

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

August 28, 1997

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF APPEALS (CALDWELL) *Our DES*
DIVISION OF COMMUNICATIONS (MOSES) *pm*

RE: DOCKET NO. ~~97-91~~ - JOINT PETITION OF ROBERT A. BUTTERNORTH, ATTORNEY GENERAL, AND THE CITIZENS OF THE STATE OF FLORIDA, BY AND THROUGH THE OFFICE OF PUBLIC COUNSEL, FOR INITIATION OF FORMAL PROCEEDINGS, PURSUANT TO SECTION 120.57, FS, TO INVESTIGATE THE PRACTICE OF SLAMMING AND TO DETERMINE THE APPROPRIATE REMEDIAL MEASURES

AGENDA: SEPTEMBER 9, 1997 - REGULAR AGENDA - DECISION ON STIPULATION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\APP\WP\970882P.RCM

CASE BACKGROUND

On July 15, 1997, the Attorney General and Public Counsel for the Citizens of the State of Florida filed a Joint Petition for Initiation of Formal Proceedings Pursuant to Section 120.57, Florida Statutes, to Investigate the Practice of "Slamming" and to Determine the Appropriate Remedial Measures. (Attachment A) Slamming is the practice of certain telecommunications companies of changing the primary interexchange company of a telephone customer without that customer's authorization. The Petition requests the Public Service Commission to conduct a full investigation within the context of an evidentiary proceeding under Section 120.57(1), Florida Statutes, into the practice of slamming, with the objective of assessing the scope and extent of the practice and determining the appropriate remedial measures calculated to protect consumers.

In their petition, the Attorney General and Public Counsel requested the following:

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FPSC-RECORDS/REPORTING

DOCKET NO. 970882-TI
DATE: August 28, 1997

- (A) Open an investigative docket initiating formal proceedings under Section 120.57(1), Florida Statutes, before the full Commission to investigate the practice of slamming;
- (B) Set public hearings throughout the state to hear testimony from the public about slamming; and
- (C) Establish an expedited schedule for responses to discovery requests, all other prehearing matters, final hearing, and final disposition of the matter.

Staff has drafted proposed amendments to rules intended to reduce or eliminate slamming. In the June 6, 1997, edition of the Florida Administrative Weekly, the draft rules were published with a notice of rule development. Pursuant to several requests, a rule development workshop was held July 23, 1997.

In light of the facts that (1) the Commission had begun rulemaking under Section 120.54, Florida Statutes, and (2) the ultimate outcome sought in the Petition were rules, the Assistant Attorney General and Deputy Public Counsel agreed, by letter dated August 13, 1997, to a course of action that could utilize the rulemaking process outlined in Section 120.54, Florida Statutes, to meet their goal. (Attachment B)

With respect to the request for public hearings throughout the state, the letter states public workshops as provided in Section 120.54(2)(c), Florida Statutes (1996 Supp.), "would be acceptable, as part of an overall solution, as long as the workshops were well publicized ahead of time and allowed testimony under oath by any interested person." The petitioners suggested holding the workshops in "Ft. Myers, the Tampa/St. Petersburg area, the Miami/Ft. Lauderdale area, West Palm Beach, Orlando, Jacksonville, Tallahassee, and Pensacola."

With respect to their request for hearing under Section 120.57, Florida Statutes, the Petitioners suggested that the rulemaking proceeding be combined with this docket. The petitioners request "full discovery rights to all parties, requiring prefiled testimony and requiring witness to provide testimony under oath subject to cross-examination at hearing before all five commissioners." Finally, "[t]he hearing would take up the proposed rules and the investigation."

DOCKET NO. 970882-TI
DATE: August 28, 1997

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Attorney General and Citizens of Florida Petition to investigate the practice of slamming?

RECOMMENDATION: Yes. The Commission should conduct an investigation into the practice of slamming within the rulemaking process provided by Section 120.54, Florida Statutes.

STAFF ANALYSIS: Section 120.54, Florida Statutes, was revised by the Legislature in 1996 to insure that the public and those persons affected by rules would have adequate notice and input in the rulemaking process. This process is accomplished early-on in rulemaking through the rule development workshop provision that was added in Section 120.54(2)(c).

Section 120.54(3)(c) provides for a hearing if requested by any affected person to allow an opportunity to present evidence and argument on all issues. Commission Rule 25-22.016, Florida Administrative Code, provides for hearing in rulemaking proceedings. In addition, the Commission rules for more formal proceedings include discovery under Rules 25-22.034, witnesses under 25-22.046, and evidence under 25-22.048, Florida Administrative Code.

Rather than recommend a draw-out proceeding provided by Section 120.54(3)(c)2. on the factual issues raised by the Attorney General and Public Counsel in their petition, staff recommends that there be a process used for rulemaking to include discovery, swearing in and cross-examination of witnesses. The purpose of this process is to fully explore all of the issues that may be raised in the course of rulemaking. Staff recommends the hearing be held before the full commission. At the hearing, staff recommends that witnesses be sworn and cross examination allowed, consistent with Rules 25-22.046 and 25-22.048. The process recommended is similar to that process recently utilized in Docket No. 951522-TS relating to Shared Tenant Service rules.

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ISSUE 2: Should the Commission set public hearings throughout the state to hear testimony from the public about "slamming"?

RECOMMENDATION: Yes. The Commission should hold rule development workshops throughout the state to allow sworn testimony from all interested persons.

STAFF ANALYSIS: Section 120.54(2), Florida Administrative Code, provides for rule development workshops, and negotiated rulemaking. Section 120.54(2)(c) provides in part: "An agency must hold public workshops, including workshops in various regions of the state, for purposes of rule development if requested in writing by any affected person," In his August 13th letter, the Assitant Attorney General stated that workshops in lieu of hearings would be acceptable so long as the testimony was allowed under oath. He also suggested numerous cities around the state where the hearings could be held. Many locations are in areas subject to numerous slamming complaints. Staff recommends holding these workshops in the locations suggested.

ISSUE 3: Should the Commission establish an expedited schedule for discovery, prehearing, final hearing, and rule adoption?

RECOMMENDATION: Yes. Schedules for discovery and other prehearing matters should be expedited.

STAFF ANALYSIS: Staff recommends allowing discovery under Rule 25-22.034 to afford participants in this proceeding the ability to establish a factual record involving the slamming controversy. As stated in Issue 2, this process was followed in Docket No. 951522-TS. The proceeding staff is recommending is not that contemplated in Section 120.54(3)(c)2., but rather an informal procedure further benefitted by discovery, sworn testimony and cross examination of witness to fully explore all issues relevant to solving the problem of slamming for the citizens of Florida.

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ISSUE 4: Should the docket be closed?

RECOMMENDATION: No. The docket should remain open and renamed:

In re: 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; and 25-24.845, F.A.C., Customer Relations; Rules Incorporated.

STAFF ANALYSIS: Staff believes that continuing with the rulemaking process will be the most effective and efficient means to ultimately deal with the problem of slamming. The overlying process of discovery and fact-finding should not delay rulemaking but should enhance the final product which is a rule that will effectively reduce or eliminate slamming.

Legal

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition of Robert A. Butterworth, Attorney General, and the Citizens of the State of Florida, by and through the Office of Public Counsel, for initiation of formal proceedings pursuant to Section 120.57(1), Florida Statutes, to investigate the practice of "slamming," i.e., the unauthorized change of a customer's pre-subscribed carrier, and to determine the appropriate remedial measures.

Docket No. 970882-TI

JOINT PETITION OF ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AND THE CITIZENS OF THE STATE OF FLORIDA, BY AND THROUGH THE OFFICE OF PUBLIC COUNSEL, FOR INITIATION OF FORMAL PROCEEDINGS PURSUANT TO SECTION 120.57, FLORIDA STATUTES, TO INVESTIGATE THE PRACTICE OF SLAMMING AND TO DETERMINE THE APPROPRIATE REMEDIAL MEASURES

Robert A. Butterworth, Attorney General (Attorney General), and the Citizens of the State of Florida, by and through the Office of Public Counsel (Public Counsel), pursuant to Section 364.01, Florida Statutes, and Rule 25-22.036, Florida Administrative Code, petition for initiation of formal proceedings under Section 120.57(1), Florida Statutes, before the full Florida Public Service Commission (Commission or PSC), and state:

1(a). The Attorney General, pursuant to Art. IV, Section 4, Fla. Const., is the chief legal officer of the State with his principal place of business and mailing address at:

Michael A. Gross
Fla. Bar No. 0199461
Assistant Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5899
FAX (904) 488-6589

1(b). Public Counsel is authorized to provide legal representation for the citizens of the

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OFFICE OF THE ATTORNEY GENERAL

State of Florida in proceedings before the Commission pursuant to Section 350.9511, Florida Statutes, with his principal place of business and mailing address at:

JACK SHREVE, Esquire
Public Counsel
CHARLES J. BECK, Esquire
Deputy Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

2. This action has been initiated to seek an order from the Commission opening a docket to conduct a full investigation within the context of an evidentiary proceeding under Section 120.57(1), Florida Statutes, into the practice of slamming, with the objective of assessing the scope and extent of the practice and determining the appropriate remedial measures calculated to protect consumers.

3. The Attorney General brings this Petition, *inter alia*, in his *parens patriae* capacity as guardian of the health, welfare, and safety of the citizens of the State of Florida. The Attorney General and Public Counsel seek relief from the Commission as the state agency charged with the responsibility under Chapter 350, Florida Statutes, and Chapter 364, Florida Statutes, to protect the public health, safety, and welfare by ensuring that the practices of telecommunications companies in the provision of regulated services provide customers freedom of choice and are in the public interest.

4. The Attorney General has broad statutory authority to prosecute and appear in suits in which the State is a party or is otherwise interested. Section 16.01(4),(5), and (6), Florida Statutes. One of the matters in which the State has an interest is upholding the intent and public

purpose of legislative enactments.

5. Where the public interest is involved, the Attorney General may not only initiate litigation, but also intervene in pending litigation. State ex rel. Shevin v. Yarbrough, 257 So.2d 891, 894 (Fla. 1972). The Attorney General is granted wide discretion in determining what particular matters involve the public interest. State ex rel. Shevin v. Exxon Corp., 526 F. 2d 266, 268-69 (5th Cir. 1976). Accordingly, his conclusion that a particular matter involves the public interest is presumed to be correct. State ex rel. Shevin v. Yarbrough, at 895; see also Lawyer v. Dep't of Justice, 65 U.S.L.W. 4639, 4632 n.4 (U.S. June 25, 1997) (No. 95-2024) (citing State ex rel. Shevin v. Yarbrough, at 894-96 and Ervin v. Collins, 85 So. 2d 852, 854 (Fla. 1956) (en banc).

6. The enforcement of the statutes and policies at issue in this proceeding clearly involve matters of public interest.

7. The problem of slamming presents numerous disputed issues of material fact, including, but not limited to: the scope and extent of slamming; the effectiveness of the methods designed to prevent slamming currently provided by existing rules and regulations; the extent to which telecommunications companies are using the alternative methods of switching customers' pre-subscribed carriers currently available under existing rules and regulations; the extent to which customers are aware of their right to protection against slamming and the devices available to implement such protection; the extent to which devices to protect against slamming are used for anticompetitive purposes; the marketing techniques, including telemarketing, and practices employed by telecommunications companies in switching customers' carriers; the scope and extent of the participation of independent contractors, authorized agents and resellers in slamming

violations; the effectiveness of the current investigative and enforcement activities of the PSC and the Federal Communications Commission (FCC); and the most appropriate and effective remedial measures which can be implemented to protect consumers against slamming.

8. The Attorney General and Public Counsel are entitled to relief under the constitutional provisions, statutes, rules, and judicial precedent cited above.

9. Petitioners are concerned about the continuing problem in Florida resulting from unauthorized and often fraudulent switching of customers' presubscribed carriers, primarily their long distance providers. The telecommunications industry and our regulatory agencies have been struggling to deal with complaints of slamming for more than a decade.

10. The Attorney General of the State of Florida, as part of a multi-state group, sought more stringent protection for consumers in FCC Docket 94-129, which sought the establishment of rules to curb slamming. In support of their requests, the attorneys general pointed to the case of Sonic Communications, Inc. (SCI), which allegedly, in just a few short months switched more than 300,000 customers and collected approximately \$13 million by charging rates double or triple those charged by competitive carriers. SCI is but one example of how slammers may overwhelm the resources of state law enforcement and regulatory agencies. FCC rules adopted in 1995 failed to incorporate many of the safeguards proposed by the attorneys general to protect consumers against the burgeoning problems of misrepresentation, deception, and outright theft that were occurring in the switching of consumers' long distance telephone service. Despite the consumer protection mechanisms provided by the FCC's rules and existing PSC rules, slamming complaints have continued unabated. The Commission Staff noted a recent increase in slamming complaints in Attachment B, Proposed Slamming Rules Overview, to its briefing paper on

slamming, dated June 18, 1997. Significantly, Staff's concerns are of sufficient gravity to have precipitated its proposed amendments to the existing slamming rule. There has also been a recent increase in slamming complaints received by the Attorney General. The total number of complaints on file may represent only the tip of the iceberg. The actual volume of slamming will not be known unless a formal proceeding is authorized by the Commission and discovery can be directed to the telecommunications companies. Slamming remains the number one consumer telecommunications issue in the vast majority of states, including Florida, according to current data published by the FCC.

11. The Final Report of the Tenth Statewide Grand Jury, September, 1992, included an investigation of Southern Bell Telephone and Telephone Company (Southern Bell). A primary focus of the investigation concerned allegations of fraudulent sales of optional telephone services resulting in customers paying for services they did not order. The Grand Jury noted that the practices may very well have been violations of the consumer protection laws, but that utility services are exempt from the Telemarketing Act and the Deceptive and Unfair Trade Practices Act. See §§ 501.212 and 501.604, Fla. Stat. One of the requirements of the consumer protection statutes for a contract made pursuant to telephone sales is a written and signed verification of orders taken by telephone and imposition of criminal penalties when deception is used in connection with an offer to sell. The Grand Jury found that requiring utilities to obtain and maintain written authorizations from customers is an easy method of preventing corporate deception. The Grand Jury expressly recommended:

The Legislature has an obligation to prevent victimization of all the citizens of this State. If the Public Service Commission does not implement similar consumer protection requirements for the utility activities it regulates, then the Legislature

should strike the exemptions in Sections 501.212 and 501.604, Florida Statutes, and subject utilities to the standards of fair trade practice outlined in the statute.

Final Report of the Tenth Statewide Grand Jury, September, 1992, at 5-6. The Grand Jury recommended that the cited problems be fixed and yet, to this date, they have not been properly fixed. A substantial portion of the slammings violations in issue are effectuated via telemarketing and are subject to the very same concerns expressed by the Grand Jury above. Accordingly, the Petitioners urge the PSC to fully investigate the problem of slammings and adopt rules which afford the equivalent protection to consumers as the consumer protection statutes.

12. The Florida telephone consumers who are the targets of slammings should be able to rely with certainty that their choice will be honored when they choose a long distance carrier. As a result of its concerns regarding the recent increase in slammings complaints, the Commission Staff has recently proposed new, more stringent rules to prevent slammings. Further, the Staff has scheduled an industry workshop to discuss the proposed rules. The Commission Staff is to be commended for its laudable effort in initiating its proposed solution to the slammings problem. Further, Petitioners acknowledge the quality of the proposed rules as a predicate for rule development. However, Petitioners are nonetheless concerned that the rulemaking process is not as effective a procedural mechanism as a formal Section 120.57(1), Florida Statutes, hearing will be in establishing a factual record and resolving the numerous factual issues and disputes of fact involved in the slammings controversy. Rather, the solution to the slammings problem requires a detailed evidentiary hearing with full discovery, testimony of witnesses under oath, and a positive effort to publicize the investigation and solicit as much public input as possible. To facilitate public input, the Commission should conduct public hearings throughout the state to allow

customers to present testimony about slamming. Consequently, an informed decision requires an investigative docket which will unequivocally yield a more complete record and understanding of both the problem and potential solutions, while workshops with incumbents are more likely to develop rules which serve only the interests of the industry and not those of the consumer.

13. Petitioners are also concerned that setting up systems to prevent slamming will resolve only half of the problem. Aggressive enforcement of applicable rules and imposition of fines and penalties that serve as effective deterrents is also an issue of equal status. Petitioners are concerned that current enforcement actions, many involving imposition of inadequate fines, have been ineffective as a deterrent to slamming.

14. It is also essential that the Commission join as necessary parties all affected telecommunications companies, including but not limited to, those involved in previous slamming complaints.

15. Finally, the Commission should place this matter in an investigative docket before the full Commission with a requirement for expedited responses to discovery requests, and an expedited schedule for prehearing matters, final hearing, and final disposition.

WHEREFORE, The Attorney General and Public Counsel respectfully request that the Commission enter an order:

(A) opening an investigative docket initiating formal proceedings under Section 120.57(1), Florida Statutes, before the full Commission, to investigate the practice of "slamming," i.e., the unauthorized change of a customer's presubscribed carrier, and to determine the appropriate remedial measures;

(B) setting public hearings throughout the state to hear testimony from the public about

slamming; and

(C) establishing an expedited schedule for responses to discovery requests, all other prehearing matters, final hearing, and final disposition of this matter.

DATED this 15th day of July, 1997.

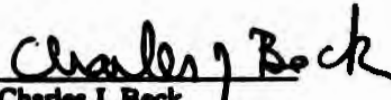
Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JACK SHREVE
Public Counsel



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ROBERT A. BUTTERWORTH
Attorney General
State of Florida

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32309-1000

ATTACHMENT B

Please reply to:

Special Projects
(904) 488-5899
FAX: (904) 488-6599

VIA MAIL AND FAX

August 13, 1997

Diana Caldwell, Esq.
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32309-0850

Re: Slamming

Dear Diane:

This letter confirms the discussions we have had to date concerning the petition filed by the Attorney General and Public Counsel for initiation of formal proceedings under section 120.57, Florida Statutes, to investigate slamming (docket 970882-TL). We have also discussed the related proposals by staff in an undocketed proceeding to amend the PSC's rules concerning slamming.

Our petition identifies numerous disputed issues of material fact and seeks a detailed evidentiary hearing with full discovery and testimony of witnesses under oath. We also seek public hearings throughout the state to receive testimony from customers about slamming.

You have asked us to consider whether a means could be reached where the actions we seek could be satisfied through the rulemaking process. Our discussions have centered on the following:

(1) With respect to our request for public hearings throughout the state of Florida, you suggested that these could be held as public workshops. Section 120.54(2)(c), Florida Statutes (1988 Supp.) states that "An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary..." This would be acceptable, as part of an overall

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AN AFFIRMATIVE ACTION/EQUAL OPPORTUNITY EMPLOYER

solution, as long as the workshops were well publicized ahead of time and allowed testimony under oath by any interested person. We suggest holding such hearings in Ft. Myers, the Tampa / St. Petersburg area, the Miami / Ft. Lauderdale area, West Palm Beach, Orlando, Jacksonville, Tallahassee, and Pensacola.

(2) With respect to our request for a hearing under section 120.57, Florida Statutes, we discussed joining the rulemaking proposals with docket 970882-TL. The Commission would issue an order providing full discovery rights to all parties, requiring prefiled testimony, and requiring witnesses to provide testimony under oath subject to cross-examination at a hearing before all five commissioners. Under this scenario, it would be imperative to begin discovery rights at the earliest possible time so that we could engage in several rounds of discovery before the filing of testimony and the hearing. The hearing would take up the proposed rules and the investigation. With this understanding, it would be acceptable.

I am glad we have been able to reach a solution that accommodates your concerns and our's. It is my understanding that you will be recommending these actions to the commissioners and that it will be taken up at the agenda scheduled for Tuesday, September 9, 1997. Please let me know if you have any questions or would like to discuss this further.

Sincerely,



Michael A. Gross
Assistant Attorney General

cc: Charlene Beck
Deputy Public Counsel