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March 28, 2006

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Tallahassee, Florida 32399-0850

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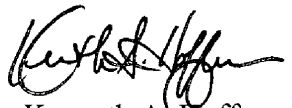
Re: Docket No. 060083-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket on behalf of Northeast Florida Telephone Company ("Northeast Florida") are the original and fifteen copies of Northeast Florida Telephone Company d/b/a NEFCOM's Response in Opposition to Southeastern Services, Inc.'s Motion to Dismiss or, in the Alternative, To Abate.

Please acknowledge receipt of these documents by stamping the extra copy of this letter filed and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,


Kenneth A. Hoffman

- CMP _____
- COM _____
- CTR _____
- ECR KAH/rl
- GCL _____
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DOCUMENT NUMBER-DATE

02776 MAR 28 06

FPSC-COMMISSION CLERK

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)
intrastate access charges pursuant to)
Northeast Florida's tariffs and for violation)
of Section 364.16(3)(a), Florida Statutes.)
_____)

Docket No. 060083-TP

Filed: March 28, 2006

**NORTHEAST FLORIDA TELEPHONE COMPANY D/B/A
NEFCOM'S RESPONSE IN OPPOSITION TO
SOUTHEASTERN SERVICES, INC.'S
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO ABATE**

Northeast Florida Telephone Company, d/b/a NEFCOM, by and through its undersigned counsel, hereby files this Response to Southeastern Services, Inc.'s ("SSI") Motion to Dismiss or, In the Alternative to Abate, (hereinafter referred to as the "Motion") and states as follows:

INTRODUCTION

1. On January 30, 2006, NEFCOM filed a two count Complaint against SSI. Count I alleges that SSI has breached NEFCOM's intrastate access tariffs approved and on file with the Florida Public Service Commission ("Commission") by failing to pay NEFCOM intrastate originating access charges. Count II alleges that SSI has violated Section 364.16(3)(a), Florida Statutes (2004) by knowingly originating traffic for which originating intrastate access service charges would otherwise apply, through a local interconnection agreement without paying the appropriate charges for such originating access service. On February 21, 2006, SSI responded to the Complaint by filing its Motion. On March 22, 2006, NEFCOM filed a Notice of Withdrawal of Count II of its Complaint and its request for imposition of penalties pursuant to Section 364.285,

DOCUMENT NUMBER-DATE

02776 MAR 28 06

FPSC-COMMISSION CLERK

Florida Statutes. On March 27, 2006, pursuant to stipulation of counsel, NEFCOM filed its Amended Complaint reflecting the withdrawal of Count II and the request for assessment of penalties pursuant to Section 364.285, Florida Statutes.

LEGAL STANDARD

2. A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a complaint to state a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving parties must demonstrate that, accepting all allegations in the complaint as facially correct, the complaint still fails to state a cause of action for which relief can be granted. In determining the sufficiency of NEFCOM's Amended Complaint, the Commission "may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side... (and) all material allegations of ... (the) complaint must be taken as true." Id.; McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So.2d 214, 215 (Fla. 2nd DCA 1998).

3. SSI's Motion fails to state a legal basis for dismissal. In addition, SSI's Motion relies on an affirmative defense and is replete with factual argument, both of which are inappropriate for the Commission to consider on a Motion to Dismiss.

ARGUMENT

A. NEFCOM's Amended Complaint is Not Barred by the Statute of Limitations

4. SSI alleges that NEFCOM's Amended Complaint is barred under the two year statute of limitations set forth in 47 U.S.C. §415.¹ That statute 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."

5. In support of its statute of limitations defense, SSI asserts that the long distance voice calling service that it provided and which is at issue in NEFCOM's Amended Complaint is an "Enhanced Service" under 47 C.F.R. §64.702(a) and an "Information Service" under 47 U.S.C. §153(20). SSI also asserts that its long distance service is a "VOIP service" that is jurisdictionally interstate.²

6. SSI's various characterizations of its service are nothing more than factual assertions and legal arguments that are inappropriate on a motion to dismiss and must ultimately be resolved by the Commission through a formal administrative hearing.

7. SSI's statute of limitations defense also is procedurally defective. A statute of limitations defense is an affirmative defense that may not be considered on a motion to dismiss. Varnes v. Dawkins, *supra*; Temples v. Florida Indus. Const. Co., Inc. 310 So.2d 326 (Fla. 2nd DCA 1975). SSI bears the burden to prove its affirmative defense by competent substantial evidence, which cannot be accomplished in proceedings on a motion to dismiss. LeGrande v. Emmanuel, 889

¹In this Response, NEFCOM will refer to SSI's allegations and arguments as they relate to NEFCOM's Amended Complaint (which are the same as Count I of the original Complaint).

²SSI's Motion, at ¶3, 4.

So.2d 991 (Fla. 3d DCA 2004).

8. NEFCOM's Amended Complaint is predicated on SSI's alleged breach of an intrastate tariff approved by this Commission. The federal statute of limitations cited by SSI as a basis for dismissal does not apply to the allegations and relief sought by NEFCOM before this Commission. See, e.g., Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) (47 U.S.C. §152(b) specifically prohibits the FCC from asserting jurisdiction over intrastate matters and federal regulations regarding depreciation could not be imposed on intrastate communication matters).

9. In sum, NEFCOM's Amended Complaint alleges that SSI provided interexchange, long distance calling services subject to NEFCOM's intrastate access tariffs approved by the Commission. SSI has attempted to recharacterize the service at issue as an interstate service or information service to import a federal statute of limitations that has no application in this proceeding. SSI's factual arguments and characterizations are inappropriate on a motion to dismiss and cannot form the basis for dismissal of NEFCOM's Amended Complaint.

B. NEFCOM's Amended Complaint is not Required to Comply with Rule 28-106.201, Florida Administrative Code

10. SSI next asserts that NEFCOM's Amended Complaint fails to comply with specific parts of Rule 28-106.201, Florida Administrative Code. NEFCOM's Amended Complaint is not subject to Rule 28-106.201.

11. NEFCOM initiated this proceeding by filing a Complaint - - not a petition or a petition on proposed agency action. The distinction is important as it pertains to the pleading requirements of Rule 28-106.201 which do not apply to a complaint.

12. In Docket No. 060038-EI, three intervenors filed a motion to dismiss a petition filed by Florida Power & Light Company ("FPL") for issuance of a Storm Recovery Financing Order under Section 366.8260, Florida Statutes (2005). The intervenors predicated their motion to dismiss on FPL's alleged failure to meet the pleadings requirements in Rule 28-106.201(2), Florida Administrative Code. The Commission ultimately held that the pleadings requirements of Rule 28-106.201 applied to FPL's petition and that FPL's petition substantially complied with the pleading requirements of subsection (2) of the rule. In so doing, the Commission confirmed that the pleading requirements of Rule 28-106.201 do not apply to complaints.

...Nonetheless, we find that the pleading requirements of Rule 106.201(2), Florida Administrative Code, to the extent that they can reasonably be applied, are applicable to FPL's petition. In 1998, following adoption of the Uniform Rules of Procedure, the Commission petitioned the Administrative Commission for exceptions to the Uniform Rules so that we could retain certain provisions of our then-existing procedural rules. One of the rules that the Commission sought an exception to retain was Rule 25-22.036, Florida Administrative Code, which concerned the initiation of formal proceedings, including pleading requirements. That rule contained provisions specific to several different types of initial pleadings - - original petitions, petitions requesting a hearing on proposed agency action, applications, and complaints - - and very clearly distinguished the pleading requirements for original petitions from the pleading requirements for petitions requesting a hearing on proposed agency action. The Administration Commission allowed this Commission an exception to retain only those provisions of the Rule that related to applications and complaints. It determined that the provisions related to original petitions and petitions requesting a hearing on proposed agency action were adequately covered by statute and other provisions of the Uniform Rules, including Rule 28-106.201. (footnote omitted). Thus, the pleading requirements of Rule 28-106.201(2), to the extent that they can reasonably be applied, are applicable to original petitions, such as FPL's petitions in this docket.

See Order No. PSC-06-0260-PSC-EI issued March 28, 2006, at 5, attached hereto as Exhibit A.

13. Accordingly, NEFCOM's Amended Complaint is not subject to the pleading requirements of Rule 28-106.201, Florida Administrative Code. SSI's argument on this issue is incorrect and fails to provide a basis for dismissal.

C. The Florida Public Service Commission has Jurisdiction over SSI

14. SSI next asserts that the Commission lacks jurisdiction over SSI with regard to the allegations and request for relief in NEFCOM's Amended Complaint. SSI's factual arguments in this regard are inappropriate on a motion to dismiss. Moreover, based on the allegations in the Amended Complaint, the Commission clearly has jurisdiction over SSI.

15. NEFCOM's Amended Complaint alleges that SSI is a competitive local exchange telecommunications company ("CLEC") as defined by Section 364.02(4), Florida Statutes and an intrastate interexchange telecommunications company ("IXC") as defined by Section 364.02(6), Florida Statutes. NEFCOM's Amended Complaint further alleges that SSI is authorized to and has provided local, intrastate interexchange and interstate interexchange services in Florida.³

16. SSI does not take issue with the fact that the Commission has jurisdiction over SSI in its capacity as a certificated CLEC and IXC in the State of Florida. Instead, SSI returns to factual arguments regarding the character of the service it provides. For example, SSI argues that the Commission does not have jurisdiction over SSI's "VOIP service" and does not have jurisdiction over entities that provide VOIP. SSI also asserts again that its "VOIP services" are jurisdictionally interstate and not telecommunications service subject to the Commission's jurisdiction.⁴

³See par. 7 of Amended Complaint.

⁴See par. 13 and 14 of Motion.

17. Once again, SSI has strayed beyond the four corners of the Amended Complaint in search of a dismissal. NEFCOM's Amended Complaint alleges that SSI provided long distance calling services subject to NEFCOM's Commission-approved intrastate access tariffs. The issues raised by SSI regarding the character of its service are questions of fact and law that will ultimately have to be resolved by the Commission but cannot form the basis for a motion to dismiss.⁵

18. NEFCOM's Amended Complaint is directed to the unlawful actions of SSI in its capacity as a certificated IXC in the provision of intrastate interexchange services. The Commission clearly has jurisdiction over SSI in its capacity as a certificated IXC. Accordingly, SSI's contention that the Commission lacks jurisdiction over SSI is without merit and fails to provide a basis for dismissal.

D. The Commission Has Jurisdiction Over the Subject Matter of NEFCOM's Amended Complaint

19. SSI asserts that the Commission lacks jurisdiction over the subject matter of the Amended Complaint. NEFCOM will address each of SSI's assertions below.

1. The Baker County Circuit Court Action

20. On September 4, 2003, NEFCOM filed a civil action against SSI in Baker County Circuit Court. Northeast Florida Telephone Company v. Southeastern Services, Inc., Case No. 02-2003-CA-0141. NEFCOM's Complaint in the circuit court states civil causes of action for damages

⁵NEFCOM points the Commission to Section 364.02(12), Florida Statutes (2004). That statute defines the term "service" to exclude "voice-over-Internet protocol services for purposes of regulation by the Commission." However, the statute goes on to state that "[n]othing herein shall effect the rights and obligations of any entity related to the payment of switched network access rates or other intercarrier compensation, if any, related to voice-over-Internet protocol service."

against SSI for fraud in the inducement, breach of the NEFCOM/SSI Resale Agreement approved by the Commission and related parts of NEFCOM's General Subscriber Service Tariff ("GSST"), violation of the Florida Deceptive and Unfair Trade Practices Act, and unjust enrichment. The gravamen of NEFCOM's Amended Complaint in circuit court is that SSI unlawfully utilized local service ADS-PRI lines ordered through the Resale Agreement and GSST to provide SSI's long-distance service customers with nationwide long distance calling thereby avoiding the payment of intrastate originating access charges due and owing under NEFCOM's Commission-approved intrastate access tariffs. NEFCOM filed its action for breach of the Resale Agreement and GSST, and related civil claims, in circuit court as required under the "Forum and Venue" provision in the Resale Agreement which requires that "[a]ny 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...." Thus, NEFCOM's claims against SSI in its capacity as a CLEC were properly filed in Circuit Court.

21. NEFCOM could not have brought the instant action against SSI, in its capacity as an IXC, before the Circuit Court. The Commission has exclusive subject matter jurisdiction over the remedies sought by NEFCOM in the Amended Complaint. Clearly, there are overlapping factual allegations in the Circuit Court action and in the instant Amended Complaint before the Commission. That does not translate into a legal conclusion that the Commission lacks subject matter jurisdiction over NEFCOM's Amended Complaint.

22. As previously stated, NEFCOM's Amended Complaint alleges that SSI breached NEFCOM's intrastate access tariffs approved by the Commission by failing to pay intrastate

originating access charges in connection with the monthly flat-rated long distance calling plan that allowed unlimited local calling throughout the fifty states and Canada offered by SSI. The question of whether SSI breached NEFCOM's intrastate access tariff is a fundamental issue underlying the pending civil claims in Baker County Circuit Court. In recognition of that fact, the Baker County Circuit Court recently entered an Order abating the Circuit Court case and referring the breach of tariff issue to the Commission. The Circuit Court held:

2. The Florida Public Service Commission is the appropriate regulatory agency to properly address the primary issue under the dispute of these parties i.e., whether or not SOUTHEASTERN SERVICES, INC. is legally responsible for payment to NORTHEAST FLORIDA TELEPHONE COMPANY for originating intrastate access charges under Northeast Florida's Public Service Commission approved tariff for the long distance calls provided by SOUTHEASTERN SERVICES, INC. as alleged in the amended complaint. This court shall stay this proceeding and refer this case on primary jurisdiction grounds to the Florida Public Service Commission for the determination of the primary issue underlying the Complaint currently before the Commission and thereby also addressing the legal principle as to the causes of action set forth in the Complaint in this cause of action.

See, Order Granting Defendant, Southeastern Services, Inc.'s Motion to Abate, entered February 28, 2006, in Baker County Circuit Court Case No. 02-2003-CA-0141, attached hereto as Exhibit B.

23. SSI has conceded that the Commission has jurisdiction over the breach of tariff issue raised in Northeast Florida's Amended Complaint. Specifically, in footnote 2 to its Motion, SSI referred to its then pending Motion to Abate before the Baker County Circuit Court and stated:

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.

24. SSI next argues that NEFCOM's Amended Complaint cannot be heard by the Commission on the ground that "[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."⁶ SSI's argument is without merit. The action filed in Circuit Court is an action for damages based on civil causes of action. The instant Amended Complaint before the Commission is not an action for damages (nor could it be) and seeks remedies that lie within the exclusive jurisdiction of the Commission.

25. Nor does the prohibition against splitting causes of action apply in this case. The prohibition against splitting causes of action requires that all damages that result from a single wrongful act must be recovered in one action or not at all. Schimmel v. Aetna Casualty and Surety, 506 So.2d 1162 (Fla. 3rd DCA 1987). A cause of action can only be split if the second suit could have been brought as part of the first suit. That is not the case here. The Circuit Court lacks jurisdiction over NEFCOM's Amended Complaint. Exclusive jurisdiction over NEFCOM's Amended Complaint resides with the Commission. Accordingly, the prohibition against splitting causes of action does not apply.

2. Jurisdiction and Venue Under the Resale Agreement

26. SSI also asserts that the Venue Selection Clause in the Resale Agreement requires NEFCOM to have brought this action in Baker County Circuit Court. Again, SSI's assertion is incorrect. As previously stated, the Venue Selection Clause in the Resale Agreement would apply to any and all causes of action against SSI in its capacity as a CLEC, to enforce any right or obligation under the Resale Agreement or arising out of any matter pertaining to the Resale Agreement. Here, NEFCOM's Amended Complaint is against SSI in its capacity as an IXC and not

⁶SSI's Motion, at par. 19.

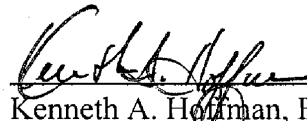
as a CLEC.

E. NEFCOM's Amended Complaint Does Not Seek an Award of Damages

27. Finally, SSI asserts that NEFCOM's Amended Complaint should be dismissed because the Commission lacks authority to enter an award of money damages. SSI is correct in its argument that the Commission lacks such authority; however, NEFCOM's Amended Complaint does not seek an award of money damages as evidenced by NEFCOM's prayer for relief. If NEFCOM prevails in this proceeding and the Commission determines that SSI has breached NEFCOM's intrastate access tariffs, and SSI fails to pay the amount of unpaid access charges as required by such order, then NEFCOM will be left with no alternative but to pursue a civil action for damages in circuit court.

WHEREFORE, for the foregoing reasons, NEFCOM respectfully requests that the Commission deny SSI's Motion to Dismiss or, in the Alternative, to Abate.

Respectfully submitted,



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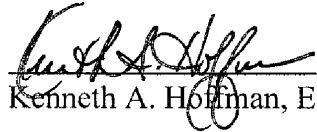
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following this 28th day of March, 2006:

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Kenneth A. Hoffman, Esq.

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for issuance of a storm recovery financing order, by Florida Power & Light Company.

DOCKET NO. 060038-EI
ORDER NO. PSC-06-0260-PCO-EI
ISSUED: March 28, 2006

ORDER DENYING JOINT MOTION TO DISMISS

BY THE COMMISSION:

On January 13, 2006, Florida Power & Light Company ("FPL") filed a Petition for Issuance of a Storm Recovery Financing Order, along with supporting testimony and exhibits, pursuant to Sections 366.04, 366.05, and 366.8260, Florida Statutes. Section 366.8260, Florida Statutes, which became effective June 1, 2005, provides a new means of financing the recovery of utilities' storm restoration costs and the establishment or replenishment of utilities' storm damage reserves. FPL's petition was the first filed under this new law. A formal evidentiary hearing has been scheduled for April 19-21, 2006.

On February 2, 2006, three intervenors in this docket – the Florida Retail Federation, AARP, and the Florida Industrial Power Users Group, collectively referred to in this Order as "Intervenors"¹ – filed a joint motion to dismiss FPL's petition, without prejudice, for failure to comply with the pleading requirements of the Uniform Rules of Procedure, Chapter 28-106, Florida Administrative Code, and the Florida Administrative Procedures Act, Chapter 120, Florida Statutes. On February 6, 2006, FPL filed a response in opposition to the joint motion.

For the reasons set forth below, we deny the joint motion to dismiss FPL's petition. This Commission has jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes.

Intervenors' Joint Motion to Dismiss

In their joint motion, Intervenors note that FPL's petition for issuance of a storm recovery financing order was filed pursuant to Section 366.8260, Florida Statutes, which establishes a new means for recovery of storm restoration costs through issuance of bonds. Intervenors concede that FPL's petition appears to comply with the pleading requirements of Section 366.8260 but argue that FPL's petition does not comply with the requirements of Section 120.54(5)(b)4., Florida Statutes, and Rule 28-106.201, Florida Administrative Code. Intervenors contend that these alleged deficiencies are prejudicial and that allowing FPL's petition to go forward on the time schedule established for this case would deprive Intervenors of due process and would constitute a departure from the essential requirements of law.

¹ Florida Retail Federation was granted leave to intervene by Order No. PSC-06-0119-PCO-EI, issued February 15, 2006. AARP was granted leave to intervene by Order No. PSC-06-0117-PCO-EI, issued February 15, 2006. Florida Industrial Power Users Group was granted leave to intervene by Order No. PSC-06-0118-PCO-EI, issued February 15, 2006.

Specifically, Intervenors allege three deficiencies in FPL's petition: (1) that the petition contains no statement of disputed issues of material fact as required by Rule 28-106.201(2)(d), Florida Administrative Code; (2) that the petition contains no statement of ultimate facts alleged, as required by Rule 28-106.201(2)(e), Florida Administrative Code; and (3) that the petition contains no statement of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief, as required by Section 120.54(5)(b)4.f, Florida Statutes.

With respect to the first alleged deficiency, Intervenors note that FPL, in its petition, indicates that it is not aware of any disputed issues. Intervenors claim that this explanation is unreasonable in light of FPL's involvement in a similar docket last year that involved numerous disputed issues and the fact that FPL's petition seeks relief under a new statute that necessarily raises new issues. Intervenors assert that FPL made no attempt to identify disputed issues of material fact and request that FPL's petition be dismissed without prejudice to allow FPL the opportunity to refile its petition with the alleged deficiency corrected.

With respect to the second alleged deficiency, Intervenors allege that FPL has failed to provide a "concise statement of the ultimate facts alleged," as required by Rule 28-106.201(2)(e). Intervenors claim that this deficiency, combined with the failure to identify disputed issues, is prejudicial because it leaves them with the job of guessing what the issues are. Intervenors request that FPL's petition be dismissed without prejudice on these grounds.

Intervenors offer no additional argument in support of the third alleged deficiency.

Finally, Intervenors argue that if FPL refiles its petition to cure these alleged deficiencies, such a filing should restart the statutory time frames set forth in Section 366.8260, Florida Statutes, for consideration of the new petition. Intervenors assert that allowing the case to continue on the current schedule would prejudice them by requiring them to prepare for a case without the benefit of the information that they believe FPL was required, but failed, to provide.

FPL's Response

In its response, FPL contends that Intervenors' argument is "specious and hyper-technical, elevates form over substance, and fails to recognize that the Petition fully complies with all pleading requirements set forth in Section 366.8260, Florida Statutes, and applicable rules." FPL asserts that the provisions of Rule 28-106.201(2), Florida Administrative Code, relied on by Intervenors do not apply to FPL's petition, and, even if those provisions did apply, FPL's petition complies with the standard set forth in that rule. FPL challenges Intervenors' assertion that they are prejudiced by not having information necessary to make their case, stating that FPL's filing (its petition, attachments, testimony, and exhibits) comprises 786 pages and is replete with information on its restoration efforts during the 2005 hurricane season, the impact the storms had on FPL's electrical infrastructure, and FPL's proposal to recover storm-related restoration costs. FPL contends that Intervenors have not met the standard for a motion to dismiss and, thus, that the joint motion should be denied.

With respect to the first and second deficiencies alleged by Intervenors, FPL states that this Commission has previously determined that the criteria of Rule 28-106.201(2), Florida

Administrative Code, relate specifically to a protest of proposed agency action. FPL notes that there is no proposed agency action for which FPL seeks review by the Commission. Thus, FPL argues, its petition is not subject to the requirements of Rule 28-106.201(2). With respect to the third deficiency alleged by Intervenors, FPL contends that Section 120.54(5)(b)4.f, Florida Statutes, applies only to the Administration Commission and not to FPL.

FPL further contends that even if the provisions of Rule 28-106.201(2), Florida Administrative Code, did apply to FPL's petition, the petition would satisfy the rule because it is, at a minimum, in "substantial compliance," as required by the rule. With respect to the allegation that FPL's petition is deficient for failure to contain a statement of disputed issues of material fact, FPL asserts that the rule does not require FPL to do any more than it did when it stated in its petition that it was "not aware of any disputed issue of material fact." FPL argues that it would be absurd to interpret the rule to require FPL to try to determine who will intervene in the case and what facts, if any, they will dispute. Further, FPL suggests that by not doing so, it could not have prejudiced Intervenors' ability to make a case.

With respect to the allegations that FPL's petition is deficient for failure to include a statement of ultimate facts alleged or a description of how the facts relate to the statute under which FPL seeks relief, FPL asserts that Intervenors' argument elevates form over substance. FPL states that in its petition it describes in detail the storm-recovery activities and associated costs from the 2005 storm season and sets forth the factual allegations supporting its request for relief. FPL notes that its petition states each of the requirements of Section 366.8260(2)(a), Florida Statutes, regarding the contents of a petition for relief under the statute, and presents supporting information for each requirement, demonstrating how the facts relate to the statute. Further, FPL notes that it provided as an attachment to its petition a draft financing order with findings of fact and conclusions of law proposed by FPL. FPL contends that its petition should not be dismissed simply because it has not separately labeled its statement of ultimate facts alleged and statement of how the facts relate to the law.

FPL contends that Intervenors' joint motion is an attempt to gain additional time by delaying this proceeding in contravention of the legislatively established time frames for disposition of petitions filed under Section 366.8260, Florida Statutes. FPL further challenges Intervenors' allegations of prejudice, noting that not one of these parties has served a single original discovery request on FPL in this proceeding.

Analysis and Conclusions

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See id. at 350. In determining the sufficiency of the petition, we must confine our consideration to the petition and documents incorporated therein and the grounds asserted in the

motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); Rule 1.130, Florida Rules of Civil Procedure.

Analysis

Intervenors' joint motion and FPL's response raise two questions: (1) what are the pleading requirements applicable to FPL's petition; and (2) does FPL's petition comply with those requirements. To answer the first question, the pleading requirements set forth in Section 366.8260, Florida Statutes, and, to an extent, those set forth in Rule 28-106.201(2), Florida Administrative Code, are applicable to FPL's petition. To answer the second question, FPL's petition, at a minimum, substantially complies with the applicable pleading requirements.

1. Applicable Pleading Requirements

Among several 1996 amendments to Chapter 120, Florida Statutes (the "Administrative Procedure Act" or "APA"), the Legislature required that the Administration Commission adopt uniform rules of procedure to serve as the rules of procedure for each agency subject to the APA. This requirement is set forth in Section 120.54(5), Florida Statutes.² In compliance with this requirement, the Administration Commission adopted uniform rules of procedure in 1997 which address, among other things, the general pleading requirements for the filing of petitions for administrative hearings. Those pleading requirements are set forth in Rule 28-106.201(2), Florida Administrative Code, which states:

- (2) All petitions filed under these rule shall contain:
 - (a) The name and address of each agency affected and each agency's file or identification number, if known;
 - (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
 - (c) A statement of when and how the petitioner received notice of the agency decision;
 - (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
 - (e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and
 - (f) A demand for relief.

² This statute, by itself, does not establish pleading requirements. Instead, it directed the Administration Commission to adopt specific pleading requirements.

Subsection (4) of the rule states that a petition may be dismissed if it is not in “substantial compliance” with these requirements or if it has been untimely filed. Subsection (1) of the rule defines a petition as “any document that requests an evidentiary hearing and asserts the existence of a disputed issue of material fact.”

As we have previously recognized,³ these general provisions apply primarily to petitions requesting a hearing on proposed agency action. First, subsection (2)(c) of the rule requires a statement of how and when the petitioner received notice of the agency decision. Obviously, this subsection can only be applicable when the agency has taken proposed action and issued a decision that is subject to a request for hearing. Second, subsection (2)(d) of the rule requires a statement of all disputed issues of material fact. A petitioner that requests a hearing on proposed agency action will clearly be able to identify those parts of the agency’s proposed action that the petitioner disputes, whereas a petitioner filing an original request for relief cannot reasonably be expected to identify “all disputed issues of material fact” that might arise. Prior to some potential party opposing the relief sought through an original petition, logic dictates that there is no “disputed issue” to identify. Third, even the definition of a “petition” under subsection (1) of the rule suggests that it encompasses only petitions requesting a hearing on proposed agency action. As is true in this case, many original petitions do not request an evidentiary hearing. Further, as noted above, a petitioner filing an original request for relief cannot reasonably be expected to assert the existence of a disputed issue of material fact prior to any known opposition to the petition.

Nonetheless, we find that the pleading requirements of Rule 28-106.201(2), Florida Administrative Code, to the extent that they can reasonably be applied, are applicable to FPL’s petition. In 1998, following adoption of the Uniform Rules of Procedure, this Commission petitioned the Administration Commission for exceptions to the Uniform Rules so that we could retain certain provisions of our then-existing procedural rules. One of the rules that we sought an exception to retain was Rule 25-22.036, Florida Administrative Code, which concerned the initiation of formal proceedings, including pleading requirements. That rule contained provisions specific to several different types of initial pleadings – original petitions, petitions requesting a hearing on proposed agency action, applications, and complaints – and very clearly distinguished the pleading requirements for original petitions from the pleading requirements for petitions requesting a hearing on proposed agency action. The Administration Commission allowed this Commission an exception to retain only those provisions of the rule that related to applications and complaints. It determined that the provisions related to original petitions and petitions requesting a hearing on proposed agency action were adequately covered by statute and other provisions of the Uniform Rules, including Rule 28-106.201.⁴ Thus, the pleading requirements of Rule 28-106.201(2), to the extent that they can reasonably be applied, are applicable to original petitions, such as FPL’s petition in this docket.

³ Order No. PSC-03-0578-FOF-TP, issued May 6, 2003, in Docket No. 030200-TP, In re: Emergency petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a AT&T for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc., at p.7.

⁴ Administration Commission Final Order No. APA 98-007, filed June 25, 1998, at p.3.

FPL and Intervenors agree that the substantive pleading requirements in Section 366.8260(2)(a), Florida Statutes, also apply to FPL's petition.⁵

2. *Compliance with Applicable Pleading Requirements*

As noted above, Rule 28-106.201(4), Florida Administrative Code, states that a petition may be dismissed if it is not in "substantial compliance" with the pleading requirements of subsection (2) of the rule. In light of the discussion above, FPL's petition, at a minimum, substantially complies with the applicable pleading requirements. Each of Intervenors' alleged deficiencies is discussed below.

First, Intervenors allege that FPL's petition is deficient because it does not contain a statement of all disputed issues of material fact, as required by Rule 28-106.201(2)(d), Florida Administrative Code. FPL addresses this pleading requirement in its petition by stating:

FPL is not aware of any disputed issue of material fact. This Petition is not filed in response to any agency action.

FPL's petition is not deficient on this ground. As discussed in detail above, a petitioner filing an original request for relief cannot reasonably be expected to identify "all disputed issues of material fact" that might arise. Prior to some potential party opposing the relief sought through an original petition, logic dictates that there is no "disputed issue" to identify. The law recognizes that statutes and rules should not be interpreted in a manner that produces an absurd result. Intervenors' argument on this point is inconsistent with this principle of interpretation.

⁵ Section 366.8260(2)(a) establishes seven substantive pleading requirements for a petition for issuance of a financing order. In such a pleading, the utility shall

1. Describe the storm-recovery activities that the electric utility has undertaken or proposes to undertake and describe the reasons for undertaking the activities.
2. Set forth the known storm-recovery costs and estimate the costs of any storm-recovery activities that are not completed, or for which the costs are not yet known, as identified and requested by the electric utility.
3. Set forth the level of the storm-recovery reserve that the utility proposes to establish or replenish and has determined would be appropriate to recover through storm-recovery bonds and is seeking to so recover and such level that the utility is funding or will seek to fund through other means, together with a description of the factors and calculations used in determining the amounts and methods of recovery.
4. Indicate whether the electric utility proposes to finance all or a portion of the storm-recovery costs and storm-recovery reserve using storm-recovery bonds. If the electric utility proposes to finance a portion of such costs, the electric utility shall identify that portion in the petition.
5. Estimate the financing costs related to the storm-recovery bonds.
6. Estimate the storm-recovery charges necessary to recover the storm-recovery costs, storm-recovery reserve, and financing costs and the period for recovery of such costs.
7. Estimate any cost savings or demonstrate how it would avoid or significantly mitigate rate impacts to customers resulting from financing storm-recovery costs with storm-recovery bonds as opposed to the traditional method of recovering such costs from customers and through alternative financing methods available to the electric utility.

Second, Intervenor's allege that FPL's petition is deficient because it does not contain a concise statement of the ultimate facts alleged, as required by Rule 28-106.201(2)(e), Florida Administrative Code. The "ultimate facts" are those which, if proven, would support the relief requested by FPL.⁶ While FPL's petition does not contain a separately labeled section devoted to identifying the ultimate facts alleged, it describes in detail the facts upon which its request for relief is based. Point-by-point, through more half of its 44 page petition, FPL addresses the seven substantive pleading requirements of Section 366.8260, Florida Statutes, which are identified in footnote 5, above, thereby alleging the ultimate facts that would support its request for relief. Further, as an exhibit to its petition, FPL filed a draft financing order which includes its proposed findings of fact and conclusions of law.⁷ Accordingly, we find that, at a minimum, FPL's petition substantially complies with the requirement of Rule 28-106.201(2)(e).

Third, Intervenor's allege that FPL's petition is deficient because it does not contain a statement of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief, as required by Section 120.54(5)(b)4.f, Florida Statutes. As noted in footnote 2, above, Section 120.54(5)(b)4. does not establish pleading requirements. Instead, it directed the Administration Commission to adopt specific pleading requirements. The requirement adopted by the Administration Commission pursuant to the subsection of the statute cited by Intervenor's appears to be embedded in Rule 28-106.201(2)(e), Florida Administrative Code, which requires that a petition include a statement of the rules and statutes that entitle the petitioner to relief.

While FPL's petition does not contain a separately labeled section devoted to identifying the rules and statutes that entitle it to relief, it more than adequately identifies such rules and statutes. In the first paragraph on the first page of its petition, FPL identifies the statutes and rules upon which it requests relief. Throughout its petition, FPL references these statutes and rules, as well as prior Commission orders, where it believes that application of such law to the facts entitles FPL to the relief it requests. Further, as noted above, FPL's petition included a draft financing order which sets forth FPL's proposed findings of fact and conclusions of law. Accordingly, we find that, at a minimum, FPL's petition substantially complies with this pleading requirement.

Finally, Intervenor's assert that allowing the case to continue on the current schedule would prejudice them by requiring them to prepare for a case without the benefit of the information that they believe FPL was required, but failed, to provide. Based on the above analysis, this assertion is entirely without merit. FPL's petition, at a minimum, substantially complies with the applicable pleading requirements and provides the necessary information to inform persons of the basis for its requested relief. In addition, as required by Section 366.8260(2)(a)8., Florida Statutes, FPL filed direct testimony in support of its petition at the same time it filed its petition. This prefiled testimony provides additional detail as to the facts and law that FPL presumably has offered in support of its petition.

⁶ Fla. Jur. 2d, Vol. 40, Pleadings, §22.

⁷ In determining the sufficiency of the petition, the Commission's consideration is limited to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. Thus, the draft financing order, which was incorporated into the petition as an exhibit, is to be considered.

Conclusion

Based on the foregoing analysis, we deny Intervenors' joint motion to dismiss FPL's petition for issuance of a financing order. FPL's petition states a cause of action upon which relief may be granted and, at a minimum, substantially complies with all applicable pleading requirements.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Intervenors' Joint Motion to Dismiss FPL's Petition for Issuance of a Storm Recovery Financing Order is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 28th day of March, 2006.

/s/ Blanca S. Bayó

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

This is a facsimile copy. Go to the Commission's Web site, <http://www.floridapsc.com> or fax a request to 1-850-413-7118, for a copy of the order with signature.

(SEAL)

WCK

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.

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BAKER COUNTY, FLORIDA

RECEIVED
3/2/06

NORTHEAST FLORIDA TELEPHONE
COMPANY, a Florida corporation,
Plaintiff,

CASE NO. 02-2003-CA-0141

vs.

SOUTHEASTERN SERVICES, INC., a
Florida corporation,
Defendant.

**ORDER GRANTING DEFENDANT, SOUTHEASTERN
SERVICES, INC.'S MOTION TO ABATE**

THIS CAUSE came on for consideration pursuant to the Defendant, SOUTHEASTERN SERVICES, INC.'s Motion to Abate filed December 8, 2005. After argument of counsel and being fully advised, this Court finds as follows:

This Court on February 4, 2004 entered its "Order Denying Southeastern Services, Inc.'s Motion to Dismiss or/in the Alternative to Hold in Abeyance Northeast Florida Telephone Company's Complaint." In said Order, this Court found "that Defendant's request that the action be abated until the issue, i.e., "access charges for Voice-Over-Internet-Protocol Services" is properly decided by the regulatory agencies . . . was premature and should be denied without prejudice."

The Defendant has again filed their "Motion to Stay or Abate Action." The Plaintiff has filed a Complaint against the Defendant, S. S. I. with the Florida Public Service Commission (PSC) and now in their Response to the Motion to Stay or Abate "request the Court to stay or abate this action and refer this case on primary jurisdiction grounds to the Florida Public Service Commission. The Public Service Commission has the resources and technical expertise regarding the primary issue of whether or not Defendant, S. S. I., should be required to pay NORTHEAST FLORIDA TELEPHONE COMPANY access charge for Voice-Over-Internet-Protocol ("VOIP") Services?

Accordingly, it is

ORDERED and ADJUDGED as follows:

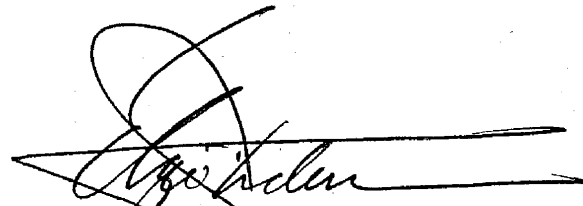
1. The Defendant's Motion to Stay or Abate Action filed December 8, 2005 is hereby granted; however, the request to abate until the Federal Communications Commission addresses the issue as framed in the pleading is denied.

EXHIBIT B

2. The Florida Public Service Commission is the appropriate regulatory agency to properly address the primary issue under the dispute of these parties i.e., whether or not SOUTHEASTERN SERVICES, INC. is legally responsible for payment to NORTHEAST FLORIDA TELEPHONE COMPANY for originating intrastate access charges under Northeast Florida's Public Service Commission approved tariff for the long distance calls provided by SOUTHEASTERN SERVICES, INC. as alleged in the Amended Complaint. This Court shall stay this proceeding and refer this case on primary jurisdiction grounds to the Florida Public Service Commission for the determination of the primary issue underlying the Complaint currently before the Commission and thereby also addressing the legal principle as to the causes of action set forth in the Complaint in this cause of action.

3. This Court reserves jurisdiction to proceed with the prosecution of this cause of action after a ruling by the Florida Public Service Commission has been received.

ORDERED on February 28, 2006



ELZIE S. SANDERS, CIRCUIT JUDGE

A conformed copy of the foregoing has been furnished 02/28/06 by the Court's Judicial Assistant to:

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