

State of Florida



Public Service Commission

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RECEIVED-FPSC

DATE: August 26, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Rojas, Susac) *GR*
Division of Competitive Markets & Enforcement (Bulecza-Banks, Casey, Cater) *BC*

RE: Docket No. 040527-TP – Complaint to enforce interconnection agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc. *CR*

AGENDA: 09/07/04 – Decision Prior to Hearing – Motion to Dismiss – Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:/PSC/GCL/WP/040527.RCM.DOC

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.

DOCUMENT NUMBER-DATE

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Discussion of Issues

Issue 1: Should the Commission grant NuVox's Motion to Dismiss BellSouth's Complaint?

Recommendation: No. Staff recommends that NuVox's Motion to Dismiss be denied. (ROJAS)

Staff Analysis:

I. Standard of Review

In reviewing a motion to dismiss, the Commission should take 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).

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, the 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 Arguments

A. NuVox's Motion to Dismiss

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 the Florida Public Service Commission (FPSC).

B. BellSouth's Response to the Motion to Dismiss

BellSouth asserts that NuVox, in its Motion to Dismiss, has failed to establish that BellSouth's Complaint does not state a cause of action for which it may obtain relief. BellSouth contends that NuVox's statement that the parties have litigated the identical claims and issues before the GPSC and that the GPSC has already evaluated these same claims and issues under the identical relevant portions of the agreement, is wholly without merit because this Commission has consistently retained the authority to arrive at independent findings regardless of the similarity of the claims or issues placed before it.

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Furthermore, BellSouth notes that a ruling by the GPSC on any of the issues also present in the current Complaint would have no binding effect on the FPSC or any proceedings before it. BellSouth cites several FPSC orders supporting this position.¹ BellSouth concludes that this Commission should once again reject the contention that the decisions rendered by another state's administrative agencies are binding upon this Commission.

III. Staff's Analysis and Conclusion

BellSouth accurately points out this Commission's precedent in the above cited orders is to patently reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission. In light of this extensive Commission precedent, 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, staff recommends that NuVox's Motion to Dismiss be denied.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 1, this Docket should be held in abeyance for a period of 30 days from the issuance of the order resulting from this recommendation and the parties should be directed to enter staff-assisted discussions to attempt to resolve outstanding issues. If at the conclusion of the 30 day period, such discussions are unsuccessful, this matter should be set for hearing. **(ROJAS)**

STAFF ANALYSIS: 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 should be held in abeyance for a period of 30 days and the parties should be directed to enter staff-assisted discussions to attempt to resolve outstanding issues. If such discussions are unsuccessful, this matter should be set for hearing.

¹ See Docket No. 991946-TP, PSC-00-1540-FOF-TP; Docket No. 020919-TP, PSC-03-0525-FOF-TP
Docket No. 001097-TP, PSC-02-0484-FOF-TP; Docket No. 020960, PSC-04-0106-FOF-TP