

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Arbitration ) DOCKET NO. 961346-TP  
of Dispute with BellSouth ) ORDER NO. PSC-97-0072-FOF-TP  
Telecommunications, Inc., ) ISSUED: January 23, 1997  
Regarding Call Forwarding, by )  
Telenet of South Florida, Inc. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

JOE GARCIA  
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding services. BellSouth has declined to continue selling call forwarding to Telenet, alleging that Telenet uses the service in violation of section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff. Telenet alleges that the tariff provision is an anticompetitive restriction and that it has not been able to reach a resale agreement with BellSouth. Although Section 364.161(1), Florida Statutes, requires that the Commission arbitrate the dispute within 120 days, the parties stated that they did not object in this case to our rendering our decision by April 1, 1997.

BellSouth at first advised Telenet that it would terminate all call forwarding services to Telenet on November 21, 1996. Later, this date was extended to December 5, 1996, in order to provide the parties with time to work out conditions by which the status quo could be preserved until our decision.

At the same time it filed its petition for arbitration with this Commission, Telenet filed a petition for a temporary injunction in the Seventeenth Judicial Circuit, Broward County. However, Telenet later requested that its petition for temporary injunction be stayed, in light of an agreement it reached with BellSouth by which Telenet would be permitted to continue to

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provide call forwarding services to existing, but not new, customers for the duration of this proceeding.

On December 5, 1996, BellSouth filed its answer and response to Telenet's petition and a motion to dismiss. Telenet filed its opposition to BellSouth's motion to dismiss on December 17, 1996. We deny BellSouth's motion to dismiss.

In its motion to dismiss, BellSouth asserted that Telenet's petition does not set forth a proper basis for arbitration under Section 364.161, Florida Statutes. BellSouth alleged that there is no dispute concerning "the terms, conditions, and prices of any feasible unbundling request," required by the statute as a condition precedent to a petition for arbitration. Rather, BellSouth alleged, Telenet merely wishes to purchase tariffed call forwarding services and to resell those services in a manner that contravenes a tariff restriction.

BellSouth's General Subscriber Service Tariff A13.9.1.A.1 defines call forwarding as "an arrangement for transferring incoming calls to another local service telephone number by dialing a code and the number of the service to which calls are to be transferred." The tariff provides that:

Call Forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment in whole or in part of message toll charges that would be regularly applicable between the station originating the call and the station to which the call is transferred.

BellSouth has concluded that Telenet's use of call forwarding contravenes this provision, and, as a result, declines to continue selling the service to Telenet.

BellSouth believes that an arbitration is not appropriate in this case, but that if Telenet wishes to challenge BellSouth's application of this tariff provision, it should proceed pursuant to Rule 25-22.032, Florida Administrative Code, (complaint process) or Rule 25-22.036, Florida Administrative Code (formal administrative hearing). BellSouth recognizes Telenet's right to challenge the tariff provision as applied and stated that it would have no objection to our treating Telenet's petition as though it were a properly filed complaint.

Telenet asserted that its petition sets forth a proper case for arbitration under Section 364.161(1), Florida Statutes. Telenet pointed out that in Section 3(29) of the Telecommunications Act of 1996, 47 U.S.C. §151 et seq., "network element" is defined as "a facility or equipment used in the provision of telecommunications service," including "features, functions, and capabilities that are provided by means of such facility or equipment." Telenet noted that, in its First Report and Order, FCC 96-325, issued August 8, 1996, the FCC, at paragraph 262, interprets the definition of "network element" to include "facilities or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Thus, Telenet argued, software and elements sold directly to end users as retail services, such as call forwarding, are "network elements."

Telenet further argued that the provision in Section 364.161, Florida Statutes, requiring local exchange telecommunications companies to unbundle all of their network features, functions and capabilities, including access to signaling databases, systems and routing processes, contemplates multi-path call forwarding. Moreover, Telenet stated that Section 364.161(2), Florida Statutes, provides that "no local telecommunications company may impose any restrictions on the resale of its services or facilities except those which the Commission may determine are reasonable." Telenet concluded, therefore, that BellSouth's denial of a tariffed service, i.e., an unbundled network element, based on the application of a tariff restriction, is a proper matter to be arbitrated under Section 364.161(1) Florida Statutes.

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which we may grant the relief requested. We must take all allegations in the petition as though true, and consider them in the light most favorable to the petitioner. 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). Applying this standard, we find that Telenet's petition is a proper request for arbitration under Section 364.161(1), Florida Statutes.

Section 364.161(1), Florida Statutes, provides that:

Upon request, each local exchange telecommunications company shall unbundle all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes, and offer them to any other telecommunications provider requesting such features. The parties shall negotiate the terms, conditions, and prices of any feasible unbundling request. If the parties cannot reach a satisfactory resolution within 60 days, either party may petition the commission to arbitrate the dispute and the commission shall make a determination within 120 days.

In its petition, Telenet alleged that BellSouth first offered to sell Telenet call forwarding lines in November 1995, and that Telenet began negotiations with BellSouth in June 1996. Telenet alleged that negotiations continued through the months of July and August. On September 19, 1996, BellSouth advised Telenet that it would not authorize any new service until Telenet initiated a request for a resale agreement. On October 15, 1996, BellSouth notified Telenet that it would remove call forwarding features from Telenet's lines on November 21, 1996, absent proof that Telenet was not using the service in violation of Section A13.9.1.A.1.

It appears in Telenet's petition for arbitration that Telenet requested that BellSouth unbundle multi-path call forwarding and that Telenet and BellSouth engaged in negotiations for at least 60 days. Further, it appears that Telenet had sufficient reason to conclude that continued negotiations would not be successful. One could conclude that Telenet's argument that call forwarding is a network element that BellSouth is obligated to unbundle pursuant to Section 364.161(1), Florida Statutes, is reasonable. Moreover, whether the application of Section A13.9.1.A.1 to Telenet's use of call forwarding is a reasonable restriction under Section 364.161(2), Florida Statutes, is appropriate for us to determine. Therefore, we find that Telenet has stated a proper claim for arbitration under the provisions of Section 364.161, Florida Statutes.

Telenet is a start-up alternative local exchange carrier, certificated by Order No. PSC-96-0538-FOF-TX, issued on April 17, 1996. It elected to request arbitration in order to obtain a resolution of its dispute with BellSouth in the shortest possible period of time. We acknowledge BellSouth's observation that

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Telenet could proceed in other ways to obtain our ruling on the applicability of the tariff provision in question. However, we understand that Telenet declined to proceed under Rule 25-22.032, Florida Administrative Code, which controls the Commission's complaint process, because it believes that there is little likelihood of an informal resolution at this stage, and because it fears that we might be unable to rule on a complaint at an earlier date and that, moreover, our ruling would be protested. We also understand that, likewise, Telenet declined to proceed under Rule 25-22.036, Florida Administrative Code, which controls the initiation of formal administrative proceedings before the Commission, because it recognizes that, while the proceeding would not be unlike an arbitration, it would not be constrained by a statutory period in Telenet's favor. Telenet's choice of arbitration in this proceeding was appropriate.

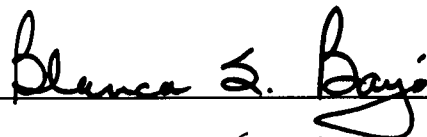
We find that Telenet's petition for arbitration appropriately states a cause of action for which relief may be sought from this Commission. Accordingly, BellSouth's motion to dismiss Telenet's petition for arbitration is denied.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s motion to dismiss Telenet of South Florida, Inc.'s petition for arbitration is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 23rd day of January, 1997.



BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

CJP

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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 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, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Director, Division of Records and Reporting, 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.

MEMORANDUM

January 27, 1997

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FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *CF MCB*

RE: DOCKET NO. 961346-TP - IN RE: PETITION FOR ARBITRATION OF DISPUTE WITH BELLSOUTH TELECOMMUNICATIONS, INC., REGARDING CALL FORWARDING, BY TELENET OF SOUTH FLORIDA, INC.

0072-FOF

Attached is an ORDER DENYING MOTION TO DISMISS, to be issued in the above-referenced docket. (Number of pages in Order - 6)

CJP/clp  
Attachment  
cc: Division of Communications (Sirianni)  
I:\ 96134601.cjp

*Parent - 3/2 KTR  
initial -*

MEMORANDUM

January 27, 1997

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FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PELLEGRINI) *CP MCB*

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0072-FDF

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cc: Division of Communications (Sirianni)  
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*forward - 3/2 RAA  
initial - @ RAA*