

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.	DOCKET NO. 080631-TP ORDER NO. PSC-09-0515-PCO-TP ISSUED: July 21, 2009
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The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING PARTIAL MOTION TO DISMISS

BY THE COMMISSION:

Case Background

On October 9, 2008, DSL Internet Corporation (“DSLi”) filed its Petition for the Florida Public Service Commission (“Commission”) to Intervene, Investigate and Mediate (“Petition”)¹ in which DSLi asks us to enjoin BellSouth Telecommunications, Inc. d/b/a AT&T Florida (“AT&T”) from suspending the services of DSLi, to deny AT&T the true-up of rates, and to provide “any such other and further relief as the Commission deems necessary to protect the Florida consumer.”

On November 3, 2008, AT&T filed its Partial Motion to Dismiss and Answer and Affirmative Defenses to DSLi’s Petition (“Partial Motion to Dismiss”). DSLi did not file a response to the AT&T Partial Motion to Dismiss.

The parties have been in settlement negotiations since October 2008. Our staff held a conference call with the parties on October 14, 2008, and has received periodic updates on the negotiations since that time. On May 7, 2009, AT&T sent DSLi a confidential settlement offer. On June 9, 2009, AT&T notified our staff that DSLi had not responded to its May 7, 2009, settlement offer and that AT&T would begin collection procedures. On June 10, 2009, staff requested an update from the parties on the status of settlement negotiations. AT&T reiterated its June 9, 2009, statements; DSLi reported that it was still evaluating the settlement offer and formulating a counter proposal. AT&T has asked that we rule on its Partial Motion to Dismiss which addresses our authority to provide the injunctive relief requested by DSLi.

¹ Although filed on October 9, 2008, the Petition is dated October 8, 2008.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

This order addresses only the AT&T Partial Motion to Dismiss. Unless resolved by the parties, the underlying dispute may need to be scheduled for hearing. We have jurisdiction over interconnection agreements pursuant to Sections 120.80(13)(d), 364.012(2), and 364.012(13), Florida Statutes.

Analysis

DSL*i* Petition

DSL*i* presents the following as facts:

- DSL*i* is a competitive local exchange company;
- on February 12, 2007, DSL*i* and AT&T executed an interconnection agreement (“ICA”) that was prepared by AT&T;
- on May 28, 2008, AT&T sent DSL*i* an invoice for \$188,820.59 for “true-ups” to special access rates going back to March of 2005;
- on July 17, 2008, DSL*i* submitted a dispute of the true-ups to AT&T;
- on September 26, 2008, DSL*i* submitted another dispute of the true-ups to AT&T;
- on September 26, 2008, AT&T rejected DSL*i*’s dispute without discussion; and,
- on October 7, 2008, AT&T advised DSL*i* that if payment was not received by October 8, 2008, AT&T would suspend service to DSL*i*.

DSL*i* contends that the ICA carefully lays out the billing, dispute resolution, and true-up procedures the parties must follow. Specifically, DSL*i* argues that Section 28 of the ICA titled “Rate True-Up” requires, in pertinent part, that rates be true-up, based upon final prices determined either by agreement between the parties, or by a final and effective order of this Commission. If our order is the basis of a true-up, it must be based upon cost studies submitted by either or both parties and be binding upon AT&T and DSL*i* specifically, or upon all carriers generally (such as a generic cost proceeding). DSL*i* argues that the parties have not agreed to any amounts and that DSL*i* has not had the opportunity to submit or review any cost studies as they believe the agreement requires. DSL*i* also argues that the general billing and collection procedures section of the ICA does not apply to rate true-ups.

As a remedy, DSL*i* asks us to enjoin AT&T from suspending the services of DSL*i*, to deny the AT&T true-up of rates requested against DSL*i*, and to provide “any such other and further relief as the Commission deems necessary to protect the Florida consumer.”

AT&T Partial Motion to Dismiss

Relying on *Varnes v. Dawkins*, 624 So. 2d 349 (Fla. 1st DCA 1993) and various orders of this Commission, AT&T sets forth the standard for a motion to dismiss as follows: a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law; in disposing of a motion to dismiss, this Commission must assume all of the allegations in the complaint as true; and, to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as correct, the petition still fails to state a cause of action for which relief can be granted.

AT&T asserts that we cannot grant DSLi's request to enjoin AT&T from suspending the services of DSLi for the following reasons: we have only powers granted by the Legislature and have no common law or inherent powers;² any authority granted by necessary implication must be derived from fair implication and intent incident to any express authority;³ and, any reasonable doubt as to the existence of a particular power of this Commission must be resolved against it.⁴

AT&T then quotes Commission orders acknowledging our lack of authority to issue injunctions. AT&T concludes that "[b]ecause DSLi's Petition seeks a remedy that the Commission has no authority to provide, the portion of the Petition seeking injunctive relief should be dismissed." AT&T asks that we enter an order denying DSLi the relief sought.

Conclusion

AT&T has provided citations to several cases in which we have acknowledged our lack of authority to provide injunctive relief.⁵ Having reviewed the referenced orders, and judicial opinion, we find that this Commission does not have the authority to provide injunctive relief to DSLi. Thus, assuming all of DSLi's allegations as true, we find that DSLi has failed to state a cause of action for which injunctive relief can be granted. As such, we shall grant the AT&T Partial Motion to Dismiss and thereby dismiss the portion of the Petition in which DSLi requests injunctive relief. The remainder of the DSLi Petition shall not be dismissed and this docket shall remain open to address the issues raised in the DSLi Petition

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the AT&T Partial Motion to Dismiss is hereby granted. It is further,

² *State v Mayo*, 354 So. 2d 359 (Fla. 1977); *City of Cape Coral v GAC Utility*, 281 So. 2d 493 (Fla. 1973).

³ *Atlantic Coast R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909).

⁴ *State v. Mayo*, 354 So.2d 359, 361 (Fla. 1977).

⁵ In re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc., Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210-FOF-WS (February 21, 1994); In re: Petition to Investigate, Claim for Damages, Complaint and Other Statements Against Respondents Evercon Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ, Docket No 060640-TP, Order No PSC-07-0332-PAA-TP (April 16, 2007); *Florida Power and Light Company v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 892 n.3 (Fla. 3d DCA 2005).

ORDERED that this docket shall remain open to address the issues raised in the DSLi Petition.

By ORDER of the Florida Public Service Commission this 21st day of July, 2009.

ANN COLE
Commission Clerk

By: Dorothy E. Menasco
Dorothy E. Menasco
Chief Deputy Commission Clerk

(S E A L)

CWM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.