allegations which purport to serve as the basis for the imposition of sanctions.

Respectfully submitted this 16 day of November, 1998.

  
KENNETH A. HOFFMAN  
J. STEPHEN MENTON  
Rutledge, Ecenia, Underwood, Purnell  
& Hoffman, P.A.  
P.O. Box 551  
215 S. Monroe Street, Ste. 420  
Tallahassee, FL 32302  
805/681-6788

**CERTIFICATE OF SERVICE**

I HEREBY certify that a true and correct copy of the foregoing has been furnished to:

Charles Beck  
Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison St., #812  
Tallahassee, FL 32399-1400

By U.S. Mail

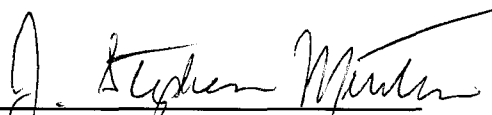
Michael Gross  
Office of the Attorney General  
Department of Legal Affairs  
The Capitol, PL101  
Tallahassee, FL 32399-1050

By U.S. Mail

Catherine Bedell  
Public Service Commission  
2540 Shumard Oak Blvd.  
Division of Legal Services  
Room 335 E-1  
Tallahassee, FL 32399-0850

By U.S. Mail

on this 16 day of November, 1998.

  
ATTORNEY