

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against 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 www.prepayserviceguide.com d/b/a CONQUEST for failure to pay intrastate access charges pursuant to Embarq's tariffs, by Embarq Florida, Inc., f/k/a Sprint-Florida, Incorporated.	DOCKET NO. 060455-TP ORDER NO. PSC-06-0777-FOF-TP ISSUED: September 18, 2006
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The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman  
J. TERRY DEASON  
ISILIO ARRIAGA  
MATTHEW M. CARTER II  
KATRINA J. TEW

ORDER DENYING MOTION TO DISMISS  
AND HOLDING DOCKET IN ABEYANCE

BY THE COMMISSION:

I. Case Background

On June 14, 2006, Embarq Florida, Inc., f/k/a Sprint-Florida, Incorporated (Embarq) filed its Complaint against 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 www.prepayserviceguide.com d/b/a CONQUEST (AT&T) for failure to pay intrastate access charges pursuant to Embarq's tariffs.

On February 23, 2005, the FCC issued a declaratory ruling finding that the jurisdiction of enhanced prepaid calling traffic is to be determined by the originating and terminating locations of the calling and called parties.<sup>1</sup> In its complaint, Embarq alleges that AT&T intentionally and unlawfully misrepresented to Embarq certain prepaid calling card traffic as interstate traffic through the manipulation of Percent Interstate Usage (PIU) reporting in violation of Embarq's

<sup>1</sup> See, In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services, 20 FCC Rcd 4826, rel. February 23, 2005 (Enhanced Prepaid Calling Card Order).

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Intrastate Access Tariff, state law and our rules and regulations.<sup>2</sup> Embarq contends that the PIU manipulation occurred specifically for prepaid calling card traffic. Consequently, Embarq asserts that AT&T has underpaid Embarq for intrastate access charges during the period August 2002 through April 2005.<sup>3</sup>

On July 10, 2006, AT&T filed its Motion to Dismiss Embarq's Complaint or, in the alternative, Stay the Proceeding (Motion). AT&T requests we dismiss the complaint because the relief requested by Embarq involves intertwined federal issues relative to interstate access charges, FCC tariffs, and private contracts that are being addressed in a pending federal lawsuit that Embarq has filed against AT&T in the U.S. District Court for the Western District of Missouri.<sup>4</sup> In the alternative, AT&T requests we stay this proceeding pending the U.S. District Court's decision on the Federal Complaint. Embarq filed its Response on July 17, 2006.

At the August 29, 2006 Agenda Conference, we granted AT&T's Request for Oral Argument and allowed ten minutes per party to present oral argument.

## II. Parties' Arguments

### *AT&T*

In its Motion, AT&T asserts that Embarq's federal access tariff establishes a comprehensive methodology for calculating PIU factors and provides a mechanism for resolving inter-company disagreements over PIU calculations. AT&T argues further that PIU calculations are jurisdictional separations that involve the drawing of lines between interstate communications regulated by the FCC and intrastate communications regulated by this Commission. AT&T asserts that because of the inter-relationship between interstate and intrastate reporting for PIU purposes, Congress, the FCC and the Federal-State Joint Board recognize that disputes involving PIU calculations must be decided in a uniform manner.<sup>5</sup> AT&T contends that uniformity cannot be achieved through duplicative cases initiated in different state and federal forums.

AT&T argues that the process of calculating PIU is federally-driven, and traffic allocated between the federal and state jurisdictions must equal 100%. Consequently, AT&T asserts that if we find that AT&T overpaid its interstate access charges, a corresponding refund of the excess

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<sup>2</sup> An ILEC does not have the ability to determine the jurisdiction of all IXC traffic on its network. PIU information is used to bill IXCs their appropriate charges for access services.

<sup>3</sup> Embarq asserts that it has been underpaid in excess of \$26 million, including applicable late payment penalties.

<sup>4</sup> See *Embarq Florida Inc., et al. v. AT&T Corp.*, Civil Case No. 06-0480-CV-W-RED filed on June 14, 2006 (Federal Complaint)

<sup>5</sup> Determination of Interstate and Intrastate usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 1966 (Fed. – State Jt. Bd. 1989)

interstate access payments paid by AT&T would be required. AT&T asserts that we do not have jurisdiction to order a change in the amount of interstate access charges that AT&T must pay. Therefore, AT&T contends that if this proceeding was to move forward and Embarq prevails in its claim, Embarq may receive compensation for more than 100% of the total traffic, since we do not have the jurisdiction to make a corresponding refund to AT&T for overpayment of interstate access charges. AT&T cites the risk of over recovery as a primary reason why we should defer to the federal court, which is reviewing these issues and has the authority to make adjustments to interstate as well as intrastate access charge levels.

AT&T opines that even if some of the issues in Embarq's Complaint are unique to Florida, we should stay or hold the proceeding in abeyance until the dispute is resolved by the U.S. District Court. Citing Florida case law, AT&T asserts it is well-settled that when a federal action is pending between substantially the same parties on substantially the same issues, the parallel state action should be stayed pending disposition of the federal action.<sup>6</sup> AT&T argues further that we have previously recognized that abeyance of a PIU dispute pending the outcome of a federal proceeding with substantially the same parties and issues would advance our policies of judicial economy and avoid inconsistent federal and state rulings.<sup>7</sup>

AT&T does not dispute that we have certain jurisdiction over Embarq's state tariffs; however, AT&T argues that Embarq's Complaint entails issues that far exceed provisions in a state tariff. AT&T asserts that the issues raised in Embarq's Complaint are intertwined with federal issues relative to interstate access charges and FCC tariffs, which are being addressed by the U.S. District Court. AT&T contends a stay of the proceeding would prevent the possibility of this Commission issuing a ruling that conflicts with the U.S. District Court's decisions on interstate access and federal tariffs.

AT&T asserts that resolution of Embarq's complaint will require a tribunal to review, interpret and apply the Settlement Agreement and the Operating Agreements between the parties which govern PIU calculations, PIU disputes and relief available to resolve such disputes. AT&T asserts that the Settlement Agreement is a multi-state compact that involves and will impact states other than Florida. AT&T argues further that the express terms of the Settlement agreement establish the parameters and timeframes within which Embarq's potential recovery in this proceeding may be obtained and is to be governed by and interpreted under the laws of Kansas. AT&T contends a stay of this proceeding would prevent the possibility of this Commission issuing a ruling that conflicts with the federal court's interpretation of private contracts and that are inconsistent or in conflict with federal law pursuant to Section 364.012, Florida Statutes.

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<sup>6</sup> Wade v. Clower, 94 Fla. 817, 14 So. 548 (1927); Beckford v. General Motors Corp., 919 So.2d 612 (Fla. 3d DCA 2006); Oviedo v. Ventura Music Group, 797 So.2d 634 (Fla. 3d DCA 2001); Polaris Public Income Funds v. Einhorn, 625 So.2d 128 (Fla. 3d DCA 1993)

<sup>7</sup> Order No. PSC-02-0081-PCO-TP, In re: Complaint by BellSouth Telecommunications, Inc. against Global Crossing Telecommunications, Inc. regarding practices in reporting percent interstate usage for compensation for jurisdictional access services., Docket No. 011378-TP (January 14, 2002).

Finally, AT&T asserts that because many of the same witnesses, documents and exhibits would be called on or used in both this proceeding and the federal proceeding, holding the docket in abeyance would conserve administrative and judicial resources.

*Embarq*

In its Response, Embarq asserts that AT&T does not allege that the Complaint fails to state a cause of action but rather, that this Commission lacks subject matter jurisdiction. Embarq argues that this Commission and the FCC have previously ruled in similar instances that we are in no way divested of jurisdiction when a decision related to payment of intrastate access charges would also impact the payment of interstate access charges. In support of its assertion Embarq cites In the Matter of LDDS Communications, Inc. v. United Telephone Company of Florida, 15 FCC Rcd 4950 (released March 8, 2000) where the FCC held that:

The regulatory scheme that has developed under the Act and the Commission's regulations requires that transmissions that use access service be identified as either interstate or intrastate. Once assigned to the appropriate category, charges for the transmissions are separately regulated under the dual regulatory regime prescribed by the Act. Thus, the two categories of traffic are regulated along two separate but parallel tracks by independent agencies – the FCC for interstate communications and the appropriate state commissions for intrastate communications. (15 FCC Rcd at 4951)

In further support of this contention Embarq cites *In re: Complaint by Bellsouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services*, Order No. PSC-01-2309-FOF-TP, issued November 21, 2001 in Docket No. 000475-TP, where we held that “[w]here the subject of the discrepancy being questioned is intrastate usage, it is entirely appropriate to look to the provisions of BellSouth's Florida tariff for the resolution of discrepancies in reported usage and an audited PIU.”<sup>8</sup>

Embarq argues further that AT&T's contention that a decision by this Commission may result in AT&T paying more than 100% of access charges due is specious. In its Response, Embarq clarifies that it is only asking AT&T to pay the difference between what it has already paid using a PIU counting all calling card traffic as interstate and an adjustment which utilizes the FCC's determination that jurisdiction of calling card traffic should be based on the beginning and end point of the calls. Embarq asserts that AT&T's payment of additional dollars would amount to an accounting adjustment for jurisdictional reporting purposes.

With regard to AT&T's assertion that we may be required to interpret contracts which we lack authority to enforce, Embarq argues such a claim is without merit. Embarq contends that whether or not the contracts referenced by AT&T are relevant to this dispute is a factual issue

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<sup>8</sup>We ultimately held the docket in abeyance pending the FCC resolution of a separate jurisdictional matter.

outside the four corners of the Complaint and cannot serve as the basis for dismissal. Embarq argues further that we have previously held that although we lack authority to enforce private contracts, we have recognized that we may consider and interpret such contracts when they are presented as evidence to determine the issues before it.<sup>9</sup>

In addressing AT&T's request that we hold the proceeding in abeyance, Embarq argues that although the federal case includes allegations related to Embarq's Florida tariffs, the federal case includes different parties, different issues and different bases for relief. Embarq contends further that the federal case does not include the allegations of violations of state law. Embarq asserts that we have exclusive jurisdiction to enforce the state statutes so that the allegations could not appropriately be included in the federal action.<sup>10</sup>

Embarq acknowledges that we have previously granted Motions to Stay proceedings pending the results of federal proceedings; however, Embarq asserts that these instances have been based on pending proceedings that might result in policy rulings which could overrule our decision. Embarq believes this proceeding should be differentiated since this proceeding does not involve a determination of regulatory policy because the jurisdictional issues have been resolved by the FCC in the Enhanced Prepaid Calling Card Order. Embarq contends we clearly have the jurisdiction and authority to rule on these issues.<sup>11</sup>

Embarq asserts that we should not stay the proceeding because this Commission clearly has the necessary expertise to resolve PIU disputes. Embarq argues further that if the proceeding is not held in abeyance, our resolution of this matter would likely inform the federal court's decision on the claims Embarq raised there.

Finally, Embarq asserts that if we deny AT&T's request to hold the docket in abeyance, we would be advancing the goal of ensuring full and fair competition in the telecommunications market. Embarq asserts that AT&T's "behavior" has distorted pricing in the marketplace for telecommunications services in Florida, and these distortions affect both consumers and other providers.

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<sup>9</sup> See, In re: Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay intrastate access charges pursuant to interconnection agreements and Sprint's tariffs and for alleged violations of Section 364.16(3)(a), F.S., Order No. PSC-05-1122-PCO-TP, issued November 7, 2005, in Docket No. 050581-TP at page 4 See also, In re: Request for Arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes, Order No. PSC-02-0484-FOF-TP, issued April 8, 2002, In Docket No. 001097-TP, at page 22 and In re: Request for arbitration concerning complaint of AT7T Communications of the Southern States, LLC, Teleport Communications Group, Inc. and TCG South Florida for enforcement of interconnection agreement with BellSouth Telecommunications, Inc., Order No. PSC-03-0528-FOF-TP, issued April 21, 2003 in Docket No. 020919-TP at pages 11& 15.

<sup>10</sup> In its Complaint, Embarq alleges that AT&T has violated Sections 364.02, 364.08, 364.09, 364.10, 364.336, and 350.113, Florida Statutes.

<sup>11</sup> Section 364.02(14), Florida Statutes

### III. Decision

#### *Motion to Dismiss*

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court 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." Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

As noted by Embarq in its Response, AT&T does not allege that Embarq's Complaint fails to state a cause of action for which relief can be granted. Alternatively, the basis of AT&T's Motion to Dismiss is that we lack subject matter jurisdiction to resolve the Complaint in its entirety. AT&T does not question our jurisdiction over intrastate access charges but rather our jurisdiction to interpret and apply private contracts and our lack of authority to order a refund of the excess interstate access payments paid by AT&T.

We find neither argument has merit. As noted by Embarq in its Response, this Commission has routinely held that although it may not enforce a private contract, we may consider and interpret private contracts when presented as evidence to determine the issues before it. Further, in previous dockets this Commission has appropriately recognized that when interpreting contracts we shall apply the laws of other states in accordance with the choice of law provisions of the contracts. Finally, whether the private contracts are even applicable is a factual question outside the four corners of the complaint and is not appropriate for consideration in addressing AT&T's Motion.

With regard to AT&T's contention that we lack authority to order a refund of the excess interstate access payments paid by AT&T, we agree with Embarq that this is a non-issue. If we ultimately determines that an adjustment to the amount of intrastate access charges AT&T has paid to Embarq is appropriate, we can appropriately take into consideration the amount of interstate access charges previously paid by AT&T. Consequently, no adjustment to AT&T's interstate access charges would be required and Embarq would not receive more than 100% compensation as alleged by AT&T.

For the reasons stated above, we find that AT&T has clearly failed to raise arguments sufficient to support dismissal of Embarq's complaint. Accordingly, AT&T's Motion to Dismiss is hereby denied.

*Request to Stay the Proceeding*

AT&T alternatively requests that the Commission stay the proceeding pending resolution of Embarq's Federal Complaint. Additionally, at the August 29, 2006, Agenda Conference, AT&T informed us that the federal court had ordered mandatory mediation. Consequently, AT&T proposed that we hold the docket in abeyance to allow the mandatory mediation to run its course. AT&T asserted that the mandatory mediation was on a fast track and may resolve some or possibly all of the issues between the parties.

Upon consideration, we find it reasonable and appropriate to hold the docket in abeyance for a period of sixty (60) days from the date of this vote to allow the mediation process to run its course (October 30, 2006). Additionally, to promote judicial economy, we strongly encourage the parties to allocate issues amongst the appropriate forums.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T's Motion to Dismiss is denied. It is further

ORDERED that this docket shall be held in abeyance for a period of sixty (60) days from the date of this vote (October 30, 2006). It is further


ORDERED that the parties shall file a status report with the Commission at the completion of the sixty (60) days. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 18th day of September, 2006.

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

By:

  
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Kay Flynn, Chief  
Bureau of Records

( S E A L )

AJT/KS

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.