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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Initiation of Show Cause Proceeding )  
Against Excel Telecommunications, )  
Inc. for Violation of Rule 25-4.118, )  
Florida Administrative Code, )  
Interexchange Carrier Selection )

DOCKET NO.: 971490-ff 4:01  
FILED: 8-11-98  
RECORDS AND REPORTING

EXCEL'S MOTION FOR MORE DEFINITE STATEMENT

Excel Telecommunications, Inc. (Excel), pursuant to Rule 25-22.037, Florida Administrative Code, hereby submits its Motion for More Definite Statement of the allegations of Order No. PSC-98-1000-SC-TI, issued on July 22, 1998, and in support states:

In Order No. PSC-98-1000-SC-TI, the Commission refers to 37 complaints against Excel alleging unauthorized carrier changes, and proposes to impose a fine of \$1,110,000 that is associated with and is a function of that number of alleged violations. Excel submits that the allegations in the Order are insufficient as a matter of law for three reasons:

(a) Excel is entitled to a specific delineation of the allegations within the charging instrument sufficient to place Excel fully on notice of the charges against it and to enable Excel to respond and to prepare a defense. The Order is inadequate for this purpose as to 34 of the 37 alleged violations which are not even identified. The Order is also inadequate for the remaining three allegations because it does not state specifically the reason why the alleged unauthorized conversions amount to willful violations of Rule 25-4.118.

(b) The Commission has the obligation in this proceeding to prove by clear and convincing competent evidence the elements of

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the alleged violations. It may not sidestep this obligation or shift the burden to Excel by refusing to state with specificity its charges.

(c) The decision as to which allegations of willful violations to include in an Order to Show Cause requires a judgment decision that cannot be delegated by the Commission. At the time the Commission voted to issue the Order to Show Cause, the Commission did not consider whether 34 of the 37 allegations of unauthorized carrier changes warranted going forward to an administrative proceeding for the purpose of asserting a fine or penalty.

#### MEMORANDUM OF LAW IN SUPPORT OF MOTION

1. The Order Does Not Contain Allegations of Sufficient Specificity to Place Excel on Notice and to Permit It to Respond.

The Commission's Order to Show Cause is the equivalent of an administrative complaint. As such, it must set out the allegations against Excel with a reasonable degree of specificity, sufficient to place Excel on notice of the specific allegations of rule violations upon which the Commission bases its action. Only with such a degree of specificity can a respondent prepare a defense. Hunter v. Department of Professional Regulation, 458 So.2d 842 (Fla. App. 2d DCA, 1984); Dubin v. Department of Business Regulation, 262 So.2d 273 (Fla. App. 1st DCA, 1972). Order No. PSC-98-1000-SC-TI refers to the Commission's intent to proceed on the basis of 37 complaints, but identifies only three as to the name of the customer and a summary description of the nature of the alleged violation. This is legally insufficient to meet the

Commission's burden. At a minimum, the order must provide, with respect to each complaint on which the Commission intends to proceed:

- a) The name of the complaining customer;
- b) The date the complaint was received;
- c) The facts alleged by complaining customer which the Commission believes would, if proven, constitute a willful violation of a rule, order, or provision of Chapter 364; and
- d) The statute, rule, or order framing the basis for the alleged violation.

In Docket No. 971482-TI, this Commission denied a motion for a more definite statement filed by Minimum Rate Pricing. See Order No. PSC-98-0908-PCO-TI. Citing Commercial Ventures v. Beard, 595 So.2d 47 (Fla. 1992), the Commission ruled that its Show Cause Order, provided MRP with "more than adequate information, opportunity and notice " to respond. Id. at 7. If it is the Commission's intention to rely on Commercial Ventures to deny the instant motion, that reliance will be misplaced.

In Commercial Ventures the Commission identified seven pay telephones at a specific location that had continuing violations of certain identified service requirements during an identified period. In contrast to the specificity seen in Commercial Ventures, in the instant case, the Commission charges Excel with 37 willful acts ("In our view, willful implies an intent to do an act . . . " Order No. PSC-96- -FOF-TL, at 4), but does not identify 34

of the alleged acts. The Commission must identify these acts, state with specificity the attendant facts and the reason in each instance the facts support the allegation that Excel willfully violated a specific rule. Assuming that the Commission wishes to prosecute these allegations as well as make them, the Commission had to have provided the detail with its initiating order.

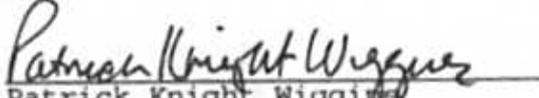
2. The Commission did not assess each alleged violation for inclusion in the Order to Show Cause, and cannot delegate that function to its Staff.

It is fundamental that, absent explicit statutory authority, an agency can delegate only ministerial functions to its Staff. Florida Dry Cleaning and Laundry Board v. Economy Cash and Carry Cleaners, 197 So. 350 (Fla. 1940). The decision to charge a carrier with the violation of a rule and place the carrier in jeopardy of a fine or loss of its certificate is not a ministerial function. It is a decision that can be made only by the Commissioners upon the exercise of informed judgement. The recommendation that the Commissioners adopted when they voted to issue an Order to Show Cause to Excel referred to 37 complaints, but gave only three "examples" of specific allegations. When they voted, the Commissioners had no information before them regarding 34 of the 37 complaints. Excel acknowledges that the Commission can rely on its Staff to assist it in many ways, including the preparation of analyses and summaries in certain adjudicatory contexts. However, Excel respectfully submits that, with respect to the initiation of the show cause proceeding, the Commissioners cannot delegate the decision as to which allegations to pursue in

a punitive proceeding, and could not, in this instance, assess whether the other 34 complaints warrant such a proceeding by extrapolating from three "examples."

WHEREFORE, Excel Telecommunications, Inc. moves for a complete delineation of the allegations which the Commission asserts to constitute willful violations, for which the Commission intends to offer proof, and on which the Commission intends to base any fine penalty.

Dated this 11th day of August, 1998.

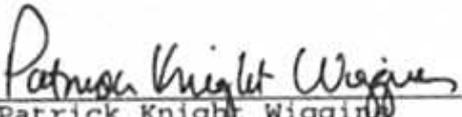
  
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Counsel for Excel  
Telecommunications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 11<sup>th</sup> day of August, 1998, to the following:

Cathy Bedell  
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Tallahassee, Florida 32399-0850

  
Patrick Knight Wiggins