

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

PETITION OF	§	
SOUTHEASTERN SERVICES, INC	§	
FOR ARBITRATION OF AN	§	
INTERCONNECTION AGREEMENT	§	
WITH NORTHEAST FLORIDA	§	DOCKET NO. 040171-TP
TELEPHONE COMPANY, INC.	§	
PURSUANT TO SECTION 252(b) OF THE	§	
COMMUNICATIONS ACT OF 1934, AS	§	
AMENDED	§	

SSI's RESPONSE TO NEFCOM's MOTION TO STRIKE

1. Southeastern Services, Inc. ("SSI"), by its undersigned counsel, hereby responds to Northeast Florida Telephone Company, Inc.'s ("NEFCOM") Motion to Strike "Portions" of SSI's Petition for Arbitration. In this Response SSI explains that (1) SSI is not seeking to hold NEFCOM to any of the "additional duties" of incumbent LECs set out in § 251(c) of the federal Act and (2) notwithstanding NEFCOM's asserted "rural" status under § 251(f), it is subject to the provisions of § 252 of the federal Act, including arbitration by the Florida Public Service Commission ("FPSC") under § 252(b), given that the parties were unable to reach voluntary terms under § 252(a). FPSC should proceed with this matter and decide the open issues under § 252(b)(4) – using the guidance supplied by § 252(c) and (d).

2. SSI will provide a brief history of the parties' "negotiations" that led to the Petition for Arbitration, and a recitation of the handling of this case to date. After SSI responds to NEFCOM's Motion to Strike, SSI will explain its position on how the matter should proceed from here.

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FPSC-COMMISSION CLERK

I.
HISTORY OF NEGOTIATIONS AND THIS PROCEEDING

3. SSI initially gave notice to NEFCOM of its desire to establish an agreement on July 16, 2003. In that notice, SSI expressly invoked § 251(a) and (b).¹ The parties had some general discussions and exchanged correspondence over several months. To facilitate negotiations, the parties mutually agreed to deem as the date negotiations had begun September 22, 2003. SSI sent a general description of its physical interconnection proposal to NEFCOM on November 20, 2003. NEFCOM requested clarification on certain compensation issues and SSI provided the requested clarification, and reiterated its request that the parties actually have the sort of substantive negotiations necessary to reach a voluntary agreement that are contemplated by § 252 of the Act. SSI provided a comprehensive proposed draft contract on January 23, 2004. NEFCOM did not respond to the terms and did not provide any alternative proposed terms prior to the filing of the Arbitration Petition on February 26, 2004.² SSI had no choice but to seek arbitration since the parties were not engaging in substantive discussions and had made very little progress between July 2003 and February 2004.

4. NEFCOM filed its Motion to Strike on March 22, 2004. In its Motion, NEFCOM incorrectly asserted that SSI was seeking to impose § 251(c) duties on NEFCOM. SSI anticipated that the Commission would process the matter and establish a date for SSI to respond to the Motion to Strike. An informal conference was ultimately held on May 11, 2004. As a result of

¹ The notice also contained a *bona fide request* for interconnection, traffic exchange, collocation, unbundled network elements and resale at cost based and/or avoided cost pricing under § 251(c), which – if pursued – would have removed NEFCOM's claimed exemption from § 251(c) obligations. SSI subsequently determined not to move forward with the *bona fide request* and – for purposes of this case – is not challenging NEFCOM's assertion of rural status and an exemption from § 251(c) pursuant to § 251(f). Hence, for purposes of this case, SSI is invoking only § 251(a) and (b).

² NEFCOM provided SSI a copy of its counterproposal on March 16, 2004, six days before it filed its Motion to Strike. The pre-arbitration negotiation window (the 160th day after the deemed notice date) had already expired. NEFCOM never proposed any terms to SSI during pre-arbitration discussions.

that conference, the parties agreed to again try to resolve issues through negotiations and if there was insufficient progress, SSI would submit a response to the Motion. The parties had their first "face to face" meeting on June 1, 2004. At the end of the meeting, NEFCOM indicated it would prepare a revised template contract within about two weeks to reflect the discussions. To date, no such revised template has been produced.³ Given the significant amount of time that has passed after the filing of the Petition, SSI has determined it should move forward and submit this response to NEFCOM's Motion. SSI commits to continue trying to negotiate and resolve issues on a direct basis with NEFCOM.

5. Meanwhile, the deadline for a decision on open issues set out in § 252(b)(4)(C) expired on June 22, 2004. Either party now has the right to seek preemption by the FCC pursuant to § 252(e)(5). Given § 252(e)(6), however, it is plain that in the absence of a petition for preemption the FPSC continues to have jurisdiction over this matter, the parties are deemed to have waived the deadline, and the Commission can and should proceed to dispose of the issues with reasonable dispatch.

II.

SSI IS SEEKING TO INTERCONNECT UNDER § 251(a) AND (b) AND IS NOT SEEKING TO IMPOSE ANY § 251(c) DUTIES ON NEFCOM.

6. NEFCOM's Motion to Strike asserts that SSI has sought to impose § 251(c) duties on NEFCOM. This is not correct. Each "open issue" identified by SSI in the Petition is related to § 251(a) or (b), and does not rely at all on § 251(c). None of SSI's proposed terms are subjects covered exclusively by § 251(c). For example, Interconnection is mandated by both § 251(a) and § 251(c)(2). Resale is addressed in both § 251(b)(1) and § 251(c)(4). While NEFCOM protests mightily that SSI is attempting to impose § 251(c) duties on NEFCOM, NEFCOM fails to

³ Counsel for NEFCOM indicated via an email dated July 22, 2004 that NEFCOM is working on a revised template and may have something to provide within a week. That "week" has now passed without any revised

actually state or point to any obligation exclusively covered by § 251(c) that SSI has sought to impose.

7. NEFCOM mentions in several instances that it is not subject to the duty to negotiate in good faith that is expressly set out in § 251(c)(1).⁴ While SSI acknowledges that there is no express obligation to negotiate stated in § 251(a) or (b), carriers that choose to not negotiate and do not make a diligent attempt to reach voluntary terms do so at their peril, since the state commissions can impose arbitrated terms under § 252(b). That is why we are here.

8. Section 252(b)(5) kicks in after a petition for arbitration is filed. NEFCOM most certainly now has an obligation to further negotiate or risk a finding by this Commission that it has not negotiated in good faith. NEFCOM may not have had an express duty to negotiate in good faith prior to the petition, but it cannot escape FPSC arbitration and it can no longer fail to actually negotiate. If NEFCOM fails to "participate further in the negotiations" then the Commission can enter a finding NEFCOM failed to negotiate in good faith under § 252(b)(5). In any event, the Commission has the duty to determine the terms of the interconnection agreement under § 252(b), regardless of whether NEFCOM chooses to participate. This will be further explained in Part III below.

9. As noted, NEFCOM does not specify any duty that SSI is trying to implement in its Petition that is addressed only in § 251(c). It cannot do so, since SSI mentioned § 251(c) only to expressly state that SSI was not relying on it. See Petition at p. 5, note 1. NEFCOM is trying to confuse the issues in an attempt to avoid its § 251(a) and (b) duties. If and when NEFCOM does

template.

⁴ NEFCOM is incorrect if it fears that SSI will attempt to secure a finding that it has violated the express duty to negotiate in good faith set out in § 251(c)(1). While SSI believes that NEFCOM has not truly negotiated and has consciously tried to avoid doing so, SSI did not assert bad faith in its Petition and is not doing so even now. SSI will, however, be candid about NEFCOM's obvious lack of enthusiasm about the prospect of facilities-based

identify an open issue brought by SSI that NEFCOM believes is exclusively governed by § 251(c), then SSI will respond. So far, there is nothing other than bluster to respond to.

10. In paragraph 38(a) NEFCOM does assert that "transit" is outside § 251(a) and (b). Note that NEFCOM does not assert that transit is exclusively covered by § 251(c). "Transit" is part of the "transport and termination" obligation covered by § 251(b)(5). SSI will note, however, that SSI is not intending to require NEFCOM to provide transit unless and until it operates a local or access tandem that connects to other carriers. SSI's understanding at this point is that NEFCOM has no such tandem.

11. In paragraph 38(b) of its Motion, NEFCOM implies that a *bona fide* request is a necessary predicate for *interim* number portability. This is incorrect. All LECs must provide interim number portability until they are required by FCC rules to provide permanent number portability. NEFCOM is not presently required to provide permanent number portability since it has not received a *bona fide* request. But it must still provide interim number portability upon request (but not a *bona fide* request such as applies to permanent number portability. Number portability – both interim and permanent – are required by § 251(b). A *bona fide* request as defined by the FCC is required only for permanent number portability.

12. NEFCOM asserts in ¶ 38(b) that "number portability is not necessary or appropriate for a non-facilities based reseller of local traffic such as SSI." SSI presently resells NEFCOM services, but is attempting – so far unsuccessfully – to also become facilities-based and to physically interconnect with NEFCOM. That is the entire purpose of this proceeding. Portability is essential for facilities-based competitors. SSI understands that if it wants to obtain permanent number portability, instead of interim portability, then it will have to provide a *bona fide* request.

interconnection such as proposed by SSI. Further, SSI reserves the right to seek a finding under § 252(b)(5), which has clearly applied since February 26, 2004.

13. SSI does not understand the basis for NEFCOM's assertion in ¶ 38(c) that a PIU is "outside the scope of an agreement for the exchange of local traffic under § 251(a) and (b) of the Act." To the extent one party provides a facility used by both parties for interconnection and exchange of traffic, the non-providing party is cost-responsible for the facility in relation to the non-providing party's proportionate originating use. *See* 47 C.F.R. §§ 51.703(b) and 51.709(b). Since TELRIC does not apply (given the limitation in § 252(d)(1)), SSI and NEFCOM will charge each other under state and interstate access tariffs or some voluntarily negotiated price. Absent a voluntary agreement, to the extent there is interstate traffic, it will be assessed at interstate rates, and to the extent the traffic is intrastate, it is assessed at intrastate rates. In order to accomplish the proration of facility charges (for the portion of the facility used for originating traffic of the non-providing LEC), there must be a PIU. This is especially the case if SSI chooses to subscribe to switched access service and use Feature Group D trunks to also interconnect with NEFCOM.

14. If NEFCOM's contention in ¶ 38(c) is intended to assert that a § 251(a) and (b) interconnection agreement is limited to "only" "local"⁵ traffic then NEFCOM is clearly wrong. Section 251(a) and (b) are not either expressly or impliedly limited to "local" traffic. LECs routinely exchange non-local traffic over interconnection facilities and routinely exchange "local" traffic over Feature Group D access trunks. Section 251(a) applies to all carriers, not just LECs. IXCs are subject to § 251(a), for example. There is no basis for any contention that § 251(a) or (b) are limited to only "local" traffic.

15. NEFCOM asserts that there should be no "facilities cost sharing factor." The facilities cost sharing factor is necessary if NEFCOM intends to insist on providing interconnection trunks

⁵ SSI does not understand what NEFCOM means by "local" traffic. The precise meaning of that term is dependent on the context.

and assessing special access for the facilities used to carry them. While it is true that SSI did propose in a November 20, 2003 letter that there be no facilities charges on each party's side of the POI, it is not clear where the POI will be, and what the ultimate arrangements will be for interconnection facilities. NEFCOM did not respond to SSI's letter. NEFCOM's proposed ¶ 4.1 terms require the parties to mutually agree on the point of interconnection. NEFCOM's proposed ¶ 5.2 indicates that facilities will be provided subject to NEFCOM's intrastate special access tariff, and does not address what happens if SSI provides the facility. SSI objects to intrastate charges to the extent they carry interstate traffic and to the extent they carry traffic that is not originated by SSI. SSI objects to any requirement that only NEFCOM may provide interconnection facilities. In any event, there must be a PIU and a facilities cost sharing factor. This is so because both 47 C.F.R. § 51.703(b) and 47 C.F.R. § 51.709(b) apply without regard to what side of the point of interconnection the facilities lie.

III.

**NOTWITHSTANDING NEFCOM'S ASSERTED "RURAL" STATUS UNDER § 251(f),
NEFCOM IS SUBJECT TO THE PROVISIONS OF § 252 OF THE FEDERAL ACT,
INCLUDING ARBITRATION BY THE FLORIDA PUBLIC SERVICE COMMISSION
("FPSC") UNDER § 252(b)**

16. NEFCOM asserts in paragraph 42 of its Motion that it is not subject to § 252(b)(4)(C), which sets out the deadline for a state commission to resolve the open issues in a § 252(b) arbitration. In other places, such as in ¶¶ 8-10, 13, 17, 18 and 21, NEFCOM strongly implies, but does not directly state, that the arbitration procedures, standards and timelines visions in § 252(b), (c), (d)(2) and (e) do not apply because of NEFCOM's alleged "rural" status under § 251(f). NEFCOM is incorrect. All of § 252 – except for § 252(d)(1) – applies to "rural" LECs. Notwithstanding NEFCOM's gentle protestations, ultimately NEFCOM in fact consents to the

processing of this case (except for the 9 month deadline set out in § 252(b)(4)(C)), since NEFCOM filed its own proposed agreement, and asked the Commission to approve it.

17. A full reading of § 252 clearly indicates that it is intended to cover all “incumbent local exchange carriers” and “requesting carriers” and is the means by which all of § 251 – including § 251(a) and (b) – is implemented. NEFCOM admits it is an ILEC on page 1 of its Motion. NEFCOM does not assert that SSI is not a “requesting carrier” for purposes of § 252. NEFCOM does not dispute that SSI delivered the notice of a desire to negotiate interconnection agreement terms “pursuant to § 251.” NEFCOM does not assert that the parties reached a voluntary agreement and does not claim that SSI’s petition was not timely filed.

18. When Congress intended a part of § 252 to be limited to § 251(c) issues, it clearly said so. Section 252(d)(1), which deals with charges for interconnection and network elements governed by § 251(c), expressly mentions § 251(c). There is no express exclusion of ILECs governed by § 251(f). There is no express statement or any implication that the entirety of § 252 is limited only to implementation of § 251(c). To the contrary. It is clear, therefore, that the arbitration provisions of the Act apply to § 251(a) and (b) agreements if the parties are not able to reach a voluntary agreement under § 252(a). In particular, after a petition for arbitration is filed, even a rural ILEC is subject to a possible finding of lack of good faith in § 252(b)(5).

19. If the state commission does not decide the open issues by the 9th month – as required by § 252(b)(4)(C) – then either party may seek preemption under § 252(e)(5). If no party does so, then the state commission continues to have jurisdiction. If neither party seeks preemption, then the parties are deemed to have constructively waived the 9 month deadline.

20. SSI has suggested to NEFCOM that the parties discuss extending the 9 month deadline, but NEFCOM refused⁶ in a letter dated July 7, 2004. In the same letter NEFCOM directly

asserted it is "not subject to compulsory arbitration before the Florida PSC" and refused to expressly waive the deadline. Unless NEFCOM files a preemption petition with the FCC, however, then it must be deemed to have constructively waived the deadline. NEFCOM must choose between compulsory arbitration before the FPSC or the FCC. These are the exclusive venues under the Act. *See* § 252(e)(6). NEFCOM is wrong if it believes it is not subject to compulsory arbitration at all.

21. SSI respectfully requests that the Commission reinstate processing of this matter. The parties have not engaged in any discovery. There is no schedule for preparation of testimony or a hearing. While SSI is obviously willing to let this matter take longer than is normally allowed in the Act, SSI does deserve a hearing and a decision with reasonable dispatch. Now that SSI has responded to NEFCOM's Motion, it should be denied in all ways and the case should proceed.

22. In order to allow for the most expeditious conduct of this arbitration, SSI respectfully requests that the Commission promptly issue a procedural order establishing a schedule for discovery, prefiled testimony, a prehearing conference, a hearing, and such other process as the Commission may determine to be necessary.

CONCLUSION AND PRAYER

23. SSI requests that the Commission deny NEFCOM's Motion to Strike, proceed to arbitrate the unresolved issues described in SSI's Petition and resolve each of them in SSI's favor.

Respectfully Submitted,
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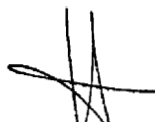
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record below to the above-styled cause, on this 29th day of July, 2004 and in compliance with Rule 28.106.104(4), Florida Administrative Code .

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