

ORIGINAL

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 MOTION FOR MORE DEFINITE STATEMENT

LCI International Telecom Corp ("LCI"), pursuant to Rule 25-22.037, Florida Administrative Code, hereby submits its Motion for More Definite Statement of the allegations of Order No. PSC-98-0566-SC-TI, issued on April 23, 1998, and in support states:

In Order No. PSC-98-0566-SC-TI, the Commission refers to 71 complaints against LCI alleging unauthorized carrier changes, and proposes to impose a fine of \$710,000 that is associated with and is a function of that number of alleged violations

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of Commission rules. However, within the Order, the Commission describes only six specific instances of alleged violations. LCI submits that the allegations in the Order are insufficient as a matter of law for two reasons:

(a) LCI is entitled to a specific delineation of the allegations within the charging instrument sufficient to place LCI fully on notice of the charges against it and

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to enable LCI to respond and to prepare a defense. The Order is inadequate for this purpose as to 65 of the 71 alleged violations.

(b) 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 65 of the 71 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 LCI 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 LCI with a reasonable degree of specificity, sufficient to place LCI 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-98-0566-SC-TI refers to the Commission's intent to proceed on the basis of 71 complaints, but identifies only six 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. LCI submits that, at a minimum, the Order should provide, with respect to each complaint on which the Commission intends to proceed:

- a) The name of the complainant.
- b) The date the complaint was received.
- c) The facts alleged by complainant which the Commission believes would,¹ if proven, constitute a willful violation of a rule, order, or provision of Chapter 364.
- d) The statute, rule, or order framing the basis for the alleged violation.


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). Clearly, 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 judgment. The recommendation that the Commissioners adopted when they voted to issue an Order to Show Cause to LCI referred to the number of 71 complaints, but gave only six

¹ LCI acknowledges that, following the decision to issue the Order to Show Cause, Staff responded to its request for information regarding the customer complaints that Staff intended its recommendation to encompass. At this point, LCI has been unable to use the information regarding complaints excluded from an earlier list received by telephone to identify the complaints fully. More fundamentally, however, the basis for this motion is that information received from Staff informally in this manner does not satisfy the Commission's obligation to allege the facts constituting the basis for the contemplated penalty with the required degree of particularity in the Order to Show Cause. To require LCI to "respond" to some 65 complaints not identified or addressed in the charging instrument would introduce the possibility of error in a situation in which LCI has been placed in jeopardy of a penalty. Further, it would effectively alter the burden applicable to an agency in a proceeding that is punitive in nature. Dubin, supra.

"examples" of specific allegations. When they voted, the Commissioners had no information before them regarding 65 of the 71 complaints. LCI 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, LCI respectfully submits that, with respect to the initiation of a 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 65 complaints warrant such a proceeding by interpolating from six "examples."

WHEREFORE, LCI respectfully 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 or penalty.²


Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525

Attorney for LCI International
Telecom Corp

² On this date, LCI is also filing a Partial Response to Order No. PSC-98-0566-SC-TI. In this pleading, which LCI is filing subject to the ruling on the instant Motion, LCI responds, to the extent it can, to the limited allegations in the Order. In the Partial Response, LCI reserves the right to modify or supplement its response upon receiving the Commission's ruling on this Motion for More Definite Statement.

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:

Martha Carter Brown
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 390-M
Tallahassee, Florida 32399-0850

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

Catherine Bedell
Division of Communications
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 335E-1
Tallahassee, Florida 32399-0850

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



Joseph A. McGlothlin