ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Rule 25-24.845, F.A.C., Customer Relations; Rules Incorporated, and proposed amendments to Rules 25-4.003, F.A.C., Definitions; 25-4.110, F.A.C., Customer Billing; 25-4.118, F.A.C., Interexchange Carrier Selection; 25-24.490, F.A.C., Customer Relations; Rules Incorporated.	DOCKET NO. 970882-TI FILED: 12/22/97

MOTION FOR RECONSIDERATION

Excel Telecommunications, Inc. (Excel) hereby files this its Motion for Reconsideration of Order No. PSC-97-0882-PCO-TI, Order Compelling Production of Documents ("Production Order").

INTRODUCTION

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v King, 146 So. 2d 889 (Fla. 1962). This standard is easily met because in the Production Order the Prehearing Officer overlooked or ignored several legal fundamentals that must be adhered to if the Commission intends to follow the law in the exercise of its delegated legislative authority.

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AFA ____
APP 1
CAF ____
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LIN 5
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SEC 1
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Discovery is Available Only on a Party and Excel Is Not a Party

The Production Order either ignores, misapprehends, or overlooks Excel's fundamental objection to the requested discovery:

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discovery through production requests may only be made by a party on a party, and Excel is not a party to this docket. More specifically, discovery through production requests may be made pursuant to Rule 1.350, Florida Rules of Civil Procedure, which states in pertinent part as follows:

> Any party may request any other party (1) to produce . . . documents . . . .

There is no provision under Commission rules or under the Rules of Civil Procedure that allows either a party or non-party to discover documents of a non-party through productions requests.

The Production Order addresses Excel's central objection by mischaracterizing it as grounded in the fact that "this is a rulemaking proceeding and therefore, . . . (Excel) is not a party to the proceeding under Section 120.54." Id. at 2. The Production Order then sidesteps the problem that Excel is not a party to this proceeding by focusing on its supposed "hybrid" nature.[1] On the one hand, the order suggests, this is a rule proceeding in which participants are not parties; on the other hand, the order announces, this is also a "limited" investigative proceeding pursuant to Section 364.058, Florida Statutes. Moreover,

> The discovery being conducted by the OPC and the AG is part of the investigation portion of the docket to establish a factual record for rulemaking. In order to establish that record, discovery may be served on certificated companies. Upon consideration, I find that

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[1] The notion that this proceeding can be a hybrid adjudicatory/legislative proceeding outside the parameters of a drawout is a fiction. There is no provision in Chapter 120 for the selective unbundling and rebundling of the various procedures delimited in the adjudicatory and rulemaking tracks established under that chapter.

> certificated companies that are under the jurisdiction of the Commission are required to respond to the production of documents requests to the extent I have outlined in this order.

Production Order, p. 3 (emphasis added).

The Production Order's ruling is based on either one of two implicit propositions. First, it may be based on the proposition that in a limited proceeding investigation pursuant to Section 364.058 a non-party can be subjected to discovery despite the plain wording of the Florida Rules of Civil Procedure. No authority or explanation is given for this departure from the Rules. In the alternative, the Production Order's ruling may be based on the proposition that in this limited proceeding all certificated IXCs are automatically parties and subject to discovery. No authority or explanation is given for this proposition either.

It is curious that the Production Order fails to address the central problem that Excel is not a party. The Production Order cites Order No. PSC-971071-PCO-TI (Initiating Order) as granting the Attorney General/OPC's joint petition to initiate an investigation as an appropriate step in contemplation of rulemaking. The Production Order overlooks, however, that the Initiating Order denies the requests of the Attorney General/OPC's that (1) the investigative proceeding be held as a formal adjudicatory proceeding and (2) that certificated carriers be joined as indispensable parties. As Excel pointed out in its general objections,

> The Initiating Order grants the Petition only in part and <u>does not</u> join as parties all affected telephone companies.

Excel's Objections at 2 (emphasis original, footnote omitted).

Thus the Production Order fails to address the conflict between its ruling and the ruling of the Initiating Order that this is not an adjudicative proceeding and that certificated carriers are not parties. Thus, this motion for reconsideration brings to the attention of the Prehearing Office a crucial point of law which she has overlooked or failed to consider when she rendered her decision in the Production Order. Diamond Cab Co. of Miami, supra. Failure to grant reconsideration would be an abuse of discretion and a violation of Excel's right to due process.

The Production Order Fails to Consider Excel's Right to Due Process In Connection with the Commission's Investigation of Excel

The Production Order portrays the focus of the Commission in this hybrid proceeding as the adoption of rules that will ". . . eliminate, or at least greatly reduce, the occurrence of slamming." Id. at 1. Moreover, "The discovery being conducted by the OPC and the AG is part of the investigation portion of the docket to establish a factual record for rulemaking." Id. at 3. The Production Order, however, overlooks and fails to consider that after Excel filed its objections, the Commission opened a docket targeting Excel as the subject of an imminent enforcement action for alleged slamming violations. There are significant due process problems inherent in requiring Excel to respond to broad production requests supposedly for the purpose of informing rule development, while at the same time investigating Excel for the purpose of imposing sanctions.

For example, a production request by a party must be reasonably calculated to lead to the discovery of admissible evidence. Whether evidence is admissible, however, depends, inter alia, on the material issues of fact in dispute. In this docket there are no material issues of fact in dispute; moreover, in the investigation allegations have yet to be made and thus no issues currently exist. Because no disputed issues of fact exist, no standards for admissibility exist either in this docket or in the investigation. Thus, any enforced production must be viewed as a contortion of the Chapter 120 that ignores the standards for discovery guaranteed Excel under Chapter 120 and the Rules of Civil Procedure, and that has the unfortunate result of compromising Excel's right to due process under the law.

The Production Order's Analysis Ignores the Problem of Ex Parte Communications

When the Initiating Order denied the OPC/Attorney General's Request for a draw-out, it recognized that this docket would be a rule proceeding handled as a legislative process, not adjudicative. Thus, the Commission could pursue its statewide service hearings, publicity, and information collection as the development of a legislative record. In this context, the prohibition under Section 120.66, Florida Statutes against ex party communications on the merits of a matter in dispute, did not apply because this proceeding was not pursuant to Sections 120.569 and 120.57. Conceptually stated, this means that as a rule proceeding not subject to a "drawout" there were (1) no material issues of fact in dispute and (2) no parties. Thus, there can be no "ex parte"

communications on the merits of disputed issues.

Because of the legislative nature of this docket, there was no problem with Commissioners and staff having numerous off the record conversations with members of the public, the legislature, and the OPC/Attorney General about slamming. On the other hand, if the Production Order contemplates that the investigation phase of this hybrid docket is a "limited proceeding" in which all certificated companies are parties, then it would appear that the OPC/Attorney General (and perhaps others) have violated Section 120.66, Florida Statutes by discussing the matters involved in this limited proceeding with Commissioners directly and with key advisory staff without notice to certificated companies that are supposedly parties.

The better view, of course, is that there have been no violations of Section 120.66 because there are no parties in this proceeding and there are no material issues of disputed fact. This understanding, however, is fundamentally incompatible with the Production Order's ruling that discovery can be made on Excel and other certificated carriers. Thus, the Production Order overlooks or fails to consider the various due process constraints on agency action when adjudication is undertaken and potentially affected persons are deemed to be parties. The Prehearing Officer should reconsider the deeply flawed analysis that the hybrid nature of this proceeding allows the Commission to "unbundle" discovery from the adjudicatory process without regard to the constitutional and legislative parameters for adjudication.

CONCLUSION

For the reasons stated above, the Prehearing Officer should reconsider the Production Order and reaffirm that this proceeding is not being held pursuant to Sections 120.569 and 120.57, Florida Statutes, that Excel is not a party to this proceeding, and that Excel is not obligated to respond further to the production requests of the OPC/Attorney General.

Respectfully submitted this 22nd day of December 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand delivery* this 22nd day of December, 1997, to the following:

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