

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Northeast Florida Telephone)
Company d/b/a NEFCOM against South-)
eastern Services, Inc. for failure to pay) Docket No. 060083-TP
intrastate access charges pursuant to)
Northeast Florida's tariffs and for violation) Filed: February 21, 2006
of Section 364.16(3)(a), Florida Statutes)

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO ABATE

COMES NOW Defendant, **Southeastern Services, Inc.** (hereinafter referred to as "SSI"), and files this Motion to Dismiss or, in the Alternative, to Abate. The Florida Public Service Commission (hereinafter referred to as "the Commission") lacks jurisdiction over the controversy and/or all of the parties and must dismiss the Complaint filed by Northeast Florida Telephone Company (hereinafter referred to as "NEFCOM."). If the Commission does not dismiss NEFCOM's Complaint, the Commission must abate the proceeding.

**THE ACTION IS BARRED IN WHOLE OR IN PART
DUE TO SERVICE BEING JURISDICTIONALLY
INTERSTATE AND LIMITATIONS IN FEDERAL LAW**

1. NEFCOM's Complaint addresses alleged wrongful acts that by NEFCOM's own admission in Paragraph 20 ended on or about July 25, 2003. NEFCOM's pleading makes it clear that NEFCOM was aware of the alleged acts before that time. NEFCOM's complaint was filed on January 30, 2005, more than two years after the last act that could have given rise to any liability on SSI's part.
2. 47 U.S.C. § 415 imposes a two year limit on actions seeking recovery of charges. It provides that "[a]ll actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after."

DOCUMENT NUMBER-DATE

01509 FEB 21 06

FPSC-COMMISSION CLERK

3. The VoIP service provided during the period involved in this proceeding is jurisdictionally interstate. The service is an enhanced and/or information service of “enhanced service” under 47 C.F.R. § 64.702(a) and an “information service” under 47 U.S.C. § 153(20). There is both a change in form and a change in content, and the conversion to IP from TDM provides the foundation for and is an essential prerequisite to the offering of enhanced functionalities. Enhanced and information services are jurisdictionally interstate services. Memorandum Opinion and Order, *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, FCC 04-27, WC Docket No. 03-45 (rel Feb. 2004).

4. Even if SSI’s VoIP service is not an enhanced and/or information service, it is still jurisdictionally interstate. Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling on Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267 (rel. Nov. 2004).

5. Regardless of the regulatory classification of SSI’s VoIP service, at least some of the traffic involved communications between points within Florida and points outside of Florida. NEFCOM acknowledges the distinct possibility there is some such traffic, but claims it can assume all the traffic is intrastate based on SSI’s failure to provide a jurisdictional factor. NEFCOM was on notice long before July of 2003 of SSI’s position regarding the jurisdiction of the service and that at least some of the traffic involved communications between points within Florida and points outside of Florida regardless of the regulatory classification.

6. All of NEFCOM's claims are barred by limitations in federal law. NEFCOM's Complaint must be dismissed. In the alternative, NEFCOM's relating to traffic involving communications between points within Florida and points outside of Florida must be dismissed.

**NEFCOM HAS FAILED TO COMPLY WITH THE PROVISIONS OF
RULE 28-106.21, FLORIDA ADMINISTRATIVE CODE**

7. NEFCOM has attempted to base its Complaint on Rule 28-106.21, Florida Administrative Code, but NEFCOM is has not complied with the requirements of Rule 28-106.21, Florida Administrative Code.

8. NEFCOM has failed to comply with Rule 28-106.201(b), Florida Administrative Code, in that complainant or petitioner did not state how its substantial interests will be affected by the agency determination.

9. NEFCOM has failed to comply with Rule 28-106.201(c), Florida Administrative Code, in that the Complaint does not state how the complainant or petitioner received notice of the agency decisions it claims apply.

10. NEFCOM has failed to comply with Rule 28-106.201(d), Florida Administrative Code, in that the Complaint does not present a statement of all disputed issues of material fact.

11. NEFCOM has failed to comply with Rule 28-106.201(e), Florida Administrative Code, in that the Complaint does not provide a concise statement of the ultimate facts alleged, including the specific facts warranting reversal or modification of any proposed action.

**THE FLORIDA PUBLIC SERVICE COMMISSION
HAS NO JURISDICTION OVER DEFENDANT**

12. The Commission lacks jurisdiction over the Defendant with regard to the claims and requests for relief asserted by Northeast Florida Telephone Company (“NEFCOM”). The Defendant is not, for purposes of the claims made by NEFCOM “a person subject to the Commission’s jurisdiction.” Therefore the Commission can not entertain this matter and must dismiss the case.

13. This Commission does not have jurisdiction over VoIP service, and does not have jurisdiction over entities that provide VoIP, to the extent they provide VoIP. *See*, Sections 364.01(3), 364.011(3), 364.013, 364.02(13) and (16), Florida Statutes. “SSI the VoIP provider” is not subject to this Commission’s jurisdiction.

14. Separate and apart from state law, the VoIP services provided by SSI are (1) jurisdictionally interstate and (2) not telecommunications service but instead enhanced and/or information services. Since SSI’s VoIP services are both jurisdictionally interstate and not “telecommunications service” this state commission is precluded by federal law from asserting regulatory jurisdiction over the services or the entity that provides them. “SSI the VoIP provider” is not subject to this Commission’s jurisdiction.

15. The complaint process does not contemplate that a private party or a telecommunications service provider can file a complaint against a person or entity that is not subject to the Commission’s regulatory jurisdiction. This is recognized in Rule 25-22.036(2), Florida Administrative Code.

16. SSI is a competitive local exchange company. SSI’s CLEC activities are subject to this Commission’s jurisdiction. SSI has a valid and subsisting Resale Agreement with NEFCOM. This contract is an agreement (“ICA”) under § 252 of the federal

Communications Act. But the complaint in this case does not and cannot confer jurisdiction because the activities complained of are not and can not be related to SSI's CLEC status. This is so for two reasons:

- a. While state commissions may at times have the power to adjudicate post-ICA disputes if state law allows them to do so, in this instance the Resale Agreement has an express Venue Selection Clause that binds both parties as to the venue in which any disputes arising under the Resale Agreement will be resolved and deprives this Commission of jurisdiction. The Venue Selection Clause in § 28.1 provides:

28.1 FORUM AND VENUE FOR LEGAL PROCEEDINGS

28.1 Forum and Venue for Legal Proceedings.

Any legal proceeding of any nature brought by either Party against the other to enforce any right or obligation under this Agreement, or arising out of any matter pertaining to this Agreement, shall be submitted exclusively for trial, before the Circuit Court for Baker County, Florida; or if such court shall not have jurisdiction, then before any other court or administrative body sitting in the State of Florida having subject matter jurisdiction. The Parties consent and submit to the exclusive jurisdiction of any such court and agree to accept service of process outside the State of Florida in any matter to be submitted to any such court pursuant hereto.

NEFCOM has contractually bound itself to jurisdiction before the courts and therefore cannot bring an action before this Commission arising under the Resale Agreement. It lacks the capacity to invoke this Commission's jurisdiction in this dispute.

As discussed further below, NEFCOM has exercised its right to bring a dispute arising under the Resale Agreement in the Baker County Circuit Court and is barred from bringing a second and redundant action before this

Commission when the dispute involves the same facts and circumstances. This Commission lacks jurisdiction over SSI in its capacity as a CLEC with regard to disputes between SSI and NEFCOM arising from the Resale Agreement, since NEFCOM is contractually barred from invoking the Commission's jurisdiction. This Commission cannot exercise jurisdiction over the parties.

a. In addition, under the Resale Agreement and the FCC's rules, SSI (as a CLEC providing a resold NEFCOM local service) is not responsible for paying, collecting or remitting any access charges NEFCOM may be entitled to receive when one of its end users initiates a call or when SSI's resold service customer receives a call. SSI is not the guarantor of any access charge liability. NEFCOM must collect from the "access customer" to the extent there is one. Section 8.1.7 of the Resale Agreement provides that "[a]ny switched access charges associated with interexchange carrier access will be billed by, and due to, [NEFCOM]." *See also* 47 C.F.R. § 51.605(b) and (c), 51.607, 51.617(b).¹ "SSI the CLEC" is not responsible for access charges that may be due to NEFCOM as a matter of law, and under the Resale Agreement and the Commission does not have jurisdiction over the dispute insofar as it pertains to a dispute arising from the RESALE AGREEMENT.

17. SSI was not acting as an IXC for purposes of the activities and traffic in issue. The service SSI provided was not a telecommunications service and was not rendered

¹ 51.617(b) clearly requires NEFCOM to deal directly with the access customer and does not allow NEFCOM to bill the reselling CLEC for access services rendered to interexchange carriers:

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69 of this chapter, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

pursuant to SSI's IXC authority. In any event, (1) the service is jurisdictionally interstate and therefore exempt from state regulation; and, (2) is an enhanced and/or information service that was not offered on a common carrier basis. "SSI the intrastate IXC regulated by the Commission" was not involved in the matters giving rise to this dispute. Finally, as noted above, even if the service was provided pursuant to SSI's IXC certification, its VoIP activities are still exempt from Commission regulation and are therefore not subject to complaints by NEFCOM or any one else.

**THE COMMISSION HAS NO JURISDICTION OVER
THIS CONTROVERSY OR SUBJECT MATTER**

A. There is already ongoing litigation over the same issues, facts and circumstances.

18. This Commission lacks jurisdiction over the controversy or subject matter. As shown above, the Resale Agreement provides for original exclusive venue and jurisdiction in the Circuit Court of Baker County, and NEFCOM has already invoked that jurisdiction. There is ongoing litigation between the parties related to this controversy and the same facts, actions, inactions and arguments are already before that court. *Northeast Florida Telephone Company v. Southeastern Services, Inc.*, Case No. 02-2003-CA-0141, Before the Circuit Court of the Eighth Judicial District in and for Baker County, Florida. That court has previously refused to dismiss this case under the doctrine of exclusive jurisdiction, and refused to abate and refer under the doctrine of primary jurisdiction.²

² There is another motion to abate pending before the Court. If the Court does refer the case to the Commission then the Commission will receive jurisdiction to resolve the matters referred to the Commission by the Court since the Commission will then be acting at the behest of the court that has jurisdiction. Unless and until there is a referral, this Commission completely lacks jurisdiction over the controversy.

19. A party cannot file a lawsuit in two jurisdictions at the same time dealing with the same issues, the same parties and the same relief.³ If there is a second suit, jurisdiction still lies in the circuit court where the service of process was first perfected. *Mabie v. Garden Street Management*, 397 So. 2d 920 (Fla. 1981), *Fasco Industries v. Goble*, 678 So. 2d 916 (Fla. 5th DCA 1996).

20. The rationale behind this principle is that when the jurisdiction of a competent court is invoked in regard to a certain set of facts and relief, it is to the exclusion of any other forum of concurrent jurisdiction; otherwise it would permit the possibility of conflicting rulings on the same facts, which is exactly what the *Mabie* Court prohibited. *Florida Insurance Guaranty Assoc. v. Celotex*, 547 So. 2d 660 (Fla. 2d DCA 1989).

21. Another principle applicable to this situation is the rule against splitting causes of action. This rule requires that all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action or not at all. *Schimmel v. Aetna Casualty & Surety*, 506 So. 2d 1162 (Fla. 3d DCA 1987). This rule is “founded upon the plainest and most substantial justice- namely, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits.” *Gaynon v. Statum*, 10 So. 2d 432, 433 (Fla. 1942).

22. NEFCOM’s claims all flow from the same allegedly wrongful acts as are in issue in the Baker County litigation. Its subsequent action before the Commission involving the same acts is therefore barred.

23. When two actions are filed in two state forums with the same parties and dealing with substantially the same cause of action, the appropriate course of action is usually for

³ NEFCOM is seeking the same relief in both cases. In this proceeding it also requests that the Commission impose penalties. The issue of penalties is addressed below.

the forum where the second suit is filed to abate the action. *Lightsey v. Honorable Volie A. Williams*, 526 So.2d 764 (Fla. 5th DCA 1988). This rule is to prevent a “race to judgment.” Failure to abate or stay the action filed in the second court is an abuse of discretion. *Id.* at 766. In *Lightsey*, the trial court in the second case filed refused to dismiss the cause of action, and the petitioner filed a writ of prohibition or certiorari to the DCA. See also *Thomas v. English*, 448 So.2d 623 (Fla. 4th DCA 1984)(holding abatement of an action is appropriate where two actions are pending simultaneously which involve the same parties and the same or substantially the same causes of action).

24. In this case the proper action is to dismiss. This is so because of the other reasons set out in this Motion to Dismiss. If the second forum would not have jurisdiction to begin with, it need not abate and should instead dismiss. If the Commission does not dismiss, it must abate.

B. No jurisdiction over disputes arising under Resale Agreement by virtue of Venue Selection Clause

25. As indicated above, the Resale Agreement has a Venue Selection Clause that operates to deprive any party of the right to seek to have the Commission assert jurisdiction over disputes arising as a result of the parties’ relationship. Since both parties voluntarily agreed to that provision, the savings clauses related to the Commission’s “authority to arbitrate and enforce interconnection agreements” stated in Sections 364.011(2) and 364.02(13), Florida Statutes, do not apply.

C. The Commission does not have jurisdiction under s. 364.16(3), Florida Statutes

26. NEFCOM's attempt to invoke Section 364.16(3), Florida Statutes, fails. That provision does not apply and therefore does not provide jurisdiction over the dispute.

Section 364.16(3), Florida Statutes, provides:

(3) Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, rates, terms, and conditions established by the procedures set forth in s. 364.162.

(a) No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

(b) Any party with a substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of this subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company. (emphasis added)

27. There are two independent reasons why Section 364.16(3), Florida Statutes, does not apply. First, the traffic in issue is originated by NEFCOM. NEFCOM is delivering the traffic; SSI is not delivering the traffic. The statute speaks only to terminating traffic. NEFCOM is asserting that originating access service charges apply. Since the legislature mentioned only terminating traffic and only terminating access service charges the provision cannot be read to also include originating traffic.

28. Second, and more fundamentally, the provision does not address a resold service arrangement. It clearly and obviously is addressing physical interconnection under § 251(a) and/or (c)(2) and traffic exchange under §§ 201 and/or 251(b)(5). It covers a "local interconnection arrangement."

29. The PRIs in issue were obtained pursuant to a § 251(b)(1) and/or (c)(4) resale contract. Resale Agreement Third Whereas Clause and § 4.1.1. The Resale Agreement between SSI and NEFCOM does not provide for physical interconnection under §§ 201, 251(a) or 251(c)(2). The Resale Agreement does not provide for traffic exchange under §§ 201 or 251(b)(5). SSI and NEFCOM do not have a “local interconnection arrangement” and they do not exchange traffic.

30. SSI did not “deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement” and NEFCOM does not allege that SSI did so. Section 364.16(3), Florida Statutes, does not apply to the parties’ relationship and therefore the grant of authority to investigate the matter or arbitrate the complaint set out in Section 364.16(b), Florida Statutes, does not apply.

31. NEFCOM did not “petition for an investigation.” It did not request an investigation. NEFCOM filed a complaint and asked that penalties be imposed. Before the Commission can accept jurisdiction under Section 364.16, Florida Statutes, it must receive a “petition for an investigation.” The process for an investigation is different than the process applicable to a complaint. Section 364.16, Florida Statutes, does not confer jurisdiction to consider a complaint and the complaint must be dismissed.

**COMMISSION HAS NO JURISDICTION TO AWARD DAMAGES;
ASSERTING JURISDICTION WOULD DENY SSI’S RIGHT TO JURY TRIAL**

32. The Commission lacks the authority to enter an award of money damages. *Florida Power & Light Co v. Glazer*, 671 So. 2d 211 (Fla. 3d DCA 1996); *Florida Power & Light v. Albert Litter Studios*, 896 So. 2d 891 (Fla. 3d DCA 2005). NEFCOM’s complaint asks for the award of money damages due to a claimed breach of contract. The Commission lacks the jurisdiction and power to award damages.

33. A breach of contract action is a long standing case or controversy which only courts are empowered to resolve. It is inherently judicial in nature. This Commission is not part of the judicial branch of government. The judicial power is exercised only by the judiciary. Florida Constitution Article V Section 1. Any attempt by this Commission to exercise judicial power would violate separation of powers contrary to Florida Constitution Article II Section 3.

34. In the State of Florida, the defendant has a right to trial by jury in all forms of action that existed in the common law at the time the Constitution was adopted. This Commission does not conduct jury trials. Resolving the dispute through administrative processing, even if there is a contested case hearing, would be the equivalent of a trial before the court. SSI has a right to trial by jury under Florida Constitution Article I Section 22 and hereby asserts that right. Since this Commission cannot grant a trial by jury it must dismiss the case. Any other result would also violate SSI's right to due process guaranteed by Florida Constitution in Article I Section 9, since in this instance the "process that is due" includes a right to trial by jury.

**COMPLAINTS BY PRIVATE PARTIES ARE NOT A LAWFUL VEHICLE FOR
CONSIDERATION OF ADMINISTRATIVE PENALTIES**

35. The Commission does not have jurisdiction to consider assessment of any administrative penalties in a complaint case brought by a private party. If the Commission decides that it should consider administrative penalties it can and should do so in an investigation.

36. Administrative penalties, when appropriate and properly imposed, are payable to the General Revenue Fund. *See, e.g.*, Florida Statutes 364.285(1). NEFCOM has no interest in any penalties that might possibly be assessed. NEFCOM may consider itself

to be the enforcer of state laws, but its obviously self-interested self-appointment is *ultra vires* and of no effect. NEFCOM is not a prosecutor and is certainly not the judge. It is not even the police. NEFCOM would not be a proper party to any administrative penalty or enforcement proceeding since it would have no standing, as none of its rights, duties or obligations would be impacted by any decision in such a case.

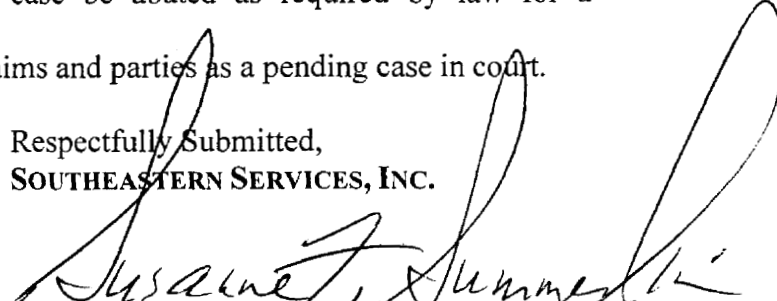
37. The Commission should dismiss that part of NEFCOM's request that penalties be imposed. If and when the Commission comes to believe or has cause to suspect that an "entity subject to its jurisdiction" has "refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter" then it can institute an appropriate proceeding to determine whether penalties should apply. Section 364.285(1), Florida Statutes.

38. SSI must note, however, that the entity that has allegedly committed a violation must be subject to the Commission's jurisdiction, and the violation must pertain to a service or activity over which the Commission has subject matter control. If the activity in issue pertains to "interstate rates, fares, charges, classifications, or rules of practice in relation thereto, for or in relation to the transmission of messages or conversations" then the Commission can not institute proceedings. Instead, under Section 364.27, Florida Statutes, the Commission "shall apply, by petition, to the Federal Communications Commission for relief and may present to the Federal Communications Commission all facts coming to its knowledge as to violation of the rulings, orders, or regulations of that commission or as to violations of the act to regulate commerce or acts amendatory thereof or supplementary thereto." As noted above, SSI's VoIP services are jurisdictionally interstate.

39. NEFCOM did not "petition for an investigation." It did not request an investigation. NEFCOM filed a complaint and asked that penalties be imposed. Before the Commission can accept jurisdiction under Section 364.16, Florida Statutes, it must receive a "petition for an investigation." The process for an investigation is different than the process applicable to a complaint. Section 364.16, Florida Statutes, does not confer jurisdiction to consider a complaint and the complaint must be dismissed.

WHEREFORE, Southeastern Services, Inc. respectfully requests that the Commission dismiss NEFCOM's Complaint. In the alternative, SSI respectfully requests that the Commission dismiss the specific parts of the complaint identified above. In the further alternative, SSI requests that the case be abated as required by law for a subsequent case involving the same acts, claims and parties as a pending case in court.

Respectfully Submitted,
SOUTHEASTERN SERVICES, INC.



Suzanne F. Summerlin, Esq.
Florida Bar No. 398586
SUZANNE FANNON SUMMERLIN, P.A.
2576 Capital Medical Boulevard
Tallahassee, FL 32309
Telephone: 850-656-2288
Facsimile: 850-656-5589

--and--

W. Scott McCollough
Texas State Bar No. 13434100
e-mail: wsmc@smccollough.com
1250 Capital of Texas Highway South
Building Two, Suite 235
Austin, Texas 78746
Telephone: 713.231.231.2315
Facsimile: 512.692.2522

Counsel for Southeastern Services, Inc.

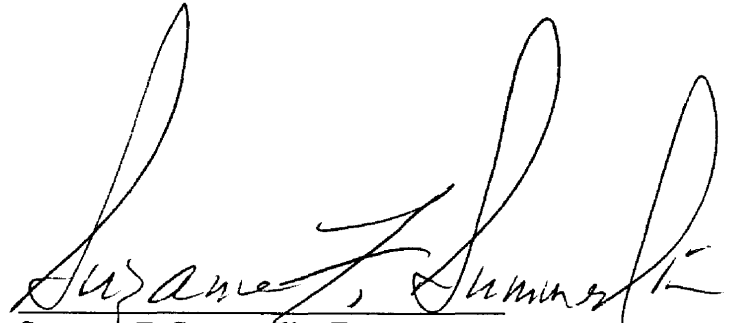
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail on this 2nd day of February, 2006, upon the following:

Kenneth A. Hoffman
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe Street, Suite 420
P.O. Box 551
Tallahassee, FL 32302

Mr. Patrick Wiggins, Attorney Supervisor
Florida Public Service Commission
Competitive Markets & Enforcement
Section
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Lee Fordham, Staff Counsel
Florida Public Service Commission
Competitive Markets & Enforcement
Section
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850



Suzanne F. Summerlin, Esq.