

REVISED

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** September 2, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Cowdery, Miller, Cibula)  
Division of Regulatory Compliance (Mailhot, Salak, Kennedy)  
Division of Economic Regulation (Hewitt)  
Division of Service, Safety & Consumer Assistance (Moses)

**RE:** Docket No. 080641-TP – Initiation of rulemaking to amend and repeal rules in Chapters 25-4 and 25-9, F.A.C., pertaining to telecommunications.

**AGENDA:** 09/15/09 – Regular Agenda – Participation Limited to Commissioners and Staff

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Skop

**RULE STATUS:** Adoption should not be deferred. It was stated at the August 18, 2009, agenda that the Commission would consider Rule 25-4.083 at the September 15 agenda. ~~F.A.W. notice issued indicating Commission would consider the written comments at August 18 agenda conference.~~

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\080641.RCM.DOC

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### Case Background

The Commission published Notices of Rulemaking in the January 23, 2009 edition of the Florida Administrative Weekly, indicating its intent to amend Rules 25-4.002, 25-4.0185, 25-4.023, 25-4.066, 25-4.070, 25-4.071, 25-4.073, 25-4.074, 25-4.083, 25-4.107, 25-4.109, and 25-4.110, and repeal Rules 25-4.046, 25-4.067, and 25-4.108, Florida Administrative Code (F.A.C.).

These rules may be generally characterized as telecommunications service quality rules. The purpose of the rules in Chapter 25-4 is to define reasonable service standards that will promote the furnishing of adequate and satisfactory local and long distance service to the public and establish the rights and responsibilities of both the utility and customers.<sup>1</sup>

The notices required that any comments or requests for hearing on the proposed rules be filed with the Office of Commission Clerk by February 13, 2009. The Commission did not receive any requests for hearing on the proposed rules. However, Verizon Florida LLC, BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Embarq Florida Inc., Quincy Telephone Company d/b/a TDS Telecom, and Windstream Florida, Inc. (together referred to herein as the Joint Petitioners) timely filed comments on the following proposed rules: Rule 25-4.066, Availability of Service; Rule 25-4.070, Customer Trouble Reports; Rule 25-4.073, Answering Time; and Rule 25-4.110, Customer Billing for Local Exchange Telecommunications Companies. The Communications Workers of America (CWA) submitted comments on proposed Rule 25-4.070, Customer Trouble Reports. The Florida Cable Telecommunications Association, Inc., (FCTA) timely filed comments on proposed Rule 25-4.083, Preferred Carrier Freeze. No comments were filed concerning the remaining proposed rules.<sup>2</sup>

On July 1, 2009, Committee Substitute (CS) for CS for Senate Bill 2626, the “Consumer Choice and Protection Act,” now Chapter 2009-226, Laws of Fla., became effective. This law amended certain sections of Chapter 364, F.S., as addressed in this staff recommendation. Interested persons were given the opportunity to file supplemental comments to address the new law’s impact on the Commission’s proposed rules. Written comments were required to be received by the Office of the Commission Clerk by July 13, 2009. Written comments were timely filed by Joint Petitioners concerning proposed Rules 25-4.0185, 25-4.066, 25-4.070, 25-4.073, and 25-4.110, and by FCTA concerning Rule 25-4.083. The proposed rules were addressed at the August 18, 2008 agenda, except for Rule 25-4.083, Preferred Carrier Freeze.

On August 17, FCTA requested that the issue on the PC-Freeze rule, Rule 25-4.083, be deferred. It was stated at the August 18 agenda that the issue was deferred to the September 15 agenda. Staff met with a representative of FCTA on August 24 to hear their concerns. FCTA filed a summary of these concerns on August 27, 2008. Staff met with representatives of AT&T, Verizon, TDS, and Embarq on August 25 to gather their input. The ILECs filed a summary of their input on August 31.

This recommendation addresses whether the Commission should make changes to proposed Rule 25-4.083, F.A.C., based on the comments submitted in the proceeding. The Commission has jurisdiction pursuant to Section 120.54 and Chapter 364, F.S.

~~This recommendation addresses whether the Commission should make changes to proposed Rules 25-4.0185, 25-4.066, 25-4.070, 25-4.073, 25-4.110, and 25-4.083, F.A.C., based~~

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<sup>1</sup> Rule 25-4.002, Application and Scope, F.A.C.

<sup>2</sup> Amended Rules 25-4.002, 25-4.023, 25-4.071, 25-4.074, 25-4.107, and 25-4.109, and repealed Rules 25-4.046, 25-4.067, and 25-4.108, F.A.C., were filed with the Department of State on March 6, 2009 and became effective on March 26, 2009.

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~~on the comments submitted by the Joint Petitioners, FCTA, and CWA.<sup>3</sup> The Commission has jurisdiction pursuant to Section 120.54 and Chapter 364, F.S.~~

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<sup>3</sup>~~If the Commission makes changes to proposed Rules 25-4.066, 25-4.070, or 25-4.073, there could be resultant changes to the language of proposed Form PSC/SSC 28, Periodic Reports, which is incorporated by reference into Rule 25-4.0185, Periodic Reports. For this reason, Rule 25-4.0185 was not filed with the Department of State even though no comments were filed specifically addressing that rule in the February 13, 2009 comments. Joint Petitioners' July 13, 2009, supplemental comments did address Rule 25-4.0185 and proposed Form PSC/SSC 28.~~

**Discussion of Issues**

**Issue 1:** Should the Commission adopt changes to proposed Rules 25-4.0185, Periodic Reports, 25-4.066, Availability of Residential Service, 25-4.070, Customer Trouble Reports for Residential Service, and 25-4.073, Answering Time for Residential Service, and 25-4.110, Customer Billing for Local Exchange Telecommunications Companies, F.A.C., based on comments filed by Joint Petitions and by CWA?

**Recommendation:** Decided at the August 18 agenda.

**Issue 2:** Should the Commission adopt changes to proposed Rule 25-4.083, Florida Administrative Code, as suggested by the FCTA?

**Recommendation:** No, the Commission should not adopt FCTA's suggested changes to proposed Rule 25-4.083, F.A.C. (Cowdery, Miller, Salak, Mailhot, Kennedy)

**Staff Analysis:** Rule 25-4.083 imposes requirements on local exchange providers concerning imposition and removal of a Preferred Carrier Freeze (PC-Freeze)<sup>4</sup> on a subscriber's account, including information which must be contained on written authorizations to impose a PC-Freeze on a preferred provider selection. Rule 25-4.083 implements Section 364.603, F.S., Methodology for Changing Telecommunications Provider, which requires the Commission to adopt rules to prevent the unauthorized change of a subscriber's telecommunications service, to provide for specific verification methodologies, to provide for the notification to subscribers of the ability to freeze the subscriber's choice of carriers at no charge, to allow for a subscriber's change to be considered valid if verification was performed consistent with the Commission's rules, to provide for remedies for violations of the rules, and to allow for the imposition of other penalties available in Chapter 364, F.S.

The Commission proposed to amend Rule 25-4.083 by requiring local providers to meet the requirements of 47 Code of Federal Regulations (C.F.R.), 64.1190 concerning PC-Freezes. Further, the Commission proposed to delete the rule requirements of Rule 25-4.083 which were duplicative of the provisions of 47 C.F.R. 64.1190. In addition to the 47 C.F.R. 64.1190 requirements, the proposed rule contains three subsections.

The Commission proposed to amend Rule 25-4.083 to add a new subsection (1) to state that a local provider shall make available a PC-Freeze upon a subscriber's request. In addition, the Commission proposed retaining the rule requirements that a PC-Freeze shall not be required as a condition for obtaining service and that a PC-Freeze shall be implemented or removed at no charge to the subscriber. The Commission proposed deleting the remaining subsections of Rule 25-4.083.

The Commission proposed that subsection (5) of Rule 25-4.083 should be deleted. This subsection prohibits a local provider from soliciting, marketing, or inducing subscribers to request a PC-Freeze, but states that a local provider is not prohibited from informing an existing or potential new subscriber who expresses concerns about slamming about the availability of a PC-Freeze.

The Commission proposed that Rule 25-4.083 be amended to delete subsections (3), (6), and (8), as covered by the requirements of the 47 C.F.R. 64.1190(c), (d)(2), and (e), respectively. Subparagraphs (4)(a) and (b) of Rule 25-4.083 were deleted because they are covered by the requirements of 47 C.F.R. 64.1190(d)(1). Likewise, subparagraphs (7)(a) through (c) of Rule 25-4.083 were deleted because they are covered by the requirements of 47 C.F.R. 64.1190(d)(3).

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<sup>4</sup> A PC-Freeze is defined in Rule 25-4.003(43) as "[a] service offered that restricts the customer's carrier selection until further notice from the customer."

The Commission proposed that subsection (9) of Rule 25-4.083 be deleted because it is unnecessary. This subsection requires a local provider to retain authorization documentation or recordings for a period of one year as proof that a customer requested implementing or lifting a PC-Freeze.

In its comments, FCTA suggests that the Commission essentially withdraw its proposal to amend Rule 25-4.083 and keep the rule as it exists today, with the exception of subsection (9), the one-year record retention requirement, which it believes may be deleted. FCTA states that Rule 25-4.083 protects consumers by ensuring that no “slamming” of a customer, i.e., the unauthorized switch of a customer’s carrier, can occur. It asserts that the rule also safeguards competition and ensures a level playing field because the rule prevents a carrier from imposing a PC-Freeze on a customer without that customer’s consent. FCTA states that, were it otherwise, carriers could unilaterally prevent any customer from switching to a competitor by imposing a PC-Freeze without the subscriber’s consent, thereby “stopping competition in its tracks.” It contends that Florida’s existing rule represents “a thoughtful and measured effort.” FCTA asserts that the amendments the Commission is proposing to Rule 25-4.083 lack evidentiary support in the record.

Specifically, FCTA disagrees with adding proposed subsection (1) to Rule 25-4.083. FCTA states that there has been no showing in this docket that the information required by proposed subsection (1) would be beneficial to consumers. FCTA asserts that introducing a new requirement in the rule that LECs provide notice to their customers of the PC-Freeze option could hamper competition.

Staff does not agree with FCTA’s characterization of proposed subsection (1). Proposed subsection (1) is not a notification provision, but is a requirement that the companies make available a PC-Freeze upon a subscriber’s request. This subsection was added because it is not specifically required by 47 C.F.R. Section 64.1190. 47 C.F.R. 64.1190 applies only to LECs who offer PC-Freezes.<sup>5</sup> Thus, if a LEC elects not to offer this service, customers would not be able to obtain a PC-Freeze to protect themselves from an unauthorized carrier change. In contrast, Section 364.603, F.S., requires telecommunications companies to offer PC-Freezes, and Rule 25-4.083, F.A.C., applies to ILECs, CLECs, and intrastate interexchange companies (IXCs).

FCTA disagrees that the offer of a PC-Freeze is mandatory. It states that Section 364.603, F.S., requires consistency with federal law, yet the federal regulations suggest that offering PC-Freezes is optional. FCTA states that it is concerned that under the proposed rule ILECs could aggressively solicit existing customers to freeze their choice of carrier, making it more difficult to transfer a customer seamlessly to a new network. FCTA states that the PC-freeze makes it harder for a competitor to win a customer because it creates numerous additional steps to “unfreeze” the carrier choice.

Staff believes that, in order to implement Section 364.603, F.S., the offer of a PC-Freeze must be a mandate. The law requires the Commission to adopt rules to prevent slamming and

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<sup>5</sup> 47 C.F.R. 64.1190(a)

take other actions, such as requiring the companies to notify subscribers of the ability to freeze the subscriber's choice of carriers.

FCTA also disagrees with deletion of subsection (5) of the existing rule, which prohibits ILECs from soliciting their subscribers to place PC-Freezes on their accounts. (p. 8) FCTA states that this provision is designed to ensure a level playing field between incumbent and competitor. It asserts that the presence of this rule requirement has helped facilitate competition in Florida. FCTA states that removing the "no solicitation" rule would enable ILECs to create a new hurdle for competitors to clear when seeking to win customers. Allowing a solicitation of a PC-Freeze would enable a competitor to freeze customers in place, thereby erecting a barrier to competition. Thus, FCTA urges the Commission to withdraw the changes it has proposed to this section of the rule.

Upon the request of FCTA in their deferral request, staff met to discuss their concerns on August 24 about this rule. On August 27, FCTA filed a summary of the points they raised at the meeting. Primarily, they are concerned with the removal of subsection (5). They repeated their concern about possible anti-competitive effects of the PC-Freeze. For example, when even a small percentage of customers experience a delay on the removal of their PC-Freeze, they may give up and decide to remain with their current provider. FCTA is concerned that the local exchange companies may try to "lock-up" customers. They said the removal of the prohibition might give the local exchange companies an easy way to "ratchet up" the number of customers who have a PC-Freeze. They said that thousands of customers per year who want to switch to cable telephone are delayed in doing so because of PC-Freezes. The customer must contact the ILECs to have the local freeze removed, creating a retention marketing opportunity. Changing the rule to allow solicitation of PC-Freezes, they urge, will multiply this problem with no consumer benefits and give the ILEC's "license to engage in anticompetitive behavior."

On August 25, staff met with representatives of the ILECs (from AT&T, Verizon, TDI, and Embarq). On August 31, the ILECs filed a summary of their concerns about placing the no solicitation language back in the rules. They urged that the new law in Sec. 364.603, Florida Statutes, already provides a process for an expedited review. The new language in Sec. 364.603 states:

The Commission shall resolve on an expedited basis any complaints of anticompetitive behavior concerning a local preferred carrier freeze. The telecommunications company that is asserting the existence of a local preferred carrier freeze, which is the subject of the complaint, shall have the burden of proving through competent evidence that the customer did in fact request the freeze.

The ILECs also expressed concern that the cable companies are not regulated to the same degree as the telecommunications companies. For example, they said the cable companies are weighing in on a rule that they are not regulated by. They further urged that subsection (5) is unnecessary and that the Commission could monitor to observe whether there is a major onslaught of PC-Freeze solicitations that would in any way impede competition. If the

Commission observes a problem, they say, then the Commission could initiate a rulemaking and revert to the existing provision.

Lastly, the ILECs noted that there's a fine line between "marketing" and "informing", and that the ambiguity itself could be a concern. In other words, it would be difficult to ascertain when they cross the line into the prohibited solicitation.

Staff does not recommend that proposed Rule 25-4.083 be changed to prohibit ILECs soliciting their subscribers to place PC-Freezes on customer accounts. Staff believes that subsection (5) is appropriately deleted because there will be sufficient consumer protections remaining in proposed Rule 25-4.083, proposed Rule 25-4.110(13), and 47 C.F.R. 64.1190 to prevent companies from misleading customers about PC-Freezes. Section 64.1190 provides that all carrier-provided solicitation must include an explanation, in clear and neutral language, of what a PC-Freeze is and what services may be subject to a freeze. Proposed Rule 25-4.110(13), requires that companies billing for local service must provide notification to customers about the availability of a PC-Freeze at no charge. Proposed subsection 25-4.083(2) prevents a company from forcing a customer to take a PC-Freeze as a condition for obtaining service. If there are abusive or anticompetitive practices that are alleged, the Commission is required by Section 364.603, F.S., to resolve on an expedited basis any complaints of anticompetitive behavior concerning a local PC-Freeze.

If the Commission believes instead that the preventative step of prohibiting solicitation of PC-Freezes is important to competition, the first sentence of subsection (5) provision on no-solicitation could be added back into the final rule.

FCTA initially took the position in this docket that the Commission should retain subsection (9) of the rule which requires authorization confirmation to be retained for one year to show that a customer requested the implementation or lifting of a PC-Freeze. However, in its supplemental comments, FCTA states that the one year record retention requirement is no longer necessary due to the Chapter 2009-226, Laws of Fla., amendments to Section 364.603, F.S., which place the burden of proving that a customer requested a PC-Freeze on the provider asserting that the PC-Freeze exists. FCTA states that existing federal rules and the statutory amendments create an incentive for providers to retain information showing a customer actually requested a PC-Freeze, because if the provider does not retain evidence of a customer request, any complaint concerning whether a customer actually requested the freeze will likely be resolved against the provider. FCTA states that the incentives for ILECs to retain these records enables the Commission to resolve disputes quickly and in a way that benefits the customer and fairness in the marketplace.

Consistent with FCTA's position in support of the proposed deletion of subsection (9), staff continues to recommend that the rule retention requirement be deleted as proposed. Staff also notes that Section 364.603 has been amended to require the Commission to resolve on an expedited basis any complaints of anticompetitive behavior concerning a local PC-Freeze. As pointed out by FCTA, the amended statute provides that the telecommunications company that is asserting the existence of a local PC-Freeze shall have the burden of proving through competent



evidence that the customer did in fact request the freeze. If the company does not retain authorization confirmation records, it may have a difficult time meeting this burden of proof.

FCTA also suggests that subsections (10), (11) and (12) of Rule 25-4.083 be retained. FCTA states that these subsections contain provisions designed to ensure that back office procedures account for PC-Freezes when an underlying wholesale service provider changes. FCTA specifically points to subsection (11) of Rule 25-4.083 as a means to increase communications between providers and states that deleting this subsection could have a harmful effect on those interactions.

Staff believes that these back office procedures are generally better left as “best practices” of the industry. Furthermore, these subsections were originally adopted in 2004 at the request of several telecommunications companies.<sup>6</sup> Because the industry requested elimination of these provisions in this rulemaking, staff concluded that the industry has changed its operational practices such that the issues addressed by these rules no longer exist as impairments to the competitive market.

FCTA states that ILECs still possess the power unilaterally to delay or prevent customers from switching to a competitor. FCTA states that for these reasons the Commission should keep Rule 25-4.083 as it is in effect today.

While staff agrees that Rule 25-4.083 has been an effective and well-balanced rule, we recommend the streamlining of the rule as proposed by the Commission and as set forth in this recommendation. Streamlining should retain the key ingredients of the rule, while minimizing the burden on the companies.

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<sup>6</sup> Docket No. 040167-TP, In Re: Proposed adoption of Rules 25-4.082, F.A.C., Number Portability, and 25-4.083, F.A.C., Preferred Carrier Freeze; and proposed amendment of Rules 25-4.003, F.A.C., Definitions; 25-24.490, F.A.C., Customer Relations; Rules Incorporated; and 25-24.845, F.A.C., Customer Relations; Rules Incorporated.

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**Issue 3:** Should this docket be closed?

**Recommendation:** Yes. (Cowdery, Miller)

**Staff Analysis:** If the Commission votes to accept staff's recommendation in Issue 2, proposed Rule 25-4.083 will be filed with the Secretary of State for adoption without changes. In either instance, the docket should be closed once the rules are filed with the Secretary of State.

~~If the Commission votes to accept staff's recommendation in Issues 1, a notice of change must be issued prior to the filing of the rules with the Secretary of State. If, however, the Commission votes not to change the proposed rules addressed in Issue 1, the rules will be filed with the Secretary of State for adoption without changes. If the Commission votes to accept staff's recommendation in Issue 2, proposed Rule 25-4.083 will be filed with the Secretary of State for adoption without changes. In either instance, the docket should be closed once the rules are filed with the Secretary of State.~~