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June 26, 1998

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Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Re: Docket No. 970109-TI

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of the Joint Post-Hearing Brief of the Attorney General and the Citizens. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck  
Deputy Public Counsel

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- APP \_\_\_\_\_
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Application for certificate to )  
provide interexchange telecommunications ) Docket 970109-TI  
service by KTNT Communications, Inc. ) Filed June 26, 1998  
d/b/a IDC Telecommunications )

**JOINT POST-HEARING BRIEF  
OF THE ATTORNEY GENERAL AND THE CITIZENS**

Robert A. Butterworth, Attorney General ("Attorney General"), and the Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this post-hearing brief.

**Basic Position**

Section 364.337(3), Florida Statutes (1997) states that the Commission shall grant a certificate of authority to provide intrastate interexchange telecommunications service upon a showing that the applicant has sufficient technical, financial, and managerial capabilities to provide such service. KTNT has made it clear that its management wishes to use fictitious names such as "I Don't Care" and "It Doesn't Matter" to trick the public into using their service. Since such operations are a management decision, the company has shown that it has inadequate management capabilities to support a certificate from this Commission.

KTNT's plan to use fictitious names such as "I Don't Care" and "It Doesn't Matter" are also anticompetitive. By tricking customers into use their service, a competitor is deprived of the opportunity to provide service to a customer who does not wish to select a specific company to provide service. Section 364.01(g), Florida Statutes (1995) requires the Commission to ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory constraint. Here, regulatory restraint is necessary to prevent anti-competitive behavior.

Section 364.335(3), Florida Statutes, empowers the Commission to make modifications to certificates in the public interest. If the Commission should nevertheless decide to grant a certificate to KTNT, it should modify the certificate to prohibit the company from using misleading fictitious names in Florida.

### Issues

Issue 1: Has KTNT made the requisite showing pursuant to Section 364.337(3), Florida Statutes, that it has sufficient technical, financial, and managerial capability to provide interexchange telecommunications services within the state?

Position: KTNT has made it clear that its management wishes to use fictitious names such as "I Don't Care" and "It Doesn't Matter" to trick the public into using their service. Since such operations are a management decision, the company has shown that

it has inadequate management capabilities to support a certificate from this Commission.

**Discussion:** KTNT seeks approval from the Florida Public Service Commission to operate in Florida using the names "I Don't Care" and "It Doesn't Matter." It wishes to use these names when people dial only "zero" and are then asked by the local operator which interexchange carrier they wish to use to complete their long distance call. Dees, Tr. 50. It is plainly obvious that the purpose of using the names "I Don't Care" and "It Doesn't Matter" is to trick people into inadvertently using their company when the customer has no intention of selecting any company at all.

In Texas, KTNT used 46 different names. Dees, Tr. 54. Based on their experience in that state, they narrowed their use of fictitious names to just two in Florida because "they were the most beneficial to us" and they "generate the most traffic." Dees, Tr. 55. This is tantamount to admitting that KTNT found that these two names accomplish their deception and trickery better than the others.

KTNT 's management capability , as required by section 364.337(3), Florida Statutes (1997) is deficient. The foundation for the company's operation is deception of customers. This is not the type of management capability that the Commission should accept. See Poucher, Tr. 88.

In its application for certification, KTNT states it has never been denied a certificate.

However, KTNT withdrew its applications in Georgia and Nevada in the face of opposition from PSC staff. Dees, Tr. 56. In addition, the PSC staff in Maryland opposed certification for the company, but KTNT claims that it withdrew its application for market reasons. Dees, Tr. 56. The management of the company was less than forthright in its characterization of opposition that it confronted in other states.

The Commission should not reward the management of such a company with a certificate to abuse Florida customers in the name of competition. Poucher, Tr. 87.

**Issue 2:** What are KTNT's business plans for the state of Florida?

**Position:** KTNT plans to use the names "I Don't Care" and "It Doesn't Matter" for operator transfer services. The company has a token marketing effort, relying instead on tricking the public into using its services.

**Discussion:** KTNT plans to use the names "I Don't Care" and "It Doesn't Matter" for its Florida operations. The company's primary business activity is providing operator transfer services. The company claims that it will expand to offer 1+ dialing and toll free numbers as time and resources permit, but that hasn't taken place yet. Dees, Tr. 43. The overwhelming percentage of revenues currently received by the company are generated by customers who dial zero and are then asked to choose an interexchange carrier to complete a long distance call. Poucher, Tr. 82.

The company depends almost solely upon revenues that are generated from an accidental and unintended choice of language by the customer. Poucher, Tr. 82. It has apparently been successful so far because KTNT spent less than \$500.00 on marketing last year while generating a million dollars in revenue. Dees, Tr. 58. The company relies upon deception or accidental choice to attract its market share and does not need to spend any more than a token amount of money marketing its services.

KTNT witness Dees claims that a local exchange company operator will use a specific phrase after a customer states that they don't care which interexchange carrier is used, or that it doesn't matter which carrier is used. He hopes that the operator will ask questions such as "Well, we have a carrier named 'It Doesn't Matter.' Is that who you wish?" Dees, Tr. 62. However, on cross examination, Mr. Dees admitted he had no agreement with the local exchange companies in Florida to require operators to ask the questions he hopes they will ask. Dees, Tr. 62-63. If a customer responded "MCI" when asked which company a customer wished to use, the operator would not respond with words to the effect "we have a company with that name; would you like to use them?" Dees, Tr. 51. There is no assurance at all that the local exchange company operator would ask such questions after a customer stated that they didn't care, or it didn't matter, which company they used.

**Issue 3:** Are KTNT's business plans for the state of Florida in the public interest?

**Position:** No.

**Discussion:** KTNT's marketing plan is based almost solely on the accidental and unintended choice of language by customers who are attempting to place long distance calls by dialing zero. Poucher, Tr. 88. KTNT also claims that it has ambitions to enter the long distance market as a primary provider of interexchange services. If the company is allowed to operate in Florida, the use of deceptive and confusing names will result in customer confusion in the selection of a primary provider. Poucher, Tr. 88. The deception of customers is not in the public interest.

**Issue 4:** Is it in the public interest to allow KTNT to obtain a certificate from the Commission?

**Position:** No, it is not in the public interest to allow KTNT to obtain a certificate from the Commission.

**Discussion:** The public interest is best served by encouraging competition. However, the primary means for KTNT to gain its market share is not through customers exercising competitive choices, but by accident and deception. Poucher, Tr. 83. KTNT intends to pursue a marketing strategy that does not serve to increase customer choice. To the contrary, the company is actually pursuing an anti-competitive strategy that would serve to limit customer choice. Poucher, Tr. 84.

In Florida there is a rotation list of about thirteen companies that are used when a customer expresses no preference about the interexchange carrier the customer wishes to use. Dees, Tr. 64. The names "I Don't Care" and "It Doesn't Matter" make KTNT "pop-up" among the other carriers on the list. Dees, Tr. 36. By "popping up," KTNT manages to defeat the purpose of the rotation by getting a greater share of zero minus traffic than is gained by other carriers not using deceptive names. This practice violates the provision contained in section 364.01(g), Florida Statutes (1997) that requires the Commission to ensure that all providers of telecommunications services are treated fairly and requires the Commission to prevent anticompetitive behavior. Not only are customers deceived by KTNT's fictitious names; other interexchange carriers are cheated.

If the Commission grants approval for the use of the two names proposed by KTNT, there will be no basis in the future to preclude the use of other deceptive names. Poucher, Tr. 85-86.

#### KTNT Does Not Have a Constitutional Right to Engage in Deception

KTNT may argue that its first amendment rights under the United States Constitution will be violated if it is not granted a certificate. The first amendment, however, does not provide KTNT the right to engage in deceptive practices.

Until 1976, commercial speech was entirely unprotected by the free speech



clause of the United States Constitution. Then, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed2d 346 (1976), the U.S. Supreme Court decided to provide a degree of protection to commercial speech. The court differentiated commercial speech from noncommercial speech and afforded commercial speech only a limited amount of protection.

An intermediate test scrutinizing commercial speech comes into play only if the commercial speech is not misleading and does not concern unlawful activity. The government may freely regulate commercial speech that is misleading. *Florida Bar v. Went For It*, 115 S.Ct. 2371, 2375-2376, 132 L.Ed.2d 541 (1995).

The first amendment does not prohibit states from recognizing a cause of action for false, deceptive, or misleading advertising. *Sakon v. Pepsico*, 553 So.2d 163, 166 (Fla. 1989). The Federal Trade Commission Act provides guidance.<sup>1</sup> Section 5(a) of the Federal Trade Commission Act, for example, declares unlawful "unfair or deceptive acts or practices in or affecting commerce." To prove a violation, the Federal Trade Commission must show a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances. *Federal Trade Commission v. Wilcox*, 926 F. Supp. 1091 (S.D. Fla. 1995). Deception may be accomplished by

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<sup>1</sup> Florida has a similar act known as Florida Deceptive and Unfair Trade Practices Act. Section 501.204(2), Florida Statutes (1997) states that in interpreting the Florida Act, great weight must be given to the interpretations of the Federal Trade Commission and federal courts relating to the Federal Trade Commission Act.

innuendo rather than by outright false statements. *Id.* If the misrepresentations of material facts are made to induce the purchase of goods or services, that constitutes unfair or deceptive acts or practices prohibited by Section 5(a). *FTC v. Kitco of Nevada, Inc.* 612 F.Supp. 1282 at 1291 (D.C. Minn. 1985). In order to determine if a statement is misleading, one must look to the overall impression it tends to create on the public. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (C.A.2 (N.Y.) 1962). Statements capable of both a misleading and a truthful interpretation will be construed against the advertiser. *Id.* at 272. See also *US v. Ninety-Five Barrels of Vinegar*, 265 US 438, 44 S.Ct. 529, 68 L.Ed. 1094 (1924). Actual deception of the public need not be shown. *Charles of the Ritz Distributors Corp. V. F.T.C.*, 143 F.2d 676, 680 (2ns Cir. 1944). "Representations merely having the capacity to deceive are unlawful." *Id.*

By using the names "I Don't Care" and "It Doesn't Matter" in situations where customers are being asked to select an interexchange carrier, KTNT is doing more than accomplishing deception by innuendo. KTNT's use of these names is designed to trick people into selecting them as a carrier when the customer is actually stating that they have no company at all that they are trying to select. The Commission is fully empowered by sections 364.01(g) and 364.335(3), Florida Statutes (1997), to prevent such activities.

**Issue 5:** If it is in the public interest to allow KTNT to obtain a certificate from the Commission, should the certificate be modified to prohibit the company from

using fictitious names in Florida?

**Position:** Yes, if the Commission decides to grant a certificate to KTNT, the certificate should be modified to prohibit the company from using misleading fictitious names in Florida.

**Discussion:** Section 364.335(3), Florida Statutes (1997) empowers the Commission to make modifications to certificates in the public interest. If the Commission should decide to grant a certificate to KTNT, it should modify the certificate

to prohibit the company from using misleading fictitious names in Florida:

Respectfully submitted,

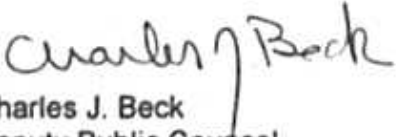
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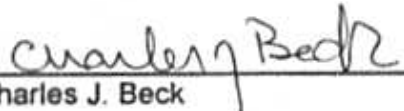
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**DOCKET NO. 970109-TI  
CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S.

Mail or hand-delivery to the following parties on this 26th day of June, 1998.

  
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