DON W. BLEVINS
ATTORNEY-AT-LAW

SWIDLER & BERLIN
CHARTERED

DIRECT DIAL
(202)424-7716

October 10, 1997

VIA FEDERAL EXPRESS

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32301

Re: Docket [redacted]
Opposition to Attorney General and Public Counsel's First Motion to Compel

Dear Mrs. Bayó:

I enclose for filing in the referenced docket an original and fifteen copies of Intercontinental Communications Group, Inc.'s Opposition to Attorney General and Public Counsel's First Motion to Compel. I also enclose an additional copy, which I request that you file-stamp and return to me in the enclosed, stamped envelope.

Sincerely,

Don W. Blevins

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CMU ____ Enclosures
CTR ____
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3000 K STREET, N.W. • SUITE 300
WASHINGTON, D.C. 20007-5116
(202)424-7500 • FACSIMILE (202)424-7643

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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 970882-TI Filed: October 13, 1997

INTERCONTINENTAL COMMUNICATIONS GROUP, INC.'S MEMORANDUMIN OPPOSITION TO ATTORNEY GENERAL AND PUBLIC COUNSEL'S FIRST MOTION TO COMPEL

Intercontinental Communications Group, Inc. ("ICG"), a nonparty to this proceeding, respectfully appears for the limited purpose of opposing the Attorney General and Public Counsel's motion to compel ICG to respond to discovery as if it were a party. By submitting this opposition, ICG in no way seeks to intervene in this proceeding, but to the contrary expressly objects to the Attorney General and Public Counsel's attempt to impose intervention and related obligations on ICG without ICG's consent.

Although it objects to becoming a party and assuming the obligations of a party, ICG applauds the Commission's efforts to develop sound rules to curb the unlawful practice of slamming in Florida. An unfortunate byproduct of increased competition in the market for telephone service, slamming directly injures consumers and their chosen carriers, and it indirectly injures all competitive carriers by undermining consumer trust in the emerging competitive marketplace. Again, ICG applauds the initiative of the Commission, Staff, the Attorney General, and Public Counsel to reduce and hopefully eliminate slamming. ICG stands ready to abide by any lawful requirements that may result from that initiative. ICG leaves to the participants in this docket, and

ultimately to the Commission, the determination of what those lawful requirements should be.

BACKGROUND

On or about September 15, 1997, ICG received in the mail a set of document production requests filed by the Florida Attorney General and Public Counsel (the "Requests"). The Requests, dated September 11, 1997, call for a sweeping production of documents, including all "internal analyses, studies, reports, papers, or other documents" in any way touching on the topic of slamming. Labeled the Attorney General and Public Counsel's "First Set" -- the Requests foretell even greater obligations in the future.

The Requests cite a number of statutes and rules of procedure that ostensibly provide authority for the Attorney General and Public Counsel to impose their production obligations on ICG. The authority cited, however, (Section 350.0611(a), *Fla. Stat.* (1995), Rules 25-22.34 and 25.22.35, F.A.C. and Rule 1.350, F.R.C.P.) applies only to discovery against parties. Specifically, section 350.0611, Florida Statutes, authorizes Public Counsel to participate in Commission proceedings, with the discovery rights of an attorney representing a party. Rules 25-22.34 and 25.22.35, F.A.C., provide that the Florida Rules of Civil Procedure apply to proceedings in which substantial interests of a party are determined by the Commission. Rule 1.350, F.R.C.P., provides for discovery only against *parties* to a proceeding. Thus: "Any party may request any other *party* (1) to produce and permit the party making the request . . . to inspect and copy any designated documents . . . ."

ICG was not a party to -- *or even aware of* -- this docket when it received the Requests.[1] ICG

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[1] Indeed, the Commission had not yet issued its order initiating this proceeding when the Attorney General and Public Counsel issued its discovery requests. *See* Order Granting Petition

has not intervened in this docket since, and it has no intention of doing so. The Requests cite no rule -- because there is none -- authorizing a party to an administrative proceeding to obtain discovery directly from a nonparty.[2]

Since receiving the Requests, ICG has obtained a copy of the Attorney General and Public Counsel's July 15, 1997 Joint Petition for the Initiation of Formal Proceedings Pursuant to Section 120.57, Florida Statutes, to Investigate the Practice of Slamming and to Determine the Appropriate Remedial Measures (the "Joint Petition"). In the Joint Petition, the Attorney General and Public Counsel urged that it is "essential that the Commission join as necessary parties all affected telecommunications companies, including but not limited to, those involved in previous slamming complaints." Joint Petition at 7, ¶ 14.[3] Significantly, the Commission's Initiating Order *does not* join ICG as a party to this proceeding.

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by the Attorney General and Office of Public Counsel and Establishing Procedure, No. PSC-97-1071-PCO-TI, September 12, 1997 (the "Initiating Order").

[2] Commission Rule 25-22.045 provides for the issuance of subpoenas by the Hearing Officer for discovery against third parties. That rule permits parties to apply in writing for the issuance of subpoenas. Rule 25-22.045, F.A.C. The Attorney General and Public Counsel did not follow those procedures in this instance, and indeed the Requests are substantially too broad and burdensome to warrant issuance of such a subpoena. *See Naples Community Hosp., Inc. v. State Agency For Health Care Admin.*, 687 So.2d 62 (Fla. Dist Ct. App. 1997) (party seeking discovery failed to explain adequately how proceeding at bar justified delving into financial aspects of the eighteen nonparty corporations); *see also Jerry's South, Inc. v. Morran*, 582 So.2d 803, 804 (Fla. Dist. Ct. App. 1991) (granting a protective order against discovery against nonparty where information sought was overbroad); *Dade County Med. Assoc. v. Hlis*, 372 So.2d 117, 121 (Fla. Dist. Ct. App. 1979) (nonparty medical association not required to comply with a discovery order in which the interests of maintaining the confidentiality of records greatly outweighed the grounds for discovery).

[3] The Joint Petition does not, however, actually request that the Commission join other telecommunications companies in this docket against their will. Indeed, there is no basis under the law or the Commission's rules for such an action.

Because it has no intention of intervening in this proceeding, and it has not been ordered to do so by the Commission, ICG timely objected to the Attorney General and Public Counsel's Requests as constituting improper discovery against a nonparty. In an abundance of caution, to ensure the preservation of all of its bases for objection, ICG also objected to specific discovery requests. The Attorney General and Public Counsel did not contact ICG relating to its objections, but rather responded with their motion to compel.

ARGUMENT

I. ICG Is Not Subject to Party Discovery.

In their motion to compel, the Attorney General and Public Counsel describe an agreement reached with Staff that led them to believe that they would be entitled to broad discovery in this docket against ICG and other nonparty telephone companies. Before addressing what the Attorney General and Public Counsel say in that respect, we observe specifically what they *do not* say.

First, the Attorney General and Public Counsel nowhere claim (because they cannot legitimately) that ICG has been made a party to this proceeding.

Second, the Attorney General and Public Counsel nowhere cite (because they cannot legitimately) any basis in law or in the Commission's rules for obtaining discovery against a nonparty outside of a request for subpoena.

Third, the Attorney General and Public Counsel nowhere claim (because they cannot legitimately) that the Initiating Order independently grants them discovery rights against non-parties generally, or ICG specifically.

The Attorney General and Public Counsel's silence on these important issues deadens their claim of authority to impose discovery obligations on ICG. Because ICG is not a party to this

proceeding, and the Attorney General and Public Counsel have no authority to impose their discovery requests on non-parties, ICG should not be required to respond to those requests.

II. The Attorney General and Public Counsel's Estoppel Argument in Support of Discovery Is Meritless.

With no legal basis for imposing discovery obligations on ICG, the Attorney General and Public Counsel attempt to ground their entitlement to discovery on a mutation of the principles of estoppel. They claim to have been led to believe that, if they consented to the rulemaking format proposed by Staff, they would be entitled to broad discovery against all telephone companies holding a certificate from the Commission. They claim to have expressed that understanding at an agenda conference before the Commission, and that there "was no disagreement by the Commission or by any other entity appearing before the Commission at [sic] agenda conference." They further claim that, "[h]ad the Commission not decided to allow discovery to all telephone companies in this docket, [they] would have never agreed to proceeding as proposed by staff."

The Attorney General and Public Counsel's estoppel theory has no basis in law or equity. First, regardless of any agreement that they may have reached with Staff, they simply have no authority to bind non-parties to discovery obligations that have no basis in law or rule. And even if the Commission did express no "disagreement" with the Attorney General and Public Counsel's interpretation of their discovery rights, it apparently expressed no "agreement" with that interpretation either.[4] The absence of any provision in the Initiating Order joining ICG as a party or otherwise imposing discovery obligations on ICG suggests that the Commission did not intend

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[4] If it had, the Attorney General and Public Counsel presumably would have claimed as much, rather than claiming only that the Commission expressed no "disagreement."

its lack of express "disagreement" to have the legal effect that the Attorney General and Public Counsel would attach to it.

The Attorney General and Public Counsel also observe that "no other party appearing before the Commission at the agenda conference" expressed disagreement with its discovery interpretation. ICG could not have expressed disagreement with the Attorney General and Public Counsel's suggestion because, again, it did not know of the Joint Petition; it was not a party to this Docket; and it did not participate in the agenda conference. Regardless of any significance that the Attorney General and Public Counsel would have the Commission attach to the silence of other parties at the agenda conference, ICG nowhere waived -- and is not estopped from asserting now -- its objections to the Attorney General and Public Counsel's unlawful discovery demands.

Finally, the Attorney General and Public Counsel appear to presume that, were it not for their assent to a manner of proceeding proposed by Staff, they would have been entitled to discovery against ICG. That presumption is false. The Joint Petition sought the initiation of formal proceedings pursuant to Section 120.57(1), Florida Statutes. That statute applies to Commission proceedings involving disputed issues of material fact that affect the substantial interests of a party to the proceeding. Again, ICG is not a party to this proceeding, and it does not dispute (or even take a position on) any material fact at issue in this proceeding. Even in a formal draw-out proceeding under Section 120.54(3)(c)2, there is no legal basis for *requiring* non-parties to join in the proceeding. That statute conspicuously stops short of imposing such a requirement. Rather, it provides that, where a party whose substantial interests are at stake requests such a proceeding, "[s]imilarly situated parties may be *requested* to join and participate in the separate proceeding." (Emphasis added.) Although ICG respects the concerns raised by the Attorney General and Public

Counsel in this proceeding, it is not "similarly situated" to those parties; it has not been requested to join in this docket; and it would respectfully decline such an invitation.

Ultimately, the Attorney General and Public Counsel want (1) all the fire power that comes with an investigation targeting a specific entity, plus (2) the breadth and flexibility of a general rulemaking. Such a chimeric proceeding would be neither equitable nor lawful. Indeed, many states have addressed or are in the process of addressing the problem of slamming. Yet none has imposed the indiscriminate discovery obligations requested by the Attorney General and Public Counsel here.[5]

Because ICG is not subject to party discovery in this proceeding, it should not be required to respond to these or any discovery requests issued in this docket.

III. ICG's Specific Objections Provide an Independent Reason for Denying the Attorney General and Public Counsel's Motion.

Without waiving its general objection to the Requests in their entirety, ICG also provided specific objections to each individually numbered document request. ICG objected to the specific requests on the grounds that they were overly broad, unduly burdensome, and seek disclosure of

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[5] *See Proposed Amendment of Chapter 515-12-1 Telephone Service Rules to Add a New Section 515-12-1-32 Entitled Rules for Changing a Telecommunication Customers Preferred Local/Long Distance Carrier*, Docket No. 6872-U, Georgia Public Service Commission, (Issued December 5, 1996); *In re: Proposed Generic Regulations for Interexchange Carriers, including Slamming and Bonding Requirements for Debit Card Providers*, Docket No. U-22219, Louisiana Public Service Commission, (Issued December 2, 1996); *In the Matter of Rules for Changing a Consumer's Communications Service*, Order Instituting Rulemaking and Requesting Comments, Docket No. P-100, Sub 139, North Carolina Utilities Commission, (Issued June 10, 1997); *In the Matter of a Rulemaking by the Oklahoma Corporation Commission Amending and Establishing Certain Rules Governing resellers Interexchange Telecommunications Services, OAC 156:56.*, Notice Soliciting Comments, Cause No. RM 970000015, Oklahoma Corporation Commission, (Issued March 5, 1997); *Proposed Permanent Rule 4.700 re: "Slamming,"* Notice Soliciting Comments, Vermont Public Service Board, (Issued April 1, 1997).

information that is not relevant nor likely to lead to the discovery of admissible evidence.[6] In their motion to compel, the Attorney General and Public Counsel argue that ICG's specific objections should not be credited. Specifically, they argue that, "[s]ince ICG was unable to provide even one instance or example showing how the request was overly broad, unduly burdensome, or sought documents not relevant nor likely to lead to the discovery of admissible evidence, the objection should be denied."

The Attorney General and Public Counsel's argument says more about the impropriety of any discovery against ICG than about the sufficiency ICG's specific objections. The Attorney General and Public Counsel do not dispute that the scope of permissible discovery is limited to information that is relevant or likely to lead to the discovery of admissible evidence. Information is relevant to a proceeding only if it speaks to an issue that is the subject of a material dispute. *But ICG has no dispute* with the Attorney General or Public Counsel. To the contrary, ICG agrees with the efforts to address the problem of slamming in Florida. ICG takes no exception to Staff's proposed rules. ICG takes no exception to the Attorney General and Public Counsel's efforts to ensure that the rules ultimately adopted are sufficient to address the problem. ICG merely disputes the Attorney General and Public Counsel's attempts to impose on ICG the costly burdens of participation as a party in this docket.

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[6] ICG also objected to the discovery requests to the extent that they seek disclosure of information protected by the work product doctrine, attorney/client privilege, trade secret privilege, or any other applicable privilege. The Attorney General and Public Counsel do not dispute these objections, but argue that, presumably as part of its production, "ICG must identify the document or documents it claims to be privileged."

Even a formal draw-out proceeding would be the product of one or more parties to a rulemaking contending that a component of that rulemaking would affect their substantial interests. That party would describe the substantial interest at stake, and anyone with a similar interest -- or with a different interest -- would be invited to express their views in a formal proceeding. There, the issue would be defined, as would the parties' positions. Discovery would then be limited to the issues raised by the parties. Here, by contrast, there has been no such identification of disputed issues affecting the parties' substantial interest. And even if there were, ICG is not one of those parties.

In all events, even if ICG had joined in this proceeding; even if it did dispute that slamming is a problem that needs to be addressed in Florida; even if it disputed Staff's proposed rules; even if it disputed the Attorney General and Public Counsel's attempts to maximize the efficacy of those rules, the Requests would still be grossly overbroad and objectionable. As a threshold matter, the Requests are not limited to Excel's contacts with, or information about, slamming issues in Florida. The following are examples of yet other problems.

Request No. 1 Request No. 1 seeks all documents, of whatever nature, regarding "slamming or unauthorized PIC changes." That request is grossly overbroad. Examples are legion of documents "regarding slamming" (*e.g.*, a memo simply relaying allegations of Sonic Communications, Inc.'s slamming of 300,000 customers or relaying a state's adoption of new rules pertaining to slamming) that would have no bearing whatever on any disputed issue in this docket.

Request No. 2 As if to reaffirm that they *really do* expect ICG to cull through and produce all of the documents "regarding slamming" requested in Request No. 1, the Attorney General and Public Counsel repeat that sweeping request, using slightly different words, in Request No. 2. That

request seeks "all memos, correspondence, or e-mail in your possession, custody or control, between people at ICG or any affiliate, regarding slamming." Request No. 2 suffers from the same overbreadth that plagues Request No. 1.

Request No. 3 Request No. 3 calls for the production of documents containing customer names, addresses, and telephone numbers. Public disclosure of that information is prohibited under Section 222 of the Telecommunications Act of 1996, 47 U.S.C. § 222. Request No. 3 is unduly burdensome to the extent that it purports to require ICG to disclose information that ICG is legally prohibited from disclosing.

Request Nos. 4, 6, 11 Request Nos. 4, 6, and 11 seek disclosure of highly confidential and trade-secret employee training materials and directives, which are at the heart of ICG's success in the increasingly competitive and service-oriented long-distance market. The training materials sought relate to the handling of slamming complaints. ICG's current internal policies on the handling of slamming complaints simply have no bearing on the Commission's adoption of rules to curb the practice of slamming. Balancing (a) the injury associated with exposure of its confidential training manuals to its competitors with (b) the little or no relevance that those policies could have on this proceeding, Request Nos. 4, 6 and 11 are decidedly overbroad and unduly burdensome.

Request Nos. 7, 8 Request Nos. 7 and 8 seek production of all documents in any way relating to slamming by (Request No. 8) and against (Request No. 7) ICG. Again, this request is grossly overbroad and includes within its scope some of ICG's most highly confidential business information.

Request No. 10 Request No. 10 seeks production of all ICG PIC change orders from January 1, 1996 forward that result from slamming. ICG has not had against it any adjudication or judgment that it has engaged in an unauthorized PIC change during this period. Yet this request improperly purports to require that ICG itself make and disclose internal legal conclusions on this issue, conclusions that would in any event be protected from disclosure as work product. Additionally, Request No. 10 would seek disclosure of confidential customer identification information, which ICG is prohibited form disclosing under 47 U.S.C. § 222. For at least the above reasons, Request No. 10 is unduly burdensome and privilege barred.

Request No. 12 Request No. 12 seeks production of all documents "commenting on or evaluating the policies or practices of the Florida Public Service Commission or its Staff regarding slamming." This request seeks information that is utterly irrelevant to the substance of this proceeding -- development of rules to protect consumers.

Request No. 13 Request No. 13 seeks all documents received from the Florida Public Service Commission or its Staff regarding any complaint about slamming. Any such documents are not only publicly available, but clearly are in the possession of the Commission or its Staff. It is unduly burdensome to require ICG to search for and produce documents that are publicly available To the extent that documents responsive to other requests are similarly available, ICG should not be required to produce them.

Finally, as stated above, all of the Requests are unduly burdensome and overly broad to the extent that they seek production of documents relating to activities outside the State of Florida. Those documents have no relevance to this proceeding.

CONCLUSION

For the foregoing reasons, the First Motion to Compel Against Intercontinental Communications Group, Inc. by the Attorney General and the Citizens of Florida should be denied.

Respectfully Submitted,

Ky E.B. Kirby
Don W. Blevins
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W.
Washington, D.C. 20007
(202) 424-7500

Counsel for Intercontinental
Communications Group, Inc.

CERTIFICATE OF SERVICE
DOCKET NO. 970882-TI

I CERTIFY that a true and correct copy of the foregoing was served by first class United States Mail, postage prepaid, this 10th day of October, 1997, on the following:

Charles J. Beck
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Diana Caldwell
Division of Appeals
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Michael A. Gross
Assistant Attorney General
Department of Legal Affairs
PL-01, The Capitol
Tallahassee, FL 32399-1050

Walter D'Haeseleer
Director of Communications
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
501 East Tennessee Street
Suite B
Post Office Drawer 1657
Tallahassee, FL 32302

Donna K. Blevins