

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration
concerning complaint against
Sprint-Florida, Incorporated for
alleged overbilling and failure
to comply with interconnection
agreement by Tallahassee
Telephone Exchange, Inc.

DOCKET NO. 020837-TP
ORDER NO. PSC-02-1529-FOF-TP
ISSUED: November 6, 2002

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Background

On November 5, 2001, Tallahassee Telephone Exchange (TTE) filed an informal complaint alleging that Sprint-Florida, Inc. (Sprint) over-billed TTE concerning collocation. Our staff investigated TTE's allegations and resolved several of the disputed issues. However, it was determined that additional information would be necessary to resolve the remaining disputed issues.

On July 16, 2002, our 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 filed its complaint with our Division of Consumer Affairs with a

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FPSC-COMMISSION CLERK

request that they 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. We note that the complaint letter was not at any time accompanied by a certificate of service.

Analysis

The "pleading" from TTE is in letter form and is titled "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 this 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.

- More than a 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. We agree with Sprint and believe 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 this Commission in settling a disagreement. Those companies being regulated by us 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 28-106.201, F.A.C., sets forth in detail the requirements for a proper petition. The TTE Petition fails to meet virtually every enumerated requirement.

Additionally, though it is difficult to decipher precisely what relief TTE is requesting, it appears that it is primarily asking that we 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. We believe 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., Sprint's Motion to Dismiss is hereby granted, without prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sprint-Florida, Inc.'s Motion to Dismiss is hereby granted, without prejudice. It is further

ORDERED that Docket No. 020837-TP shall remain open to allow Tallahassee Telephone Exchange, Inc. the opportunity to amend the Petition if the issues are not otherwise resolved. It is further

ORDERED that if the petitioner does not file an amended petition within 30 days of the issuance of this Order, this docket shall be administratively closed.

By ORDER of the Florida Public Service Commission this 6th Day of November, 2002.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

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CLF

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.