BEFORE THE PUBLIC SERVICE COMMISSION

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| In re: Petition by Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. for adoption of existing interconnection agreement between ALLTEL Florida, Inc. and Level 3 Communications, LLC. | DOCKET NO. 040343-TP<br>ORDER NO. PSC-04-1109-PCO-TP<br>ISSUED: November 8, 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 HOLDING PROCEEDINGS IN ABEYANCE

BY THE COMMISSION:

On April 19, 2004, Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. (Volo) filed a Petition to Adopt (Petition) the ALLTEL Florida, Inc. (ALLTEL) and Level 3 Communications, LLC (Level 3) Interconnection Agreement, which was effective through June 30, 2004. In its Petition, Volo requests that this Commission acknowledge Volo's immediate adoption of the ALLTEL and Level 3 Interconnection Agreement (Agreement), in its entirety, pursuant to §252(i) of the Telecommunications Act of 1996.

On May 7, 2004, ALLTEL filed its Motion to Dismiss (Motion) the Petition on the basis that it fails to state a cause of action and was not filed within a reasonable time as set forth in 47 C.F.R. §51.809(c).[1] Alternatively, ALLTEL requests that if this Commission decides not to grant the Motion, that this Commission set this matter for a hearing under §120.57(1), Florida Statutes.

On May 19, 2004, Volo filed its Response to ALLTEL's Motion in which it contends that the reasonable time argument as set forth by ALLTEL is not a valid basis for the Motion or to prevent Volo's adoption of the Agreement. Volo asserts that under the language of §252(i), a Competitive Local Exchange Carrier's (CLEC) ability to adopt an existing agreement with the exact same terms and conditions is absolute and unambiguous. Furthermore, Volo contends that the reasonable time standard proposed by ALLTEL is futile, absent any standards set forth by either the Federal Communications Commission (FCC) or this Commission. Additionally, Volo

[1] It is important to note that, up until now, this issue has not been contested before this Commission.

amends its earlier pleading to change it from a "Petition to Adopt" to a "Notice of Adoption" (Notice).

On June 30, 2004, ALLTEL filed a Notice of Supplemental Authority attached to which was an Order Denying Notice issued by the Georgia Public Service Commission (GPSC). The Order had not been issued as of the filing of ALLTEL's Motion or Volo's Response. Therein, the GPSC sets forth a standard whereby "a request to adopt an interconnection agreement with six months or more remaining in the term of the agreement constitutes a reasonable period of time under 47 C.F.R. 51.809(c)."

Standard of Review

In reviewing a motion to dismiss, this Commission shall 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, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, this Commission shall 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).

Volo's Notice of Adoption

In its Notice, Volo seeks to completely and fully adopt the rates, terms, and conditions of the Agreement, which was filed and approved in Docket No. 020517-TP. Volo acknowledges that the Agreement was set to terminate on June 30, 2004 pursuant to §4.1 of the Agreement. However, Volo asserts that §4.2 of the Agreement provides that the Agreement shall remain effective while ALLTEL and Level 3 are negotiating a successor interconnection agreement. Therefore, Volo contends that the underlying Agreement, and its adoption by Volo, would likely remain in effect beyond the June 30, 2004 termination date.

Volo further asserts that given its present business needs it is imperative that it proceed with an immediate adoption of an existing interconnection agreement. Pursuant to §252(i) of the Telecommunications Act of 1996, Volo requests an immediate acknowledgement of its adoption of the Agreement.

ALLTEL's Motion to Dismiss

ALLTEL's Motion asserts that Volo's Notice affects its substantial interests, because it seeks to require performance of an agreement set to expire within a short period of time, *i.e.*

seventy-two days after the adoption date. ALLTEL contends that Volo's Notice fails to state a cause of action as a matter of law and has not been filed within a reasonable period of time as required. ALLTEL asserts that 47 C.F.R. §51.809(c) requires an interconnection agreement be made available for adoption if the request is made within a reasonable period of time. ALLTEL claims that there is no guarantee that the Agreement will continue to be in effect past the termination date.[2]

47 C.F.R. §51.809(a) and (c) provide in part the following:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(h) of the Act.

ALLTEL cites to two cases, *In re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (Aug. 5, 1999) and *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999), both of which were attached to its Motion. Each case involves a CLEC's request to adopt an interconnection agreement within approximately seven months and ten months, respectively, of each agreement's termination date. In each case the respective state commissions held that given the limited amount of time remaining in the interconnection agreements, allowing the CLECs to opt-in would be unreasonable.

ALLTEL asserts that the Agreement will terminate before this Commission could approve Volo's Notice. ALLTEL requests that Volo's Notice be dismissed on the basis that it was not filed within a reasonable amount of time as required by 47 C.F.R. §51.809(c) and that this Commission enter an order dismissing the Notice for failure to state a cause of action. In the alternative, ALLTEL requests that, in the event its Motion cannot be granted, this matter be set for a hearing under §120.57(1), Florida Statutes.

Volo's Response

In Volo's Response, it asserts that ALLTEL's sole basis for objecting to the Notice is not valid to support a Motion to Dismiss or any objection pursuant to §252(i) of the Telecommunications Act of 1996. Volo contends that there is no statutory basis to prevent it from adopting the existing Agreement. Volo further contends that 47 C.F.R. §51.809(c), upon which ALLTEL bases its Motion to Dismiss, does not limit its ability to fully and completely

[2] ALLTEL and Level 3 are currently negotiating a successor interconnection agreement. As such, the Agreement is presently in effect.

adopt the Agreement, because what constitutes a reasonable period of time has not been definitively ruled on by either the FCC or this Commission.

Furthermore, Volo asserts that ALLTEL bases its Motion on the erroneous assumption that there is a substantive review and approval process inherent in a §252(i) adoption. Volo contends that an interconnection agreement arrived at through negotiation or arbitration has a specific statutory review process under §252(c). Volo further contends that the only review process under §252(i) is to "ensure that the requested interconnection agreement is lawfully approved and effective and that the CLEC is adopting the agreement" without modifications. Volo contends that, under 47 C.F.R. §51.809(b), an ILEC's only possible objection to a §252(i) adoption is that it would not be cost effective or technically feasible. Volo points out that ALLTEL has asserted neither objection.

Volo distinguishes the two cases which ALLTEL cites to in its Motion. Volo contends that these two cases are distinguishable from Volo's attempts to adopt, because Global NAPs petitioned each state commission for arbitration to adopt existing interconnection agreements under changed terms and conditions. Unlike the situation in the Global NAPs cases, Volo asserts that it is complying with the same terms and conditions requirement of §252(i).

Volo further contends that if there is a reasonable time period standard in this jurisdiction, then ALLTEL has still acted in a discriminatory manner when it has permitted other CLECs to adopt the Agreement with less than six months remaining in the Agreement. Volo points to a specific instance where, on February 17, 2004, Sprint filed a notice of adoption for the same Agreement in dispute here, and ALLTEL signed a letter accepting such adoption. See FPSC Docket No. 040155-TP.

Finally, Volo requests that ALLTEL's alternative request for a §120.57(1) hearing be denied, because ALLTEL has not specified any disputed issues of material fact or complied with the pleading requirements under Rule 28-106.201, Florida Administrative Code, for such a hearing.

Analysis

Upon consideration, we find that Volo's Notice of Adoption does state a cause of action upon which relief may be granted. However, ALLTEL raises a valid argument as to what constitutes a reasonable period of time under 47 C.F.R. §51.809(c), which we find may involve legal and policy arguments that could implicate a dispute of material fact.

Although the FCC has adopted a regulation implementing §252(i) of the Act that requires an ILEC to make an interconnection agreement available for a reasonable period of time, there seems to be no definitive standard set forth by the FCC as to what constitutes a reasonable time. Whether such a limitation would apply to Volo's adoption of the Agreement would depend on this Commission's further analysis and interpretation of 47 C.F.R. §51.809(c) in this proceeding. Thus, ALLTEL's Motion fails because Volo's Notice, on its face, states a cause of action upon which relief could be granted; however, we find that ALLTEL's request for a hearing shall be

granted. Whether a §120.57(1) or (2) hearing is appropriate requires further consideration, and shall be addressed through the issue identification process.

Decision

Based on the foregoing, we deny ALLTEL's Motion to Dismiss. Volo has stated a cause of action upon which relief may be granted under §252(i) of the Telecommunications Act of 1996. Because the parties are, however, currently negotiating a new agreement, proceedings in this matter shall be held in abeyance for a period of 60 days. Thereafter, if negotiations are not successful, this matter shall be set for hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that ALLTEL Florida, Inc.'s Motion to Dismiss is denied. It is further

ORDERED that proceedings in this matter shall be held in abeyance for a period of 60 days. It is further

ORDERED that, if negotiations are not successful, this matter shall be set for a hearing. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 8th day of November, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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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.

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 Director, Division of the Commission Clerk and Administrative Services, 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.