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State of Florida



Public Service Commission

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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: December 21, 2004

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

FROM: Office of the General Counsel (Cibula) *smc. DS*
Division of Competitive Markets & Enforcement (King) *all- [signature]*

RE: Docket No. 041211-TP – Petition for declaratory statement by Smart City Telecommunications LLC d/b/a Smart City Telecom to determine application of term "subscriber" or "customer" as contemplated by Rule 25-4.003(50), F.A.C.

AGENDA: 01/04/05 – Regular Agenda – Decision on Declaratory Statement – Parties May Participate at Commission's Discretion

CRITICAL DATES: 01/16/05 (By Statute, Order Must Be Issued By This Date)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041211.RCM.DOC

Case Background

Pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, Smart City Telecommunications LLC d/b/a Smart City Telecom (Smart City or company) filed a petition for declaratory statement on October 18, 2004. By its petition, Smart City seeks a determination from the Commission of the application of the term "subscriber" or "customer" set forth in Rule 25-4.003(50), Florida Administrative Code, as applied to the company's tariff provisions governing the transfer of service between subscribers. On November 1, 2004, Smart City filed a letter with the Commission to further supplement and clarify the statement of facts set forth in its petition.

Pursuant to section 120.565, an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The Commission, thus, must issue an order on Smart City's petition for declaratory statement or deny the petition by January 16, 2005. The Commission has jurisdiction pursuant to section 120.565, Florida Statutes.

DOCUMENT NUMBER-DATE

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Discussion of Issues

Issue 1: Should the Commission grant Smart City's Petition for Declaratory Statement and provide a determination as to whether Mr. Keith Kropp or Main Street Realtors was the original subscriber or customer of the Smart City account at issue pursuant to Rule 25-4.003(50), Florida Administrative Code?

Recommendation: Yes, the Commission should grant Smart City's petition and declare that, based on the facts as set forth in Smart City's petition, Main Street Realtors was the original subscriber or customer of the Smart City account. (Cibula, King)

Staff Analysis: As stated in the case background, Smart City filed a Petition for Declaratory Statement on October 18, 2004, and a letter supplementing and clarifying the facts set forth in the petition on November 1, 2004. Pursuant to Rule 28-105.003, Florida Administrative Code, an agency may rely on the statement of facts contained in the petition for declaratory statement without taking a position on the validity of the facts when making a determination on the petition.

Summary of Facts As Set Forth in Smart City's Petition for Declaratory Statement

Smart City is a small local exchange company, as defined by section 364.052(1), Florida Statutes. Main Street Realtors has been a business customer of the company since July 2001. Main Street Realtors is the name that appears on the monthly bills from Smart City.

Keith Kropp set up the account with Smart City, and he has always been the designated person of record. The Smart City monthly bills were paid by way of checks bearing the name of Keith Kropp and signed by Mr. Kropp.

On or about July 30, 2004, Smart City received a call from a Sarah Carlson, who stated that she was calling on behalf of Main Street Realtors and requested that the telephone and facsimile numbers assigned to the Main Street Realtors account be remote call forwarded to other numbers. Smart City completed this request on August 2, 2004.

On August 2, 2004, Smart City received a call from a Peggy Leman, who requested that the remote call forward request be removed and the name on the account be changed from Main Street Realtors to FrontGate Realty. Ms. Leman indicated that while the name of the office had changed, the location and telephone numbers assigned to the account remained the same. The Smart City service representative confirmed that Ms. Leman worked with Mr. Kropp, who, as mentioned above, was the person of record on the account. The remote call forward request was then removed, and the name on the account was changed from Main Street Realtors to FrontGate Realty. On that same day, Ms. Leman again called Smart City, requesting that the voice mail password associated with the account, now under the name of FrontGate Realty, be reset.

Later on the same day, Ms. Carlson called Smart City. Ms. Carlson stated that she was not receiving calls at the remote call forward number as requested on July 30, 2004. The Smart City representative informed Ms. Carlson that because Mr. Kropp was the person of record on

the account, Smart City would only process service requests directly from him or his representative.

At 5:00 p.m. on that same day, a Mr. Jason Black contacted Smart City. He identified himself as the Vice President and Corporate Counsel for Main Street Realtors. He stated that Main Street Realtors owned the telephone number associated with the Smart City account and that the company was losing business because Smart City had removed the remote call forward on its telephone and fax lines. Mr. Black requested that the remote call forward be reinstated. The Smart City representative agreed to complete the request. However, upon further review of the account, Smart City informed Mr. Black that its records indicated that Mr. Kropp was the customer of record, and therefore, the requested changes could not be made.

Mr. Black indicated that Mr. Kropp recently resigned and no longer had authority over the account with Smart City. He stated that there was pending litigation between Main Street Realtors and Mr. Kropp concerning the business relationship. Smart City declined to make any further changes to the account.

Exhibit 6 to Smart City's petition is a partnership agreement between Judy Black, Keith Kropp and Kit Zayas, wherein it is stated that the partnership will operate under the name of Main Street Realtors or Celebration Real Estate Services, Inc. The partnership agreement states that the office of the partnership shall be a branch office of Main Street Realtors.

The partnership agreement includes an indemnity clause which suggests that Mr. Kropp would be ultimately responsible for payment of the Smart City account if a dispute arose due to non-payment of the account. However, the letter submitted by Smart City on November 1, 2004, indicates that Mr. Kropp terminated the partnership agreement, and thus the indemnity clause, on May 24, 2004. Exhibit 7 to Smart City's petition shows that Mr. Kropp resigned from Main Street Realtors effective July 28, 2004.

Analysis and Recommendation

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Smart City states that it has tariffs on file with the Commission setting forth rates and charges for service and general rules and regulations governing the relationship between customers and Smart City. The company further states that these tariffs do not contain provisions that govern the specific set of circumstances outlined in this petition. The company

states that these tariffs do, however, address the procedure to follow when a transfer of service from one subscriber to another subscriber is requested. Smart City states that in order to apply its tariff, it is first necessary to identify who the original subscriber was for the purpose of this account. Thus, it requests that the Commission determine the limited issue of whether Mr. Keith Kropp or Main Street Realtors was the original subscriber or customer of the Smart City account.

Smart City asks the Commission to interpret Rule 25-4.003(50), Florida Administrative Code, as it applies to the facts set forth above. Rule 25-4.003(50) defines the term "subscriber" or "customer" and states that these terms may be used interchangeably in the Commission's telecommunications rules to refer to "any person, firm, partnership, corporation, municipality, cooperative organization, or governmental agency supplied with communication service by a telecommunications company."

Smart City's petition indicates that the business account was in the name of Main Street Realtors. Exhibit 1 to Smart City's petition shows that Main Street Realtors was the name that appeared on the bills from Smart City. Thus, although Mr. Kropp set up the account and was the person of record for the account, it appears from Smart City's petition that Mr. Kropp established the account for Main Street Realtors. The plain language of Rule 25-4.003(50) indicates that a subscriber or a customer can be an entity, such as a firm, corporation, or partnership, and does not necessarily have to be a person. Staff recommends that the Commission should grant Smart City's petition and declare that, based on the facts as set forth in Smart City's petition, Main Street Realtors was the original subscriber or customer of the Smart City account.

Docket No. 041211-TP
Date: December 21, 2004

Issue 2: Should this docket be closed

Recommendation: Yes. No further action is required; therefore, this docket should be closed.
(Cibula)

Staff Analysis: No further action is required; therefore, this docket should be closed.