

State of Florida



Public Service Commission
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TALLAHASSEE, FLORIDA 32399-0850

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RECEIVED- FPSC

DATE: OCTOBER 24, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (FORDHAM) *c.s.a. AK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (FULWOOD) *JW VJ*

RE: DOCKET NO. 020837-TP - REQUEST FOR ARBITRATION CONCERNING
COMPLAINT AGAINST SPRINT-FLORIDA, INCORPORATED FOR ALLEGED
OVERBILLING AND FAILURE TO COMPLY WITH INTERCONNECTION
AGREEMENT BY TALLAHASSEE TELEPHONE EXCHANGE, INC.

AGENDA: 11/5/02 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020837.RCM.WPD

CASE BACKGROUND

On November 5, 2001, Tallahassee Telephone Exchange (TTE) filed an informal complaint alleging that Sprint-Florida, Inc. (Sprint) over-billed TTE concerning collocation. [Consumer Activity Tracking System No. (CATS#) 416216T] Staff investigated TTE's allegations and resolved several of the disputed charges. However, staff concluded that additional information would be necessary to resolve the remaining disputed charges.

On July 16, 2002, the Division of Competitive Markets and Enforcement received a letter from TTE, complaining of Sprint's alleged over billing and failure to comply with the parties' interconnection agreement. Following a review by Competitive Markets and Enforcement, it was determined that the letter was improperly filed and it was returned to TTE with information concerning the proper filing procedure. On July 30, 2002, TTE

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filed its complaint with the Commission's Division of Consumer Affairs with a request that the Commission docket the complaint and resolve the dispute between the parties. Accordingly, this Docket was opened on July 31, 2002.

On August 12, 2002, a copy of the complaint and attachments was delivered to Sprint. Subsequently, on September 3, 2002, Sprint filed its Motion to Dismiss, Answer and Counterclaim to Request for Arbitration By Tallahassee Telephone Exchange, Inc. In that pleading, Sprint asserts that it was not provided a copy of the complaint letter and only became aware of the action by routinely scanning the FPSC website. It is noted that the complaint letter was not at any time accompanied by a certificate of service.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Sprint's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should grant Sprint's Motion to Dismiss. (FORDHAM, FULWOOD)

STAFF ANALYSIS: The "pleading" from TTE is in letter form and is referenced, "Formal Complaint and Protest of over billing and failure to comply with Interconnection Agreement by Sprint-Florida, Inc." TTE complains primarily of "egregious over-billings and an abuse of their stature as the incumbent carrier in the Tallahassee area." TTE requests that the Commission docket its complaint and resolve the dispute between the parties. TTE also complains that its attempts to enter the DSL market have thus far been frustrated by delaying actions and misinformation on the part of Sprint.

The TTE letter reports that the charges that are in dispute relate to TTE's attempt to gain access to five of Sprint's end offices in Tallahassee. TTE is urging an audit of all Sprint's billing activities for the end offices from June, 2000, through May, 2002. The alleged misconduct by Sprint falls into the following categories:

- 90 days to act on TTE's collocation application, which is well beyond the 30 days required by law.

- Various delays in building out the physical facilities and entering NXX numbers into the Local Exchange Routing Guide.
- A two-month delay in allowing connection between TTE's cabinet space and rack space.
- An over three-month delay in provisioning an Internet T1 that allowed remote administration of various switching equipment.
- An approximate half-year delay in provisioning local trunking requests so that TTE would have sufficient incoming local trunks to handle local calls for existing business customers.

Sprint urges that the TTE letter, which forms the basis of the complaint and request for arbitration, is defective procedurally and should be dismissed on that basis. The defects in the TTE letter are identified by Sprint as follows:

1. Sprint was not served with a copy of the pleading, and no certificate of service was filed with the Petition as required by Rule 28-106.104, F.A.C.

2. Sprint became aware of the pleading while routinely browsing the FPSC website. After notifying staff that it had not been served with the Petition, Sprint was served with a copy via hand delivery on August 12, 2002. However, a certificate of service was never filed in the docket as required by the rules.

3. In addition, Sprint alleges the Petition is deficient in that it does not comply with Rule 28-106.201, F.A.C., because it fails to state the rules and statutes which entitle the petitioner to relief; it fails to clearly and coherently set forth the disputed issues of material fact, and it fails to specify the relief that is being sought. Sprint claims that TTE's failure to comply with the requirements of the rules of administrative procedure make it difficult, if not impossible, for Sprint to respond to the allegations upon which TTE bases its petition.

4. There is also confusion as to whether the pleading is a complaint or a petition for arbitration. While styled as a "petition for arbitration" by the FPSC Clerk, the letter filed by TTE indicates that the document was intended to be a "complaint" as defined in Rule 25-22.036, F.A.C. That rule sets forth the requirements for a complaint. Sprint claims that the letter also

fails to meet the requirements of that rule in that it does not cite the rule, statute or order that TTE is alleging has been violated, it does not cite the name and address of the person against whom the complaint is lodged, it does not clearly and coherently explain the actions that constitute the violation, and it does not state the specific relief requested.

Therefore, Sprint requests that the document filed by TTE that purports to be a "petition for arbitration" with Sprint for violation of the parties' interconnection agreement be dismissed without prejudice, in accordance with Rule 28-106.201(4), F.A.C., for failure to substantially comply with the rules of administrative procedure, thereby depriving Sprint of a meaningful opportunity to respond.

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

The above guidelines, however, assume procedurally correct pleadings. In the present case, the challenge by Sprint is that the TTE Petition is procedurally defective. Staff agrees with Sprint and believes that the TTE Petition is so inartfully drafted as to make it difficult, if not impossible, to properly respond. Rules are established for the purpose of assuring fairness and due process for those who find themselves in the position of seeking assistance from the Commission in settling a disagreement. Those companies being regulated by this Commission are charged with the responsibility of knowing and abiding by the rules under which they are regulated and which establish uniform procedures for seeking the assistance of this Commission. Rule 28-201, F.A.C., sets forth in detail the requirements for a proper petition. The TTE Petition fails to meet virtually every enumerated requirement.

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Additionally, though it is difficult to decipher precisely what relief TTE is requesting, it appears that it is primarily asking that the Commission audit all Sprint billings related to the specified central offices and determine the appropriateness thereof. However, the controlling interconnection agreement provides a procedure for audits by either party. TTE has not availed itself of that provision. Staff believes that the parties should avail themselves of the remedies provided in their agreement before seeking the assistance of this Commission. Therefore, pursuant to Rule 28-106.201(4), F.A.C., staff recommends that Sprint's Motion to Dismiss be granted, without prejudice.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. This docket should remain open to allow the petitioner to amend the Petition if the issues are not otherwise resolved. If the petitioner does not file an amended petition within 30 days of the issuance of the order resulting from this recommendation, this docket should be administratively closed.
(FORDHAM)

STAFF ANALYSIS: This docket should remain open to allow the petitioner to amend the Petition if the issues are not otherwise resolved. If the petitioner does not file an amended petition within 30 days of the issuance of the order resulting from this recommendation, this docket should be administratively closed.