

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Sprint PCS for arbitration of rates, terms and conditions of interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast.

DOCKET NO. 070249-TP
ORDER NO. PSC-07-0834-PCO-TP
ISSUED: October 16, 2007

ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED PETITION

I. Case Background

On April 6, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint) filed a Petition for Arbitration (Petition) of a single issue in its Interconnection Agreement (ICA) with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act). Section 252 (b)(1) of the Act sets forth the procedures for petitioning a state commission to arbitrate "any open issues." Section 251 provides the framework for negotiation or arbitration of ICAs.

In its Petition, Sprint stated that the single issue, a three-year extension of its ICA, involves the voluntary Merger Commitments filed with the Federal Communications Commission (FCC) that were incorporated into the FCC's approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control. The merger closed on December 29, 2006. On March 26, 2007, the FCC released its Order, FCC 06-189, authorizing the merger.

On May 1, 2007, AT&T filed a Motion To Dismiss and Answer (Motion to Dismiss). In its Motion to Dismiss, AT&T argued that the matter in dispute between it and Sprint was not one that arose as an issue subject to arbitration under Section 252 and that the FCC has sole jurisdiction over the Merger Commitments.

By Order No. PSC-07-0680-FOF-TP, issued August 21, 2007, the Commission granted AT&T's Motion to Dismiss holding that the Commission does not have jurisdiction to enforce Sprint's putative right to a certain extension under the Merger Commitments through arbitration as though it were an "open issue" within the meaning of Section 252(b) of the Telecommunications Act.

On August 9, 2007, Sprint filed its Request for Leave to File Amended Petition (Request) and Motion for Oral Argument. On August 16, 2007, AT&T filed its Opposition to Sprint's Request.

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II. Parties Arguments

Sprint's Request

In its Request, Sprint asserts that it seeks leave to file an Amended Petition in order to revise the statement of issue for which it seeks arbitration. Sprint contends that its Amended Petition states with clarity that the issue for which it seeks arbitration is the determinative "open issue arising out of negotiations within the frameworks of Sections 251 and 252."

In support of its Request, Sprint cites Rule 28-106.202, Florida Administrative Code, which provides "the petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer." In further support of its Request, Sprint asserts that this Commission has a longstanding policy to allow free amendment of petitions, holding that "[t]he law is clear that leave to amend pleadings should be freely granted in order to allow disputes to be resolved on their merits." Order No. PSC-05-0283-PCO-EI;¹ *see also* Order No. PSC-02-1291-PCO-TP,² Order No. PSC-03-1305-PCO-TP,³ and Order No. PSC-03-0516-PCO-WS.⁴

Additionally, Sprint asserts that granting its Request will not prejudice AT&T's case. Sprint contends that AT&T has not propounded discovery to Sprint or filed testimony, and - as set forth in Sprint's Amended Petition - has been aware of the relief sought by Sprint for some time, having negotiated this very issue during the parties' interconnection negotiations.

AT&T's Response in Opposition

In its Response, AT&T argues that the issue Sprint raises in its Amended Petition is substantively identical to the issue the Commission unanimously dismissed on July 31, 2007. AT&T contends further that the issue in the Amended Petition still erroneously attempts to arbitrate the same FCC merger commitment that AT&T Florida argued, and the Commission agreed, cannot be an open issue under Section 251.

¹ Docket No. 041291-EI, *In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.*

² Docket No. 020738-TP, *In re: Petition of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Switched Access Contract Tariff No. FL2002-02 filed by BellSouth Telecommunications, Inc.*

³ Docket No. 030746-TP, *In Re: Complaint of Cargill Crop Nutrition, Inc, f/k/a Cargill Fertilizer, a subsidiary of Cargill Corporation, against Verizon Florida Inc. for enforcement of FCC Orders and Florida Public Service Commission decisions eliminating application of tariff changes for complex inside wiring, and request for relief.*

⁴ Docket No. 990374-WS, *In re: Application for staff-assisted rate case in Highlands County by the Woodlands of Lake Placid, L.P., and for deletion of portion of wastewater territory in Certificate No. 361-S held by Highlands Utilities Corporation.*

AT&T Florida concedes that Section 120.569(2)(c), Florida Statutes, provides for the right to amend, "unless it conclusively appears from the face of the petition that the defect cannot be cured." However, AT&T argues that it is clear, based on the face of Sprint's Amended Petition, that Sprint cannot cure the defect. AT&T argues this is because, as previously determined by the Commission, the purported enforcement of a merger condition contained in an FCC Order is not an "open issue" to be arbitrated under Section 251.

III. Decision

Pursuant to Section 120.569(2), Florida Statutes, "[d]ismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." Furthermore, it is a general principle that an amendment should be allowed until the privilege to do so has been abused or the opposing party is prejudiced. See Fouts v. Margules, 98 So. 2d 394 (3d D.C.A. 1957).


Consistent with the Commission's prior practice and upon consideration of the parties' arguments, I find it reasonable and appropriate to grant Sprint's Request for Leave to File Amended Petition. Pursuant to Section 120.569(2) Florida Statutes, Sprint is permitted to at least once file a timely amended petition. Furthermore, I do not find, nor does AT&T allege, that allowing Sprint to amend its Petition will prejudice AT&T.

In light of my decision to grant Sprint's Request, I hereby find that Sprint's Motion for Oral Argument is rendered moot.

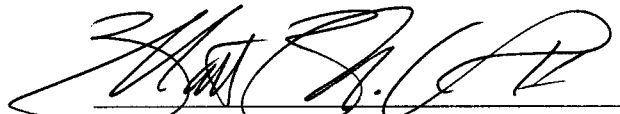
Based upon the foregoing, it is

ORDERED by Commissioner Matthew M. Carter II, as Prehearing Officer, that, Sprint's Request for Leave to File Amended Petition is granted. It is further

ORDERED that Sprint's Motion for Oral Argument is rendered moot.



By ORDER of Commissioner Matthew M. Carter II, as Prehearing Officer, this 16th day of October, 2007.


MATTHEW M. CARTER II
Commissioner and Prehearing Officer

(S E A L)

AJT

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.