

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint to enforce interconnection
agreement with NuVox Communications, Inc.
by BellSouth Telecommunications, Inc.

DOCKET NO. 040527-TP
ORDER NO. PSC-04-0998-FOF-TP
ISSUED: October 12, 2004

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION TO DISMISS AND PLACING DOCKET IN ABEYANCE

BY THE COMMISSION:

Case Background

On June 4, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint to enforce its interconnection agreement with NuVox Communications, Inc. (NuVox). BellSouth asks that the Commission take the appropriate action to enforce the audit provisions in Section 10.5.4 of the agreement with NuVox and order appropriate relief for NuVox's breach of the agreement. On June 24, 2004, NuVox filed a Motion to Dismiss BellSouth's complaint. On July 1, 2004, BellSouth filed its Response to NuVox's Motion to Dismiss.

Motion to Dismiss

I. Standard of Review

In reviewing a motion to dismiss, this Commission takes all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

DOCUMENT NUMBER-DATE
10993 OCT 12 3
FPSC-COMMISSION CLERK

Furthermore, a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

II. Analysis and Conclusion

The crux of NuVox's Motion to Dismiss is based upon the doctrines of collateral estoppel and res judicata. NuVox argues that the parties have litigated identical claims and issues before the Georgia Public Service Commission (GPSC). NuVox argues that the GPSC has evaluated these same claims and issues under the identical relevant provisions of the parties' agreement. NuVox concludes from this that the doctrines of collateral estoppel and res judicata should bar BellSouth from bringing this claim before this Commission.

We reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission. Thus, NuVox's sole reliance on the doctrines of Collateral Estoppel and Res Judicata fails to demonstrate that BellSouth's Complaint does not state a cause of action upon which relief can be granted. Based on the foregoing, we find it appropriate to deny granting NuVox's Motion to Dismiss.

However, while the Georgia Commission's decision is not binding on this Commission, this matter has undergone substantial litigation. In an effort to avoid a potentially unnecessary burden upon the resources of this Commission and for purposes of administrative efficiency, this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues. If such discussions are unsuccessful, this matter shall be set for hearing.

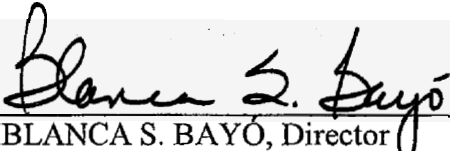
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that NuVox's Motion to Dismiss shall be denied. It is further

ORDERED that this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues.

ORDER NO. PSC-04-0998-FOF-TP
DOCKET NO. 040527-TP
PAGE 3

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



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

(SEAL)

JPR

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.