BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida Inc.	DOCKET NO. 040156-TP ORDER NO. PSC-04-0671-FOF-TP ISSUED: July 12, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP'S MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order (TRO), promulgating various rules governing the scope of incumbent telecommunications service providers' obligations to provide competitors access to unbundled network elements (UNEs). Verizon Florida, Inc. (Verizon) stated that on October 2, 2003, it sent a letter to each competitive local exchange carrier (CLEC), initiating negotiations on a proposed draft amendment to implement the provisions of the FCC's TRO.

On February 20, 2004, Verizon filed its Petition for Arbitration of Amendment to Interconnection Agreements with Certain CLECs and Commercial Mobile Radio Service Providers (CMRS) in Florida. In that Petition, Verizon noted that it would be filing an update to its Petition when the Court ruled on the appeal pending in the United States Court of Appeals for the District of Columbia. The Court issued its ruling in United States Telecom Association v. Federal Communications Commission and United States of America, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) on March 2, 2004. On March 19, 2004, Verizon filed its Update to Petition for Arbitration. Seven motions to dismiss were filed in the proceeding by various carriers challenging the Petition for Arbitration and the Update to the Petition for Arbitration.

Of the approximately 110 companies identified by Verizon in its Certificate of Service, 18 filed a response of some type. Some, most notably MCI, appear ready to proceed with the arbitration. Others, however, object to the Petition on a variety of grounds. Among those

objecting, seven requested either dismissal or some similar alternative relief. Parties seeking dismissal include Sprint, Eagle/Myatel, Competitive Carrier Coalition, Z-Tel, Time Warner, and AT&T.

It should be noted that MCI filed a Response in Opposition to Sprint's Motions to Dismiss. In its response, MCI urges that other CLECs have no right to object to a Verizon/MCI arbitration. MCI asserts that it desires to conclude a contract amendment with Verizon and desires to have this Commission conduct this arbitration under Section 252 of the Act. MCI alleges that any procedural deficiencies can be cured quickly and that the pending appeals of the USTA II decision should not delay this proceeding. Accordingly, MCI urges that all Motions to Dismiss filed in this matter be denied. We also note that on June 8, 2004, Order No. PSC-04-0578-PCO-TP was issued, granting Verizon's Motion to Hold Proceeding in Abeyance Until June 15, 2004.

As discussed below, we grant Sprint's motions to dismiss on the grounds that Verizon's Petition and Update to Petition are facially deficient under Section 252(b)(2) of the Telecommunications Act of 1996. Dismissal on this basis makes it unnecessary at this time to rule on the other grounds for dismissal urged by the parties.

SPRINT'S MOTIONS TO DISMISS

I. Standard of Review

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. See also Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958)(consideration should be confined to the allegations in the petition and the motion). The moving party must specify the grounds for the motion to dismiss, and the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Florida courts have held that when a petition is dismissed without prejudice, the Order is deemed **non-final and thus, not subject to appeal.** A dismissal with prejudice or with the

suggestion to seek another forum for relief is a final decision. Hollingsworth v. Brown, 788 So. 2d 1078 (Fla. 1st DCA 2001); citing Benton v. Department of Corrections, 782 So. 2d 981, 26 Fla. L. Weekly D 1013 (Fla. 1st DCA 2001); Eagle v. Eagle, 632 So. 2d 122 (Fla. 1st DCA 1994); Carlton v. Wal-Mart Stores, Inc., 621 So. 2d 451 (Fla. 1st DCA 1993). If the Petitioner is unable or unwilling to correct the defect that serves as the basis for dismissal without prejudice, the courts have indicated that the proper course of action is to notify the court, or in this case the Commission, so that the dismissal can be made final and, thereafter, subject to appeal. Benton v. Department of Corrections, 782 So. 2d 981, 26 Fla. L. Weekly D 1013 (Fla. 1st DCA 2001); citing Ponton v. Gross 576 So. 2d 910, 912 (Fla. 1st DCA 1991).

II. Argument

A. Sprint's Position

Sprint notes that Verizon's Petition requests that this Commission initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and each of the CLECs in Florida with which Verizon has an agreement. Verizon purports to file its consolidated Petition under the authority of the TRO. Sprint alleges that, in filing its Petition, Verizon has failed in every respect to comport with the principles established in the TRO and under the Telecommunications Act of 1934, as amended (Act). Sprint states that it did not receive prior notice of Verizon's intent to file the Petition, and only determined its existence after this Petition and some 14 others were filed in various states. Regarding Verizon's statement in the Petition that of those carriers who did not sign the draft amendment "virtually none provided a timely response," Sprint states that it did provide a timely response, which Verizon chose to ignore.

Sprint requests that this Commission dismiss Verizon's Petition because it is procedurally deficient and premature. In addition, Sprint requests that we instruct Verizon to negotiate with Sprint in good faith toward a mutually acceptable amendment to the existing interconnection agreement.[1] Specifically, in its initial Motion to Dismiss, Sprint cites four reasons why Verizon's Petition should be dismissed. Subsequent to Verizon filing its Update to Petition for Arbitration, Sprint filed its Motion to Dismiss Verizon's Amended Petition for Arbitration. In that Motion Sprint additionally argues that: 1) the Act does not provide for amendments to arbitration petitions outside the stipulated arbitration window of the 135th to the 160th day after interconnection negotiations are commenced; 2) Verizon has failed to comply with the Act because the new language it is proposing in response to the DC Circuit Court decision vacating

[1] Sprint notes that in addressing a similar petition filed by Verizon in North Carolina, the North Carolina Utilities Commission recently held that the proceeding should be continued indefinitely because of its interrelationship to the North Carolina proceeding to implement the TRO. The North Carolina Commission also found that Verizon had failed to comply with its procedural rules for filing an arbitration. In addition, the Maryland Commission recently rejected a similar petition filed by Verizon, stating that the petition was premature because of the uncertain status of the TRO.

certain provisions of the TRO has never been presented to Sprint for negotiation; and 3) Verizon's obligations under the Merger Conditions support the dismissal of Verizon's Petition. Thus, Verizon's Amended Petition does nothing to correct the procedural deficiencies that are the basis for Sprint's initial Motion to Dismiss – instead, it compounds them. Only Sprint's challenge based on procedural deficiencies is addressed in this Order.

Aside from the refusal of Verizon to negotiate the amendment in good faith, the form of the Petition fails to comport to the express provisions of the Act, according to Sprint. Section 252 (b)(2) of the Act provides in pertinent part:

> (2) Duty of petitioner
>
> (A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning-
>
> (i) the unresolved issues;
>
> (ii) the position of each of the parties with respect to those issues; and
>
> (iii) any other issue discussed and resolved by the parties.
>
> (B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

Sprint urges that Verizon has failed to comply with each of these provisions of the Act, and therefore its Petition must be dismissed.

Sprint notes that Verizon has not stated in its Petition any of the issues discussed between Verizon and Sprint. Sprint states that it expressed agreement with Verizon over various provisions in the proposed draft, and tried to focus the discussion to a narrow list of issues, which was completely ignored by Verizon. Sprint argues that Verizon's Petition does not contain a discussion of the positions of the parties as required by §252 (b)(2), nor does it reflect any identification of issues that have been discussed between the parties, what Sprint's position is, or which issues remain unresolved. Therefore, Sprint argues, the form of the Petition does not meet the requirements under the Act.

Sprint further alleges that Verizon failed to properly serve the Petition on Sprint in Florida. While the service list indicates that service was made to the contact person indicated in the Sprint/Verizon interconnection agreement for the purposes of notices under the interconnection agreement, the document was not served on Sprint's designated representative in Florida as set forth on the Florida Commission's website.

B. Verizon's Response

According to Verizon, the argument that its Petition fails to comply with Section 252(b) is without merit. As an initial matter, Verizon maintains the requirements that apply to a petition for arbitration under §252(b)(2) do not apply to Verizon's Petition to amend existing agreements. To be sure, argues Verizon, the FCC has held that the "section 252(b) timetable" and negotiation process applies (TRO, 18 FCC Rcd at 17405-06, ¶ 703-704), but the FCC never held that a petition seeking resolution of disputes over amendments with respect to the TRO would have to comply with all of the formal requirements of a petition for arbitration of a brand new agreement.

Verizon urges that, even if the technical requirements of §252(b)(2) did apply, Verizon has complied with those requirements in light of the circumstances of this proceeding. Verizon has set forth in detail the issues presented by its draft amendment and has explained its position in detail. Indeed, Verizon argues that because it has received little in the way of response to its proposal, and because most of the responses that it has received did not represent serious efforts at negotiation and arrived very late in the process, Verizon was simply unable to set forth other parties' positions on the various issues. As this Commission is aware, argues Verizon, each of the parties - including Sprint - will have an opportunity in its response to Verizon's Petition to set forth its own position on each of the issues in its own words. Verizon urges that it has, nevertheless, complied with the clear purpose behind §252(b)(2), which is to set forth clearly the disputed issues that the Commission may be called upon to resolve.

Verizon argues that, in light of the unique circumstances present here, the drastic remedy of dismissal would be an inappropriate response to any technical defects in Verizon's Petition. The FCC has determined that "delay in the implementation of the new rules we adopt in [the TRO] will have an adverse impact on investment and sustainable competition in the telecommunications industry." (TRO, 18 FCC Rcd at 17405, ¶ 703). Verizon claims that its Petition fully frames the issues presented to the Commission for resolution and provides all parties clear notice of Verizon's position and a fully adequate basis to respond. The appropriate course, urges Verizon, is for the Commission to allow this proceeding to move forward with an eye towards achieving prompt and equitable results, not satisfying empty formalities.

III. Conclusion

Upon consideration of the foregoing, we grant Sprint's Motion to Dismiss on the grounds that Verizon's Petition and Updated Petition are facially deficient. As noted earlier, Section 252 (b)(2) of the Act provides in pertinent part:

(2) Duty of petitioner

> (A) A party that petitions a State commission under paragraph (1) shall at the same time as it submits the petition, provide the State commission all relevant documentation concerning-
>
> (i) the unresolved issues;
>
> (ii) the position of each of the parties with respect to those issues;
>
> . . .

In the present Petition, we are asked to divine such essential facts as: (1) who the parties to this arbitration are; (2) what the specific issues are; (3) which of the unknown parties agree or disagree with which of the positions of the Petitioner; (4) what each of the unknown party's response might be to each of the unknown issues; (5) whether the unidentified agreements contain a change of law provision; and (6) whether the unidentified agreements contain an alternative dispute resolution provision. As such, Verizon's Petition and Updated Petition do not even marginally comport with Section 252(b)(2). Furthermore, the required information is not of the type that can be easily obtained by this Commission on its own.

Accordingly, we find that Verizon has failed to state a cause of action upon which relief can be granted by failing to comply with Section 252 (b)(2) at a sufficient level to sustain the action requested in its Petition. This Commission would be severely impaired in its ability to perform its responsibilities without the information required by the above cited statute. We acknowledge, nevertheless, that those CLECs that have failed to respond to Verizon have contributed greatly to the lack of information available and have likely increased the burden on Verizon to meet the requirements of Section 252(b)(2).

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sprint Communications Company Limited Partnership's Motions to Dismiss are hereby granted, without prejudice. It is further

ORDERED that Verizon Florida, Inc. is granted leave to refile a corrected Petition within 60 days of the Commission's vote on this matter. In addition, if Verizon elects to refile, it is directed to include in its petition, at a minimum, the information identified in the body of this Order. It is further

ORDERED that responses to Verizon Florida, Inc.'s corrected Petition shall be due within 20 days of Verizon's filing its Petition. It is further

ORDERED that if Verizon Florida, Inc. elects not to refile within the allotted time frame, and the time frame is not otherwise extended by this Commission, this Order shall thereafter be deemed final for purposes of appeal. It is further

ORDERED that all other pending motions in this docket need not be addressed at this time and are, therefore, rendered moot. It is further

ORDERED that this docket shall remain open for 60 days to allow the Petitioner an opportunity to file a Petition consistent with the guidelines set forth herein. In the event Petitioner does not file a new Petition within 60 days, this Docket shall then be administratively closed.

By ORDER of the Florida Public Service Commission this 12th day of July, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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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.