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June 5, 2006

Blanca Bayo, Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

In re: Docket No. 050948-TX
Compliance Investigation of Arrow Communications, Inc.
d/b/a ACI for Apparent Violation of Section 364.183(1), F. S.
Access to Company Records

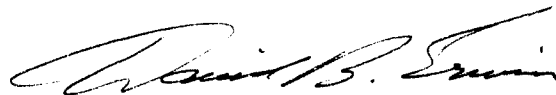
Dear Ms. Bayo:

Enclosed please find the original and 15 copies of a Petition on Proposed Agency Action in Docket No. 050948-TX. A copy is being provided to staff counsel, Lee Eng Tan.

Please note that the Petition requests that this matter be referred to the Division of Administrative Hearings (DOAH), so that an administrative law judge can be assigned to conduct a hearing.

Thank you for your attention to this filing.

Sincerely,



David B. Erwin
Attorney for Arrow Communications, Inc.

DBE:jm

Copy: Jeff Leslie, Arrow

DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Compliance Investigation)
of Arrow Communications, Inc.)
d/b/a ACI for Apparent Violation)
of Section 364.183(1), F. S.,)
Access to Company Records)

DOCKET NO. 050948-TX

Filed: June 5, 2006

PETITION ON PROPOSED AGENCY ACTION

Arrow Communications, Inc. d/b/a ACI (Arrow), a corporation regulated by the Florida Public Service Commission (Agency or Commission), brings this petition on Proposed Agency Action (PAA) against the Commission and alleges:

a) The agency affected is the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. The Docket Number in this matter is 050948-TX, and the PAA Order in issue is PSC-06-0440-PAA-TX.

b) The petitioner is Arrow Communications, Inc. d/b/a ACI, 96 N. E. Dixie Highway, Stuart, Florida 34994-1840, telephone 772.692.3000. Petitioner's representative for this proceeding is Attorney David B. Erwin, 127 Riversink Road, Crawfordville, Florida 32327, telephone 850.926.9331. Petitioner's substantial interests will be affected by the agency's determination in this docket by imposition of a substantial penalty or loss of operating authority, in lieu of payment of the fine, in spite of the fact that the petitioner did not refuse to comply with or willfully violate any lawful rule or order of the Agency.

c) Petitioner received verbal notice of the agency determination to impose a \$10,000 penalty at the Commission agenda conference on May 2, 2006; and petitioner's attorney received a copy of the order memorializing the action on May 23, 2006, by

accessing the Commission's website, and petitioner got a certified copy of the order in the mail on May 24, 2006.

d) There are disputed issues of fact that relate to the action or inaction of the petitioner's employee. The agency characterizes the action or inaction as being suffused with "refusal," "intentional disregard," "plain indifference," and "willful" components. The petitioner believes the action or inaction of the petitioner's employee was "unintentional," "inadvertent," "inattentive," "mistaken," "careless," "negligent."

e) Petitioner alleges the following ultimate facts:

- 1) At the time of the alleged "intentional" and "willful" failure to respond in June and July 2005, Arrow had two clerical employees.
- 2) One of the employees, Cherie Sulzer, sat at Arrow's front desk, answered the telephone and handled customer contact matters. Cherie Sulzer stopped working for Arrow in November 2005. The clerical employee, Ruby Evans, is a dedicated, long-term employee of Arrow who has worked for Arrow for six years. Ruby Evans handles all reports, tax returns and filings for Arrow. In June and July 2005, Ruby Evans was in the middle of closing out financial matters for calendar year, 2004, and was extremely busy.
- 3) Ruby Evans handled filing the PSC competition data report for the two years prior to 2005, and the report was filed timely and correctly in those years, by checking a box that indicated Arrow was not providing local service and then faxing the sheet with a check mark on it to the Commission.

- 4) In June 2005, Ruby Evans checked the box indicating that Arrow had provided no local service in the preceding year and placed it on her desk to be faxed.
- 5) Ruby Evans intended to comply with the Commission request, as in previous years. Ruby Evans believes that she mistakenly put the checked sheet in a pile of documents to be filed instead of in a group of documents that were to be acted upon.
- 6) Ruby Evans believes that she filed the checked sheet by mistake instead of faxing the sheet to the Commission, which she intended to do, as she had done in the past.
- 7) When the "Failure to Respond" notice came to Ruby Evans' attention a month and a half later, she believed she had already faxed the sheet to the Commission, as she had intended.
- 8) Ruby Evans is not aware of receiving any telephone call or message related to this matter.
- 9) Ruby Evans feels devastated by her mistake that may cost her employer \$10,000, since she never had any intention to not file the report.

Petitioner contends that the above facts warrant reversal of the agency's proposed action of imposing upon petitioner a \$10,000 penalty for refusal to comply with or willful violation of the agency's request for data.

- 10) In addition to the two written requests for data, the Commission telephoned non-responding telephone companies in an effort to insure a

100% response rate. (See Footnote 15 on page 8 of the Commission's Report on Competition.)

- 11) Ruby Evans did not receive a telephone call about failure to file a response.
- 12) The response rate of 89% to the data request in issue enabled the Commission to present an accurate report to the Governor and Legislature. Lack of a 100% response rate did not affect the Commission's conclusions reached in the report. (See last paragraph, page 8, of the Report on Competition.)
- 13) The Commission was not penalized monetarily by the Legislature for not having a 100% response rate, and needed to recover no money from non-respondents to offset any Commission monetary loss.
- 14) There has been no input asked for by the Commission from those telephone companies potentially affected by the extremely high penalties levied for non-response to the Competition Report data request.
- 15) The magnitude of a \$10,000 penalty for non-response, or a \$3,500 "negotiated" penalty for a first time non-response, is anti-competitive and has driven potential competitors out of the market place by causing them to forfeit their certificates in lieu of payment of the penalties assessed.

f) Petitioner contends that the same statute cited by the agency as authority for imposition of the \$10,000 penalty, s. 364.285(1), F. S., is authority for reversing the agency's proposed agency action. The cases cited by the agency in order PSC-06-0440-

PAA-TX also fail to support the agency position and instead support petitioner's position that the order should be reversed. Petitioner is not guilty of any "specific intent to fail to do something the law requires to be done." The contrary is the factual situation.

Petitioner fully intended to do what was required, but through simple oversight, mistake, inadvertence, incorrect belief that the act required had been already done, petitioner failed to comply.

g) Petitioner seeks to have order PSC06-0440-PAA-TX reversed and overturned, and Petitioner requests that in fairness, this matter be referred to the Division of Administrative Hearings (DOAH), so that an administrative law judge be assigned to conduct a hearing. The Commission has already voted against Petitioner by a vote of 3 – 2, after the facts were proffered at Agenda Conference. A new and impartial trier of fact is required.

Respectfully submitted

A handwritten signature in black ink, appearing to read "David B. Erwin". The signature is fluid and cursive, with a horizontal line drawn underneath it.

David B. Erwin
Attorney for Arrow Communications, Inc.
d/b/a ACI

CERTIFICATE OF SERVICE

A copy of this Petition on Proposed Agency Action has been provided by the undersigned this date, by U. S. Mail, to Lee Eng Tan, Staff Attorney, Florida Public Service Commission.



Date: June 5, 2006