

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 9, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (L. FORDHAM) *L.F.F. PER FOR BIC*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BUYS) *DRB*
DIVISION OF CONSUMER AFFAIRS (K. SMITH) *JS*

RE: DOCKET NO. 021122-TX - COMPLAINT OF DONALD CHAPMAN AGAINST FLORIDA DIGITAL NETWORK REGARDING INTERRUPTION OF SERVICE AND REQUEST FOR COMPENSATION.

AGENDA: 01/21/03 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021122.RCM

CASE BACKGROUND

On April 12, 2002, the Division of Consumer Affairs received a complaint from Mr. Donald Chapman, owner/agent of Masters Dri Mist Jet Extraction (Mr. Chapman). Mr. Chapman alleged that on March 26, 2002, he contacted Sprint-Florida, Inc. (Sprint), requesting that his service be transferred back to Sprint from his present provider, Florida Digital Network, Inc. (FDN). Pursuant to that request, Sprint issued a service order with a due date of April 4, 2002.

On April 4, 2002, Sprint faxed a Letter of Authorization (LOA) to Mr. Chapman, who signed it and returned it the same day. On that same date, Sprint faxed a Local Service Request (LSR) to FDN. Sprint explained that the delay in submitting the LOA to Mr. Chapman was occasioned by a Sprint Small Business/Home Business

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(SBHB) error. On April 4, 2002, FDN terminated service to Mr. Chapman.

Between April 4, 2002, and April 12, 2002, there were many communications among Sprint, FDN, and Mr. Chapman regarding the requested change in service providers. There was significant confusion among all parties involved as to what went wrong. However, it was April 12, 2002, before Mr. Chapman's service was restored by Sprint. It was also on April 12, when Mr. Chapman made his first complaint to this Commission.

On August 15, 2002, Mr. Chapman requested an informal conference regarding this matter. An informal conference acknowledgment and a Form X were sent to Mr. Chapman on August 20, 2002, via certified mail. On September 6, 2002, the Division of Consumer Affairs talked at some length with Mr. Chapman and advised him that we could not provide him with an informal conference for two reasons. First, we never received the completed Form X which had been provided, and, second, it is not within the Commission's authority to grant his request for an award of \$3,000 for lost business as a result of the gap in his telephone service. Mr. Chapman stated that he never received the Form X. Mr. Chapman was also advised that this Commission could not award him damages for lost business. On September 10, 2002, the Division of Consumer Affairs received the certified copy of the Form X letter back from the Post Office as unclaimed. However, other letters sent to the same address had been claimed.

On October 16, 2002, Mr. Chapman advised that he understood that we could not provide him the relief he had requested but wanted to file a formal complaint against FDN. He asked for information on how to file a formal complaint. Mr. Chapman was advised by the Division of the Commission Clerk and Administrative Services (CCA) to send his complaint in writing to Ms. Blanca Bayo, and he was provided with the correct mailing address. He was advised that when the complaint was received it would be entered and forwarded to the proper technical division for review and response to him. On October 31, 2002, a letter of complaint was received from Mr. Chapman. It contained one short paragraph wherein he requested compensation from FDN for loss of business resulting from his service outage. On December 3, 2002, FDN filed a Motion to Dismiss the Complaint. That Motion is the subject of this recommendation.

DISCUSSION OF ISSUES

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

RECOMMENDATION: Yes. The Commission should grant FDN's Motion to Dismiss. (FORDHAM, BUYS, K. SMITH)

STAFF ANALYSIS: The "pleading" from Mr. Chapman is in letter form and contains no title or reference. It is one short paragraph, containing four sentences. The attachments are, simply, all the records of this Commission regarding this matter. In his letter of complaint, Mr. Chapman only requests compensation for loss of business that resulted from the service outage.

FDN urges that Mr. Chapman's letter, which forms the basis of the complaint and request for compensation, is defective for three basic reasons and should be dismissed for those reasons. The defects in the complaint are identified by FDN as follows:

While the letter filed by Mr. Chapman contains no title or style, it seems obvious that the document was intended as a "complaint" as defined in Rule 25-22.036(2), F.A.C. That rule sets forth the basic requirements for a complaint. FDN claims that the letter fails to meet the requirements of that rule in that it does not cite the rule, statute or order that Mr. Chapman 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, FDN requests that the document filed by Mr. Chapman that purports to be a "Complaint" 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 FDN of a meaningful opportunity to respond.

Next, FDN pleads that the Complaint is defective because it fails to state a cause of action upon which this Commission can grant relief. Indeed, the only request made by Mr. Chapman is for compensation for loss of business that resulted from the service outage. FDN urges, citing Southern Bell Tel. And Tel. Co. v. Mobile America Corp., that the Commission does not have the authority under Chapter 364, Florida Statutes, to award contract, tort or any other type damages. Therefore, the Complaint fails to

state a cause of action on which the Commission may act, and should be dismissed.

Finally, FDN pleads that the Complaint should be dismissed because, in addition to not stating a cause of action against FDN, it fails to join an indispensable party, namely, Sprint. FDN points out that there is no allegation that it even violated any particular statute, rule, or order of the Commission. Moreover, FDN alleges that Sprint is the only party to blame for the customer's service outage. There is no proof provided in the documentation attached to the Complaint which would in any way establish who is to blame for the service outage. Therefore, the Complaint should be dismissed for failure to join an indispensable party.

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 FDN is that the Complaint is procedurally defective. Staff agrees with FDN and believes that Mr. Chapman's Complaint is so inartfully drafted as to make it 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 this Commission in settling a disagreement. Though utilities customers may not generally be knowledgeable regarding the rules under which this Commission must operate, it is, nevertheless, necessary to follow the rules with which companies being regulated by this Commission must comply. Rule 28-201, F.A.C., sets forth in detail the requirements for a proper petition. Mr. Chapman's Petition fails to meet virtually every enumerated requirement.

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Additionally, though it is difficult to decipher precisely what relief Mr. Chapman is requesting, it appears that he is primarily asking that this Commission award him compensation for business lost during the service outage he experienced as a result of his transition from FDN to Sprint. Staff believes that this request is easily disposed of by one simple fact of law. This Commission lacks any legal authority to award the type of monetary compensation sought by Mr. Chapman. The compensation sought by Mr. Chapman is, first, highly speculative. It appears to staff that there is no objective way in which the subject damages could actually be calculated. The more basic problem, however, is that the Commission, as a matter of law, may not grant the relief requested by Mr. Chapman in his complaint. See Southern Bell Tel. And Tel. Co. v. Mobile America Corp., 291 So. 2d 199 (Fla. 1974) ("Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards . . .").

Based on the above, staff recommends that FDN's Motion to Dismiss be granted, without prejudice.

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ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. This docket should remain open to allow Mr. Chapman to amend the Petition. If Mr. Chapman does not file an amended Complaint, comporting with the above cited rules, within 21 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 Mr. Chapman to amend the Petition. If Mr. Chapman does not file an amended Complaint, comporting with the above cited rules, within 30 days of the issuance of the order resulting from this recommendation, this docket should be administratively closed.