

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition by Metropolitan) DOCKET NO. 960838-TP
Fiber Systems of Florida, Inc.) ORDER NO. PSC-96-1321-FOF-TP
for arbitration of certain terms) ISSUED: October 30, 1996
and conditions of a proposed)
agreement with Central Telephone)
Company of Florida and United)
Telephone Company of Florida)
concerning interconnection and)
resale under the)
Telecommunications Act of 1995.)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

CASE BACKGROUND

On February 8, 1996, the Telecommunications Act of 1996 (the Act) became law. Part II of the Act sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act concerns interconnection with the incumbent local exchange carrier, and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

By letter dated February 7, 1996, MFS Communications Company, Inc. (MFS) requested that Central Telephone Company of Florida, Inc. and United Telephone Company of Florida, Inc. (Sprint/United-Centel) commence good faith negotiations under Section 251 of the Act. On July 17, 1996, MFS petitioned the Commission to arbitrate unresolved issues with Sprint/United-Centel pursuant to Section 252. Part of MFS's petition was a request that the Commission include a specific liquidated damages provision in the agreement. On August 12, 1996, Sprint/United-Centel filed a Motion to Dismiss the part of MFS's petition that requested a liquidated damages provision. MFS filed a response in opposition on August 19, 1996. Neither party filed a request for oral argument.

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FPSC-RECORDS/REPORTING

We considered Sprint/United-Centel's motion to dismiss at our September 16, 1996 Agenda Conference. We granted the motion on two grounds: 1) imposition of a liquidated damages provision is beyond the scope of our arbitration responsibilities under Sections 251 and 252 of the Act; and, 2) if we imposed a liquidated damages clause we would be doing indirectly what we cannot do directly; that is, imposing damages for breach of contract. Our reasons for our decision are memorialized below.

DECISION

Sprint/United-Centel makes three arguments in support of dismissing MFS's request. First, it argues that Section 251 limits the topics that may be decided by arbitration to terms and conditions that specifically relate to duties imposed on the LECs by Sections 252(b) and (c). Second, it argues that imposition of a liquidated damages provision is equivalent to imposing money damages; and the Commission lacks the jurisdiction to impose money damages. Third, Sprint/United-Centel argues that the specific provision requested by MFS is a penalty and therefore an illegal liquidated damages clause.

MFS responds that Section 252(b)(1) allows a party to petition the state commission to arbitrate "any open issues." MFS argues that whether or not to include a liquidated damages clause is an "open" issue subject to arbitration. MFS further argues that a liquidated damages clause is an enforcement provision and the Commission should include an enforcement provision in the arbitrated interconnection agreement.

Section 251(b) of the Act imposes certain duties upon local exchange companies regarding resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. Section 251(c) imposes additional requirements on LECs regarding the duty to negotiate, interconnection, unbundled access, and resale. If a party requests negotiations under the Act, the parties may reach an agreement without regard to the standards set forth in Sections 251(b) and (c). 47 USC § 252(a)(1). The negotiated agreement is submitted to the Commission under Section 252(e) and is approved if it is not discriminatory and not against the public interest. 47 USC § 252(e)(2)(A).

If the parties do not reach agreement, one party may petition the Commission to arbitrate unresolved issues between them. 47 USC § 252(b)(1). The Commission arbitrates the agreement pursuant to Sections 251 and 252, and approves the agreement if it meets the standards of 47 USC § 252(e)(2)(B).

The question raised by Sprint/United-Centel's motion is: exactly what issues are appropriate for arbitration under the Act? We believe that we should limit our consideration to the items enumerated in Sections 251 and 252, and matters necessary to implement those items. A liquidated damages provision does not meet that standard.

A liquidated damages provision in a contract allows the parties to determine, in advance, the appropriate level of damages in the event of a breach of contract. Parties typically include such provisions in their contracts in order to lessen the cost of litigating disputes that may arise in the future. The Act does not require parties to include in their agreements a method to resolve disputes. Instead, the Act includes provisions to deal with disputes. For example, Section 252(e)(6) allows the parties to petition the Federal Communications Commission if the state commission fails to act. Further, if the state commission takes action, an aggrieved party may bring an action in Federal district court to determine whether the state commission's action complies with Sections 251 and 252. We believe that if Congress wanted to require enforcement provisions in agreements, it would have specifically said so.

The Act is silent on how to resolve intercompany disputes once an agreement has been reached. If a party to an arbitrated agreement believes the other party is not performing its duties under the agreement, it has remedies under state law. A party may file an appropriate petition or complaint under Rule 25-22.036, Florida Administrative Code.

Section 252(a) allows parties to enter into a binding agreement without regard to Section 251. This agreement can include any issues the parties wish to put in it, including enforcement provisions such as liquidated damages, or other forms of dispute resolution rather than bringing a complaint to the Commission. A liquidated damages provision might be an appropriate method for parties to resolve disputes without resorting to litigation in court or before the Commission. It is not, however, a requirement of Section 251. We do not believe, therefore, that the issue of whether or not it should be included in the parties' agreement is relevant to our resolution of contested issues pursuant to Sections 251 and 252. Sprint/United-Centel is under no obligation to include such a provision in any agreement.

Even if the Act permitted the arbitration of a dispute over liquidated damages, we do not believe it would be appropriate for us to do so under state law. If we were to impose a liquidated

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damages provision, we would be, in effect, awarding damages to one party for a breach of contract. We lack the authority to award money damages. Southern Bell Telephone and Telegraph Company v. Mobile America Corporation 291 So.2d 199, 202 (Fla. 1974). If we cannot award money damages directly, we cannot do so indirectly by imposing a liquidated damages arrangement on the parties.

Upon consideration, we grant Sprin:/United-Centel's motion.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion to Dismiss is granted for the reasons discussed in the body of this Order. It is further

ORDERED that this docket shall remain open pending resolution of the remaining issues in the case.

By ORDER of the Florida Public Service Commission, this 30th day of October, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, 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.