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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Robert A. Butterworth, Attorney General, and the Citizens of the State of Florida, by and through Jack Shreve, Public Counsel, against LCI International for slamming David Howe in violation of Rule 25-4.118, F.A.C.	)	Docket No. 971403-TI
In re: Initiation of show cause proceedings against LCI International Telecom Corp. for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection.	)	Docket No. 971487-TI Filed: May 13, 1998

LCI'S PARTIAL RESPONSE
TO ORDER NO. PSC-98-0566-SC-TI

Subject to the ruling on its Motion for More Definite Statement,[1] filed this date, LCI International Telecom Corp, through its undersigned counsel, files its Partial Response to Order No. PSC-98-0566-SC-TI. LCI reserves the right to modify or supplement its Response as appropriate upon receiving the ruling on the Motion for More Definite Statement.

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PRELIMINARY STATEMENT.

LCI relies on its reputation for ethical practices and on the good will it has established with the consuming public, as well as its high quality of service to attract

[1] LCI is simultaneously filing a Motion for More Definite Statement, in which it requests the Commission to delineate all of the allegations on which the Commission bases its contention that LCI has committed 71 seperate, willful violations of Commission rules. In this Partial Response, which is subject to the ruling on the motion, LCI attempts to respond to the limited allegations in the Order.

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customers. LCI believes strongly that the major source of complaints of unauthorized carrier changes in the telecommunications industry consists of deceptive or otherwise unscrupulous marketing practices engaged in by certain carriers who intentionally mislead customers to gain market share. LCI is in favor of regulatory measures designed to prevent such "slamming," for the simple reason that it is in LCI's interest as well as the customers' interest for the Commission to police against deceptive practices that victimize customers and ethical carriers alike. LCI's view is that prompt action to identify and punish carriers who intentionally abuse customers would be the best cura for the problem of slamming complaints. However, LCI is not one of those carriers. LCI has promulgated a strong policy that it will not tolerate deceptive procedures on the part of those who contract with LCI to sell LCI's services. LCI has actively policed its distributors, and has voluntarily taken stern measures -- including the termination of distributors -- when those distributors failed to meet LCI's requirements promptly. These measures were costly to LCI, in that the relationships with the terminated distributors were a significant source of new revenues.

RESPONSE TO DESCRIPTION OF LCI'S MARKETING ACTIVITIES
(Page 2 of Order No. PSC-98-0566-SC-TI)

While over time LCI has engaged, to one extent or another, in the various types of marketing to which the Order refers, LCI denies that the description in the Order accurately portrays LCI's principal mode of obtaining new customers. Overwhelmingly, LCI's principal source of new long distance customers during the time period to which the Order refers was through contracts with companies who in turn employ independent contractors to distribute LCI's services. LCI's business

structure sets it apart from many other carriers, in that LCI's principal and most effective means of minimizing claims of unauthorized carrier changes lies in its oversight of its relations with the independent contractors who sell its services directly to customers. These distributor representatives sell LCI's services face-to-face to potential customers and obtain a signed Letter of Authorization from the new customer at the time of the sale. The marketing activities of the distributors are carried out pursuant to contract terms and guidelines communicated to the distributors by LCI. The guidelines stress the obligation of the distributors and their representatives to employ responsible and ethical practices. As a company dedicated to and dependent upon its reputation for ethical conduct in the marketplace, LCI does not tolerate any deceptive or otherwise abusive practices on the part of the numerous distributors with whom it contracts.

RESPONSE TO ALLEGED VIOLATIONS

In the Order, the Commission identifies two categories of alleged violations. First, at page 2, the Order states that "it appears that LCI is submitting numerous preferred interexchange carrier (PIC) changes with forged customer signatures." Second, the Order states, ". . . in some instances, the name and address listed on the Letter of Authorization is not the name and address of the authorized person for the telephone number listed on the LOA."

With respect to the allegation that LCI "is submitting numerous . . . changes with forged customer signatures," LCI first states that the allegation is too vague to permit an appropriate response and/or defense; however, LCI denies that it has ever

knowingly or willfully relied on an LOA containing a forged signature to change a customer's carrier. LCI also denies that there have been "numerous" incidents of forged signatures. With respect to the relatively small number of instances in which it has been alleged that the distributor representative/independent contractor forged the customer's signature on an LOA, LCI states it was without knowledge of any forgery and reasonably and in good faith relied on the representation that the LOA was valid. Further, LCI states that any such forgery on the part of any of the independent contractors employed by the distributors was beyond the scope of authorization received by the independent distributor/contractor from LCI; was contrary to express directives and guidelines for behavior communicated by LCI; and was not condoned, ratified, or tolerated by LCI. In fact, LCI has demonstrated that it will promptly call on a distributor to terminate any representative who it has reason to believe forged a customer signature, and will also promptly terminate its entire relationship with any distribution company that fails to deal adequately with this or similar issues.

With respect to the allegation that "in some instances, the name and address listed on the Letter of Authorization is not the name and address of the authorized person for the telephone number listed on the LOA," LCI first states that the allegation is too vague to permit a specific response or defense. However, LCI generally denies that it has ever knowingly, willfully, or deliberately included or authorized the inclusion of incorrect information on an LOA for any reason, including the purpose of securing a customer without authorization.

RESPONSE TO ALLEGATIONS REGARDING THE ADEQUACY OF LCI'S STEPS TO PREVENT UNAUTHORIZED CARRIER CHANGES

At page 2, the Commission states, "We are concerned that adequate steps have not been taken by LCI to prevent unauthorized carrier changes and to ensure compliance with our rules." LCI denies that the steps it has taken to manage issues of unauthorized changes are inadequate. LCI's measures include written guidelines and policies; requirements embedded in contracts with distributors; a zero tolerance policy with respect to distributors who fail to abide by those requirements; and prompt and aggressive policing of distributors, including, but not limited to, the actual termination of distributors. In fact, within the recent past, as part of its response to the issue of complaints of unauthorized carrier changes, LCI voluntarily terminated its agreements with three distributors, notwithstanding the fact that the terminations resulted in a significant adverse financial impact upon LCI. Additionally, LCI denies that it is not in compliance with the Commission's rules.[2]

RESPONSE TO SPECIFIC ALLEGATIONS

At page 2, the Commission describes three "examples" of complaints alleging the forgery of a customer's signature: the complaints involving Ms. Nellie Hancock, Mr. Joe Monroe, and Mr. David Howe.

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[2] The Commission's rules require a carrier to obtain verification in one of the forms prescribed in the LOA. LCI does so, in a manner and under parameters designed to comply in good faith with the Commission's rules. The Florida Legislature recently expressed its intent that a carrier change supported by a verification procedure established by the Commission is to be deemed valid. See Enrolled HB 4785, creating Section 364.603(1), Florida Statutes.

With respect to the allegation concerning Ms. Nellie Hancock, LCI admits that a PIC change request was submitted based on an LOA bearing the signature of Talbot Hancock that was forwarded by an LCI distributor, and admits that LCI believed it to be valid. Based upon the allegation of forgery and available information, LCI insisted that the distributor involved investigate the individual who supplied the LOA, and in due course the distributor fired the individual. However, LCI is without sufficient knowledge to admit or deny that the signature was forged. LCI denies any implication in the allegation that LCI participated in, authorized, knew of, condoned, or ratified the forgery of the signature. LCI states that, if the signature was forged by the independent contractor said act was a fraud on LCI as well as on the customer. LCI denies that its good faith reliance on the LOA for the purpose of changing the customer's carrier constituted a willful violation of a rule, order, or provision of Chapter 364 within the meaning and purview of Section 364.285, Florida Statutes.

With respect to the allegation concerning Ms. Alice Monroe, LCI admits that a PIC change request was submitted based on an LOA bearing the signature of Joe Monroe that was provided by an LCI distributor, and that LCI believed it to be valid. LCI is without sufficient knowledge to admit or deny that the signature was forged. LCI denies any implication in the allegation that LCI participated in, authorized, knew of, condoned, or ratified the forgery of the signature. LCI states that, if the signature was forged by the independent contractor, which the distributor disputed when questioned by LCI, said act was a fraud on LCI as well as on the customer. LCI denies that its good faith reliance on the LOA for the purpose of changing the customer's

carrier constituted a willful violation of a rule, order, or provision of Chapter 364 within the meaning and purview of Section 364.285, Florida Statutes.

With respect to the allegation concerning David Howe, LCI admits that a PIC change request was submitted based on an LOA bearing the signature of Mr. Howe that was forwarded by an LCI distributor, and admits that LCI believed it to be valid. Based upon available information, LCI insisted that the distributor involved investigate the individual who supplied the LOA, and in due course the distributor fired the individual. However, LCI is without sufficient knowledge to admit or deny that the signature was forged. LCI denies any implication in the allegation that LCI participated in, authorized, knew of, condoned, or ratified the forgery of the signature. LCI states that, if the signature was forged by the independent contractor, said act was a fraud on LCI as well as on the customer. LCI denies that its good faith reliance on the LOA for the purpose of changing the customer's carrier constituted a willful violation of a rule, order, or provision of Chapter 364 within the meaning and purview of Section 364.285, Florida Statutes.

LCI admits that, at the time LCI received Ms. Theresa Chen's complaint from the Commission, the distributor who sold the account was unable to provide a copy of the LOA. LCI denies that no authorization was given by the customer, denies any implication that no LOA was secured, and further denies that the inability to produce an LOA in this instance was the result of a refusal to comply with the requirements of Rule 25-4.118(3)(a), or that it constitutes a willful violation of the rule within the meaning and purview of Section 364.285, Florida Statutes.

LCI admits that Ms. Kathlyn Landry's service was switched from AT&T to LCI as a result of a keying error made when LCI was attempting to establish an account for a different customer in New York and entered the wrong area code. LCI denies that the change of Ms. Landry's carrier was deliberate and knowing, and states that it was instead accidental and inadvertent. LCI denies that the change of Ms. Landry's service was the result of a refusal to comply with the requirements of Rule 25-4.118 or a willful violation of the rule within the meaning and purview of Section 364.285, Florida Statutes.

LCI acknowledges that when Ms. Carmen Zuinones Fuentes called to request information about LCI's access code, an order was established to convert her service to LCI. LCI asserts the order was based on an unfortunate miscommunication between Ms. Fuentes and the LCI representative, stemming from the fact that Ms. Fuentes called to inquire about LCI's access code during a special promotion that LCI was conducting on 10XXX access. LCI denies that the change in Ms. Fuentes' service was the result of a refusal to comply with the requirements of Rule 25-4.118, or that it represents a willful violation of the rule within the purview and meaning of Section 364.285, Florida Statutes.

With respect to the statement, "LCI has not satisfied us that it is in compliance with the Commission's rules . . ." (Order, p. 3), LCI respectfully denies that this is an accurate statement of the legal standard governing the imposition of a penalty under Section 364.285, Florida Statutes, and states that the Commission has the burden in this proceeding to prove, by clear and convincing evidence, each allegation that LCI

has refused to comply with, or has willfully violated, a lawful rule or order of the Commission. Department of Banking v. Osborne Sterns, 670 So. 2d 932 (Fla. 1996). LCI denies that it has refused to comply with any such requirement and denies that it has willfully violated any rule or order of the Commission.

With respect to the statement, "Utilities are changed with knowledge of the Commission's rules and statutes," and the further statement, ". . . it is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person either civilly or criminally . . ." LCI denies any implication that LCI was or is without knowledge of the Commission's rules and statutes, and further respectfully denies that either statement is relevant to the issue of whether LCI has refused to comply with or has willfully violated a lawful rule or order of the Commission or a provision of Chapter 364, Florida Statutes.

With respect to the Commission's characterization of "willful" as intended by Section 364.285, Florida Statutes, to mean any "willful act," whether or not there was a willful intent to violate a rule, order, or provision of Chapter 364, Florida Statutes, LCI denies that the statutory construction claimed by the Commission in its Order is valid. Specifically, LCI denies that the Legislature intended "willful" to mean intent to do an act as opposed to the intent to violate a rule, and further states that if this were the case, there would have been no reason for the Legislature to include the word "willful" in the statute at all, because -- under the Commission's interpretation -- there would be no need to distinguish between those violations that are subject to a penalty and those that are not. LCI denies that Order No. 24306, in

which the Commission offered the same construction, supports the Commission's proffered interpretation, and further states that reference to settled case law shows the Commission's contention is untenable. Case law establishes the principles that a legislative word is to be given its plain and ordinary meaning as it is used in the statutory context; that punitive statutes are not to be extended by construction, but instead are to be narrowly construed; and that, when used in the context of the type of violation that is subject to a penalty, "willful" means "conscious wrong" or "purpose to disobey." Capital National Financial Corporation v. Department of Insurance and Treasurer, 690 So. 2d 1335 (Fla. App. 3d Dist. 1997); Brown v. Watson, 156 So. 327 (Fla. 1934); and County Canvassing Board, etc. v. Lester, 118 So. 201 (Fla. 1928); Sanders v. Florida Elections Commission, 407 So. 2d 1069 (Fla. App. 4th DCA, 1981).

With respect to the Conclusion of the Order (page 3), LCI denies the findings therein, and reiterates that its proposed offer of settlement was made for the purpose of settlement and compromise, without conceding it had violated any rules and without waiving of its rights or legal positions.

AFFIRMATIVE DEFENSES

1. Under Section 364.285, Florida Statutes, the Commission's authority to impose penalties is limited to situations in which a carrier has refused to comply with or has willfully violated a lawful rule, order or provision of Chapter 364. LCI has neither refused to comply with nor willfully violated any rule or order of the Commission.

2. LCI submits that in every instance identified in Order No. PSC-98-0566-SC-TI, it has met the requirements of Rule 25-4.118, Florida Administrative Code, in that it obtained diligently and in good faith the type of confirmation required by the rule.

3. The action contemplated by the Commission is arbitrary, unreasonable, and discriminatory, in that it is based on the number of complaints received, without taking into account the size or volume of overall activity.

4. Without waiving its right to have each allegation upon which it proposes to base a penalty considered by the Commission prior to the issuance of the Order to Show Cause and to a delineation containing the requisite specificity of each allegation against it, LCI states the time frame relating back to January 1996, is inconsistent with Rule 25.4.118, which requires that LOAs and ballots be kept for only one year. It is unreasonable, inequitable, and arbitrary to reach back further than the time frame established to govern the maintenance of records of confirmation.

5. LCI states the proposal to consider past complaints is unreasonable and arbitrary, for the additional reason that they encompass a period of time during which LCI responded to any and all customer complaints on a "no-fault", and "no-questions-asked" basis, with a view to emphasize customer satisfaction over investigations of the merits of complaints.

6. Because of the way LCI's business activities are structured, its primary tool for the managing of the quality of its marketing activities consists of the policing of the distributors who have contracted with LCI. Through contract terms, policy

guidelines, and active administration, LCI has carried out its responsibilities in those areas diligently, forcefully and effectively. Recently, LCI terminated its entire relationships nationwide with three distributors when they failed to meet LCI's requirements. LCI took this action voluntarily, despite a significant adverse financial impact on LCI.

7. For the reasons set forth in LCI's Motion for More Definite Statement, which is incorporated by reference, the allegations of Order No. PSC-98-0566-SC-TI are insufficient to place LCI on notice of the charges against it.

8. Without conceding that any of the allegations, if proven to be true, would constitute a willful violation within the meaning of Section 364.285, Florida Statutes, the imposition of a penalty under the circumstances would conflict with Section 120.695, Florida Statutes. In that section, the Legislature admonished agencies to treat the imposition of fines and penalties as secondary to attaining compliance, and required agencies to respond to a minor violation with a notice of noncompliance rather than a penalty.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery this **13th** day of **May, 1998**:

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