

State of Florida



Public Service Commission

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

DATE: July 19, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Wiggins, Mann)
Division of Competitive Markets & Enforcement (Pruitt, King)

Handwritten signatures and initials: aw, jk, z, and another illegible signature.

RE: Docket No. 070249-TP - Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection With BellSouth Telecommunications, Inc., d/b/a AT&T Florida, d/b/a AT&T Southeast

AGENDA: 07/31/07 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070249.RCM.DOC

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Case Background

On April 6, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P., d/b/a Sprint PCS (Sprint) filed a Petition for Arbitration (Petition) of a single issue in its Interconnection Agreement (ICA) with BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) under Section 252(b) of the Telecommunications Act of 1996 (Act). Section 252 (b)(1) of the Act sets forth the procedures for petitioning a state commission to arbitrate “any open issues.” Section 251 provides the framework for negotiation or arbitration of ICAs.

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In its Petition Sprint stated that the single issue, a three-year extension of its ICA, involves the voluntary Merger Commitments filed with the Federal Communications Commission (FCC) that were incorporated into the FCC's approval of the AT&T Inc. and BellSouth Corporation Application for Transfer of Control. The merger closed on December 29, 2006, and on March 26, 2007, the FCC released its Order, FCC 06-189, authorizing the merger.

On May 1, 2007, AT&T filed a Motion To Dismiss and Answer (Motion to Dismiss). In its Motion to Dismiss, AT&T argued that the matter in dispute between it and Sprint was not one that arose as an issue subject to arbitration by this Commission under Section 252 and that the FCC has sole jurisdiction over the Merger Commitments.¹

On May 2, 2007, Sprint filed an unopposed request for an extension of time to file its response to the Motion to Dismiss. The request was granted. On May 15, 2007, Sprint timely filed its Response to AT&T's Motion to Dismiss (Response). Sprint opined that this Commission has concurrent jurisdiction under the Act and Section 364.162, Florida Statutes, to arbitrate the commencement date of the three-year extension.

This matter now is before the Commission solely for purpose of resolving AT&T's Motion to Dismiss.

¹ AT&T's Motion to Dismiss and Answer also pleads denials, an affirmative defense, and alternative issues to be determined by the Commission. These aspects of the pleading are not germane to the Motion to Dismiss and are not addressed in this recommendation.

Discussion of Issues

Issue 1: Should the Commission grant AT&T's Motion To Dismiss?

Recommendation: Yes. The Commission should grant AT&T's Motion to Dismiss because Sprint is requesting the Commission enforce an allegedly known right (the Merger Commitments as interpreted by Sprint) under an FCC order as opposed to arbitrating an "open" issue concerning Section 251 obligations. (WIGGINS)

Staff Analysis:

I. STANDARD OF REVIEW

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.

In its motion AT&T alleges that the Commission lacks subject matter jurisdiction to arbitrate, because the Merger Commitment at issue is not a "Section 251 Arbitration Issue." Lack of subject matter jurisdiction may be properly asserted in a motion to dismiss. See Fla. R. Civ. P. 1.140(b). Florida courts regularly review arguments concerning subject matter jurisdiction on motions to dismiss. See, e.g., Bradshaw v. Ultra-Tech Enters., Inc., 747 So. 2d 1008, 1009 (Fla. 2d DCA 1999) (affirming dismissal of complaint based on ERISA preemption of state law); Doe v. Am. Online, Inc., 718 So. 2d 385, 388 (Fla. 4th DCA 1998) (rejecting the argument that a federal preemption defense constituted an affirmative defense that should have been raised in an answer, not on a motion to dismiss); Bankers, 697 So. 2d at 160 (addressing an issue raised in defendant's motion to dismiss regarding federal preemption of plaintiff's claims).

AT&T argues that interpretation and enforcement of the Merger Commitments is within the exclusive purview of the FCC. This is a preemption argument. Staff notes that Florida courts, including the Florida Supreme Court, have held that the issue of federal preemption is a question of subject matter jurisdiction. Boca Burger, Inc. v. Richard Forum, 2005 Fla. LEXIS 1449; 30 Fla. Law Weekly S 539 (Fla. July 7, 2005); citing Jacobs Wind Elec. Co. v. Dep't of Transp., 626 So. 2d 1333, 1335 (Fla. 1993); Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc., 697 So. 2d 158, 160 (Fla. 2d DCA 1997); Fla. Auto. Dealers Indus. Benefit Trust v. Small, 592 So. 2d 1179, 1183 (Fla. 1st DCA 1992).

In sum, in ruling on the Motion to Dismiss this Commission does have jurisdiction to determine whether it has subject matter jurisdiction, and this may include a review of the Merger Commitments as established by the FCC Order.

II. ARGUMENTS

A. Sprint's Argument

Sprint's Petition identifies the issue to be arbitrated by the Commission as follows:

ISSUE 1: May AT&T Southeast effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007, pursuant to Interconnection Merger Commitment No. 4? [Petition, p. 8.]

Sprint's Response provides a useful summary of its Petition and the elements of the claim for relief.

Sprint's Petition seeks to implement an amendment to convert and extend its current month-to-month Interconnection Agreement ("ICA") with AT&T to a fixed 3-year term. The amendment arises from Sprint's acceptance of an AT&T, Inc. and BellSouth Corporation proposed "Merger Commitment" that became a "Condition" of approval by the Federal Communications Commission ("FCC") of the AT&T/BellSouth merger when the FCC authorized the merger. [Response, pp. 1, 2].

Sprint further argues that,

The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. The specific condition at issue here is that AT&T "shall permit a requesting telecommunications carrier to extend its current interconnection agreement . . . for a period of up to three years." . . . This is the offer that AT&T was required to make as a matter of law and this is the offer that was accepted by Sprint during the parties' statutory 251-252 negotiations for a new agreement. Sprint's Petition makes it clear that the single issue pertaining to the amendment is establishment of essential ICA terms related to the 3-year extension, with the specific disputed term being when the 3-year extension commences. [Response, pp. 2, 3]

B. AT&T's Argument

AT&T argues that "(t)he merger commitment is not a requirement of Section 251." [Motion to Dismiss, p. 2] Consequently, the issue raised by Sprint is "not a Section 251 Arbitration Issue." AT&T also argues that the "merger commitment" issue "was not discussed in the context of the parties' negotiations of a new interconnection agreement." AT&T states that "Sprint's attempt to frame the merger commitment as an arbitrable issue is an affront to the

plain, clear, and unambiguous language contained in the Act. Given that Sprint's Petition contains solely this one non-arbitrable issue, Sprint's issue should be dismissed."

AT&T also contends that the petition should be dismissed because the Commission allegedly has no jurisdiction to address the meaning of the Merger Commitment. According to AT&T, "(t)he FCC has the sole authority to interpret, clarify or enforce any issue involving Merger Commitments set forth in its Merger Order." [Motion to Dismiss, p. 2] AT&T adds that this approach ensures a "uniform regulatory framework" for handling post-merger issues.

III. ANALYSIS

Section 251 of the Telecommunications Act, *inter alia*, imposes upon ILECs certain duties of interconnection and resale. Section 252(a) provides for establishing interconnection agreements through negotiation. Section 252(b) provides the framework for establishing interconnection agreements through compulsory arbitration, as opposed to negotiation. Simplifying, under Section 252(b)(1) a carrier "may petition a State commission to arbitrate any *open issues*" (emphasis added) while under Section 252(c), the commission must, *inter alia*, ensure that its decisions "meet the requirements of Section 251" and regulations prescribed pursuant to that section. Thus, this Commission has jurisdiction to arbitrate any open issues properly brought before it relating to the interconnection agreements created under Section 252 to meet the duties of ILECs under Section 251.

The dispositive question placed before the Commission in the instant dispute is whether the issue Sprint seeks to arbitrate is an "open issue" arising out of the negotiations within the frameworks of Sections 251 and 252. If so, the Commission's jurisdiction under Section 252 is properly invoked; if not, the Commission's jurisdiction is not properly invoked and the petition must be dismissed.

The nature of the remedy sought in an action often reveals the nature of the issue presented and the jurisdiction invoked. In this case, the remedy sought by Sprint is the enforcement of an FCC order as Sprint interprets it. Specifically, Sprint seeks to enforce through arbitration one of the Merger Commitments. By analogy to civil suit, Sprint is like a third-party beneficiary seeking to enforce a contract between AT&T and the FCC as memorialized in the FCC's order. Thus, the nature of the remedy is an enforcement of an allegedly *known right*, not a determination of an *open issue* to comport with the requirements of Section 251. For this reason, Sprint is not seeking arbitration of an open Section 251 issue, and thus its petition should be dismissed.

Sprint's theory for treating the enforcement of the particular Merger Commitment as an arbitration of an open Section 251 issue is, at best, awkward. Sprint argues as follows:

The interconnection-related Merger Commitments must be viewed as a standing offer by AT&T which, as of December 29, 2006, became part of any new or ongoing AT&T negotiations with any carrier regarding interconnection under the Act. [Response, p. 2]

Sprint, however, offers no legal support for why the Merger Commitments “must” be viewed as a “standing offer” that automatically became inserted into Sprint’s negotiations with AT&T. As suggested above, one could see the Merger Commitments as establishing a third-party’s rights to an extension, which is different than establishing a negotiable offer under Section 251. Moreover, even if one treats the Merger Commitments as an offer, AT&T says it offered something different than Sprint accepted. This is a classic “meeting-of-the-minds” contract formation problem, which as presented is not a Section 251 issue either.

In rejecting Sprint’s attempt to arbitrate the Merger Commitments as pled, staff does not suggest that interpreting and enforcing the Merger Commitments are off limits to the Commission in all circumstances. There may be situations in which such interpretation and enforcement are inextricably intertwined with open issues being arbitrated under either Section 252 or Section 364.162, Florida Statutes, or both. In those situations it would be within the Commission’s subject matter jurisdiction to arbitrate the conflicting views. Moreover, staff also stresses that it takes no position on the merits of the competing interpretations of the particular Merger Commitment. Staff’s recommendation is simply that Sprint’s petition should be dismissed because it seeks to enforce the particular Merger Commitment as a known right, not arbitrate it as an open, Section 251 issue.

IV. CONCLUSION

For the reasons provided above, staff recommends that Sprint’s petition be dismissed for failure to state a claim for which relief may be granted by this Commission. More specifically, as pled by Sprint, the Commission does not have jurisdiction to enforce Sprint’s putative right to a certain extension under the Merger Commitments through arbitration as though it were an “open issue” within the meaning of Section 252(b) of the Telecommunications Act. Staff acknowledges that under some circumstances enforcement of an FCC order or regulations may be inextricably intertwined with determining matters normally subject to this Commission’s jurisdiction and thus permissible. Moreover staff stresses that it expresses no opinion on the merits of the competing interpretations of the particular Merger Commitment.

Docket No. 070249-TP

Date: July 19, 2007

Issue 2: Should this docket be closed?

Recommendation: Yes. Staff recommends that if the Commission approves staff's recommendation in Issue 1, this docket should be closed because the matter has been dismissed and no other issues need to be addressed by the Commission. (WIGGINS)

Staff Analysis: Staff recommends that if the Commission approves staff's recommendation in Issue 1, this docket should be closed because the matter has been dismissed and no other issues need to be addressed by the Commission.