BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF FLORIDA

990869-TL

PETITION TO AMEND DISCONNECT AUTHORITY RULE

In re: FAC Rule 25-4.113 (1) (f)
Refusal or Discontinuance of Service (Wire-based telephone)
by Company

Date of filing: July 1, 1999

Subject Issue: DISCONNECT AUTHORITY, defined as the right granted by regulatory rule to local exchange telephone companies to block and/or terminate local and emergency telephone service; and access to competing long distance telephone networks, as a tactic for use in the collection of telephone debts in which they have no financial interest.

The PETITIONER, Chester Osheyack of 10410 Zackary Circle, Apt. 28, Riverview, Florida, 33569-3994, a substantially affected party in the above captioned PETITION, herewith requests that the COMMISSION **amend the above noted rule in a manner consistant with applicable State and Federal debt collection statutes.**

The Rule : FAC 25-4.113(1)(f) Refusal or Discontinuance of Service

(1) As applicable, the company may refuse or discontinue telephone service under the following conditions provided that, unless otherwise stated, the customer shall be given notice and allowed a reasonable time to comply with any rule or remedy any deficiency:

(f) For non-payment of bills for telephone service, including the telecommunications access sur-charge referred to in Rule 25-4.160 (3), provided that a suspension or termination of service shall not be made without five (5) working days' written notice to the customer, except in extreme cases. The written notice shall be separate and apart from the regular monthly bill for service. A company shall not, however, refuse or discontinue service for non-payment of a dishonored check service charge imposed by the company. No company shall discontinue service to any customer for the initial non-payment of the current bill on a day preceding a day the business office is closed.

Cause of Action: The Commission has stated that the rule under challenge implements FS Ch 364.03 and Ch 364.19. The former provides that telecommunication services be provided by companies "as demanded **upon terms to be approved by the Commissions".** The latter provides the Commission with authority to " **regulate by reasonable rules, the terms of the telecommunications contracts between telecommunications companies and their patrons.**" Together,

these statutes provide the Commission with broad discretionary powers to regulate the telecommunications industry. However, it is important to note that while these statutes do grant rule-making authority of a general nature, they do not specifically confer upon the Commission the power to disregard or override existing specific statuatory provisions of state or federal law. **Accordingly, the Commission exceeds its authority by applying its discretionary power to implement rules which do not reflect the specific language of existing state and federal debt collection practices laws and statutes of limitations thereupon.**

The Standards: In our democratic republic, discretionary power is never absolute. It always has limitations...sometime in the form of guidelines... sometimes in the form of statutes. Moreover, while the agencies of government are mandated to make rules based in statutes, and they may well have a conditional power to interpret statutes for the purpose of making policy, they have neither the right nor the power to unilaterally repeal, amend, modify or ignore the clear intents, purposes or language of the laws of our state, our nation or our constitution. Policy decisions of unelected Commissioners must always be subject to challenge. The agencies of government must be held accountable for their actions. Additionally, unbridled discretion is highly vulnerable to abuse resulting from unseemly outside pressures or perhaps despotic behavior. Furthermore, there is, as perhaps never before, a great need for stability in the regulatory process in order to encourage the corporate decision-makers in the telecommunications industry to focus on **competitive marketing practices**. The only way to achieve that kind of environment is by limiting discretionary power of agencies to the specific language of laws. Our laws are the backbone and the strength of our nation. We are a nation of laws, and the law must be obeyed by Presidents and panhandlers; and, by our government agencies.

This concept was recognized and **codified by** our state Legislature when they conceived and clarified FS 120 as amended in 1997 and 1999. The following are the appropriate citations in law that apply to this PETITION:

FS 120.536 (1) "A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties ; nor shall an an agency have the authority to implement statuatory provisions setting forth general legislative intent or policy. Statuatory

language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute."

FS 120.536 (2)(a) "..... As of July 1, 1999, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal (modify or amend) any rule, or portion thereof, because it exceeds rulemaking authority permitted by this section."

FS 120.54 (7)(a) "Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to **adopt, amend, or repeal a rule**, ..."

The Objections: (1) The amendments to FS 120 in 1997 by the legislature contained a shield against challenges to rules that were adopted prior to October 1, 1996 on grounds that it exceeds rulemaking authority permitted under FS 120.536. Such challenges were not to be permitted before July 1, 1999. **Accordingly, this rule challenge is now permissible.**

(2) The amendments to Rule 120 in 1997 removed the presumption of validity for proposed rules on the premise that there would be adequate time and reason to fully consider the impact of the revisions in the law. While this restriction was not extended to include existing rules, a reasonable interpretation would lead to the conclusion that all revisions in FS 120 that were made prior to July 1, 1999 must be given fair consideration in determining whether or not prior agency or court decisions may still have relevance and authority. **It is my position that, any agency or judicial order must meet current standards in order to be admissible in this proceding.**

(3) A critical element in the amended Rule 120 (1999) is the tenet that when the legislature enacts a statute, it may delegate the power to adopt rules to carry out the provisions of the statute. However, if the legislature has granted rulemaking authority to an agency, that authority must have identifiable standards for implementation. Now look at FS 364.19 in that context. This statute provides the Commission with authority to "regulate by reasonable rules, the terms of the telecommunications contracts between telecommunications companies and their patrons". **There are no specific standards for implementation.** One must therefore conclude, that the standards set forth in existing

applicable law must provide the governing authority. Our nation has had more than 100-years of legislative history on the issues of fair trade and consumer protection, including but not limited to the Fair Debt Collection Practices Acts of both the federal and state governments. This rich body of legislation is designed to provide both the industry and the consumer with firm RULES OF LAW to govern the marketplace. Now, it states clearly in FS 559.552, which addresses the RELATIONSHIP OF STATE AND FEDERAL LAW, that "Nothing in this part (of the Florida Consumer Collection Practices Act) shall be construed to limit or restrict the continued applicability of the federal Fair Debt Collection Practices Act." The Act further states that "This part is in addition to the requirements and regulations of the federal Act", and, "In the event of any inconsistancy..... the provision which is more protective of the debtor shall prevail." Accordingly, it is appropriate that we examine the 15 USC 1601 et seq.(the federal Consumer Protection Act) and more specifically, Title VIII, the federal Fair Debt Collection Practices Act, in the context of the relationship between the telephone service provider, its billing and collection agent, and the consumer, under the RULE OF LAW.

15 USC 1692a §803 (4) excludes from the definition of **creditor,** "any party who receives assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another". This may well be significant since under the agreements between the toll service providers and their "billing and collection" agents, the agent recourses the debt back to the service provider four weeks after the default accrues, so that it has no liability in the debt. (PSC Order 13429-1984 "true-up provision")

Under the terms of PSC Order No. 13429 (1984 Order Approving Stipulation) the billing agent was granted the right to purchase receivables "to alleviate the problem of maintaining multiple balances and pro-rating partial payments received from customers." Accordingly, we have a situation where the purchase of receivables was permitted to accomodate limitations of computer capacity in 1984 (which we have been informed by PSC staff people is no longer a real limitation with current technology), and, in the face of possible liability for the debt, it is assigned back to the service provider. Therefore, since the billing agent has no financial risk or security interest in the debt, he is excluded under 15USC 1692 §803(4) from being a "creditor", and under the same law (6) is considered to be a "debt collector." As a debt collector,

the billing agent is precluded by 15 USC 1692(f) §808(6) from "taking or threatening to take any non-judicial action to effect dispossession or disablement of property". sic disconnection of toll service provided by another party, or interference with access to the competitive interstate toll service providers, so long as the billing agent is fully paid for the service that it provides.

(4) 15 USC 1692(h) §810 states, "If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may **not** apply such payment to any debt which is disputed by the consumer, and where applicable, shall apply such payment in accordance with the consumer's directions". PSC Order No. 13429 (1984) contravenes the law by permitting the debt collectors to prorate partial payments received from customers. Thus, the consumer has no control over where his payments are applied...and he cannot pay his local service bill.

(5) FS 95.11 (statutes of limitations on debt collection) (3)(p) provides that "Any action not specifically provided for in these statutes" for recovery of "other than real property" shall be commenced within FOUR YEARS", with time to be tolled from the date the debt came into default.

47 USC §415 (a) limits ".....actions in law by telephone carriers for recovery of their lawful charges, or any part thereof, shall be begun within two (2) years (prior to 1996 it was one-year) from the time that the cause of action accrues, and not after." PSC Rules do not address the issue of "limitations" on debt collection, however if one is to separate interstate toll charges from charges for service within the borders of the State, it would appear that interstate charge collections are limited to two-years, and intrastate and local charge collections are limited to four-years.

(6) It is interesting to note that 47 USC §42.6 (Retention of telephone toll records) establishes limits on "....
..each carrier that offers or bills toll telephone service" to the retention of billing information about....
.."toll calls" to eighteen months...."whether it is billing its own toll service customers for toll calls, or billing customers for another carrier". Now, if the debt for "another carrier's" toll charges is recoursed back to the toll carrier in four-weeks; and if the toll carrier eliminates his records after eighteen-months; and, if the statute of limitations on toll charge debts is limited to two-years; how can the disconnection of local service to collect toll charge debts carry beyond the limits of law? It is my position that the "disconnect authority rule encourages an abusive collection practice which can reasonably be characterized as a non-judicial punitive act which violates the first and fourteenth amendments to the U.S. Constitution because it is imposed without "due process". Moreover, it is prescribed under discretionary rules which disregard applicable legal standards, and therefore is an invalid exercise of delegated legislative authority under FS 120.536 (1) as amended.

(7) In the context of addressing the issues raised in this PETITION, it is important to examine the relationship between state and federal law as applicable. In §(3) of this brief, FS 559.552 identifies this relationship from the standpoint of the State. In the PL 95-109, §816, the federal viewpoint is stated as follows: "This title does not annul, alter or affect, or exempt any person subject to the provisions of this title with respect to **debt collection practices, except to the extent that those laws are inconsistant with any provision of this title**....." For purposes of this section, a State law is not inconsistant with this title **if the protection such law affords any consumer is greater than the protection provided by this title".** Further, §817, which addresses Exemption for State regulation, such exemption from federal requirements is provided **"if the Commission (FTC) determines that under State law that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and there is adequate provision for enforcement.** It is my position that the right to disconnect local telephone service to collect the debt of "another carrier" does not meet this test.

(8) If additional evidence of the supremacy of federal law is required, it is appropriate to look to the U.S. Constitution. Article VI (2) states clearly that "This Constitution.....shall be the supreme law of the land; and judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Additionally, §IV of Article I,while giving the States the power over conduct of Federal elections, permits Congress to alter such regulations at any time. Article I, §8 (3) gives the Congress exclusive power to regulate commerce with foreign nations and among the states, which clearly takes the regulation of interstate and international telecommunications billing and collection out of state juristiction....and Article VII, Amendment 7 provides the right of trial by jury where there is dispute over debts. This right is preempted by the "disconnect authority" rule which imposes punishment first, and permits negotiation afterward in the cases where interstate and international toll charges are involved. It is my position that under the current "disconnect authority" rule, **due process**, which is guaranteed under the First and Fourteenth amendments, is disregarded by the action of local telephone service carriers when they terminate local telephone service to collect debts in dispute which are owed for services that they do not provide and services over which they do not have juristiction. The Commission has oft stated that "all

the debtor need do is pay the part of the debts that are not in dispute, and his service will be restored." It is my position that, without a court order or valid court judgement, the Commission has no right to permit the local carriers to intervene in negotiations between the debtor and the carrier when they have no juristiction over the sources of the debt, or alternatively, when they are aware that the debt collector has no financial interest in the debt.

(9) The above noted Section 8 is particularly appropriate in light of the FCC REPORT AND ORDER in FCC Docket No. 85-88, which is dated as adopted January 14, 1985, and which de-tariffed billing and collection service. In this order, the FCC adopted the conclusion that **billing and collection services are not communications common carriage within "Title II of the Communications Act (47 USC §201 et seq. This had the effect of amending Part 69 (access charge rules) to cause deletion of the billing and collection element. The FCC also required local exchange carriers to file tariff revisions (with the states) removing provisions for interstate billing and collection effective January 1,1987. The order was clear in its determination that "billing and collection is a financial and administrative service" when the functions are performed by a third party. While the FCC did defer to state regulatory authorities with respect to local cut-offs, they specifically stated that "....we do not by this action, intend to give tacit approval to this activity.....".**

(10) In connection with §9 above noted, it is important to review the Federal Telecommunications Reform Act of 1996, and specifically Title IV, §401(a) which directs the FCC to "forbear regulation when such is not in the public interest or not necessary". Now, this was easy for the FCC because they had already implemented such action in 1985. However, it must be noted that §401 (e) which deals specifically with State enforcement, states clearly that **"A State Commission may not continue to apply or enforce any provision of this Act that the FCC has determined to forbear."** Now the attorney for the PSC in prior actions in this matter presumed to pronounce that the law "speaks for itself", but the Court's have the prerogative, when they choose to exercise it, to interpret the law which may not speak loud enough to those who prefer not to hear it . Facts, however, should have the power to convince, and conversely, a lack of supportable facts should proffer a void that cries out to be filled.

(11) Finally, FS §364.27 which addresses "Powers and duties as to interstate rates, fares, charges, classifications, or **rules of practice-**", quite clearly charges the Commission to **investigate all interstate.....rules of practice in relation thereto, for and in relation to** (telecommunications activities) **where** (such) **takes place within the state, and when such....rules of practice, are in the opinion of the Commission, excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "The Communications Act of 1934"** (as amended, of course, by the Telecommunications Reform Act of 1996). Thus, under Florida law, the PSC has both the right and the responsibility to gather facts where there are matters it considers to be beyond its juristiction, and present them to proper juristictions. It is my position that all of the above noted facts and laws were available to the Commission prior to 1996, and the Commission had access to all of the information as documented above. Under the provisions of FS 120.536 (2) the Commission had the obligation to provide the Administrative Procedures Committee (Joint House and Senate) with a list of each rule which exceeds rulemaking authority. The above noted "disconnect authority" rule was not included in that list. As of July 1, 1999, "any substantially affected person may petition an agency to repeal any rule or portion thereof, because it exceeds the rulemaking authority permitted in this section" sic FS 120.536 (2)(a). This petition is consistant with that statute.

(12) In prior actions before the Division of Administrative Hearings, consideration of the above noted statute was ruled to be "premature". Moreover, the DOAH acknowledged that it had no juristiction over matters involving federal law.....and, under appeal before the 2d District Court of Appeals, the Court upheld the contention of the attorney for the PSC that, while the Appeals Court had proper juristiction, the issues relating to the Constitution and federal statutes were "not properly preserved". Accordingly, prior participation by the PETITIONER in the subject of this petition does not preclude his right to present it to the PSC at this time. Furthermore, the Commission, in its wisdom, did stipulate that the PETITTIONER was in fact "a substantially affected person" prior to the presentation to the Administrative judge. These facts should be a matter of record.

This PETITION is submitted herewith, on behalf of the PETITIONER and his spouse of more than fifty (50) years; on behalf of more than 650,000 Floridians which are effectively cut-off from a part of society every year for non-payment of toll bills in dispute or default; for the working poor, the infirm, the single mothers with school age children or infants, and the elderly on fixed incomes. Moreover, this issue speaks to the concerns and circumstances of my life, a part of which was snatched from me and withheld from me for five (5) years by what I consider to be the **administration of injustice.** The purpose of this PETITION is to serve the cause of justice and humanity, and to preserve the RULE OF LAW.

Respectfully submitted by:

Chester Osheyack
an old man with a typewriter

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