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Sent: Tuesday, August 21, 2007 3:43 PM
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Subject: 070552-TP - AT&T Florida's Motion to Dismiss
Attachments: 070552-TP Mtn to Dismiss.pdf; Docket_070552-TP_AT&T_Florida's_Motion to Dismiss.DOC

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B. Docket No.: 070552-TP: In Re:

Petition and Complaint of MetroPCS Florida, LLC against BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast; TDS Telecom d/b/a TDS Telecom/Quincy Telephone; Windstream Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC

C. BellSouth Telecommunications, Inc. on behalf of Robert Culpepper

D. 14 pages total in PDF format (includes Letter, Certificate of Service and Pleading)
11 pages in Word Format in lieu of the disk

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss to the Complaint and Petition of MetroPCS, Florida, LLC

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DOCUMENT NUMBER - DATE
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8/21/2007



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August 21, 2007

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Docket No. 070552-TP

Petition and Complaint of MetroPCS Florida, LLC against BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast; TDS Telecom d/b/a TDS Telecom/Quincy Telephone; Windstream Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc.'s d/b/a AT&T Florida Motion to Dismiss in Response to the Petition and Complaint of MetroPCS Florida, LLC in the above-referenced docket.

A copy of the same is being provided to all parties as reflected in the attached certificate of service.

Sincerely,

Robert A. Culpepper

Enclosures

cc: All parties of record
Jerry D. Hendrix

686869

CERTIFICATE OF SERVICE
Docket No. 070552-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and First Class U.S. Mail this 21st day of August, 2007 to the following:

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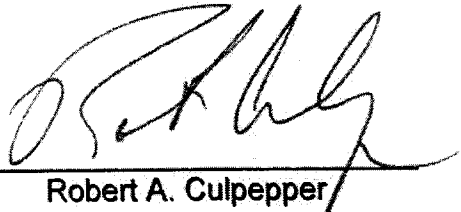
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A handwritten signature in black ink, appearing to read 'Robert A. Culpepper', written over a horizontal line.

Robert A. Culpepper

#586819

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

Petition and Complaint of MetroPCS Florida,)
LLC against BellSouth Telecommunications,)
Inc. d/b/a AT&T Florida d/b/a AT&T Southeast,)
TDS Telecom d/b/a TDS Telecom/Quincy)
Telephone; Windstream Florida, Inc.; Northeast)
Florida Telephone Company d/b/a NEFCOM;)
GTC, Inc. d/b/a GT Com; Smart City)
Telecommunications, LLC d/b/a Smart City)
Telecom; ITS Telecommunications Systems,)
Inc.; and Frontier Communications of the South,)
LLC)
_____)

Docket No. 070552-TP

Filed: August 21, 2007

AT&T FLORIDA'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") hereby files this motion to dismiss the Petition and Complaint for Expedited Proceeding or, Alternatively, Petition and Complaint or Petition for Declaratory Statement ("Petition") filed by MetroPCS Florida, LLC ("MetroPCS") on August 1, 2007. In its Petition, MetroPCS seeks an Order requiring the filing with the Florida Public Service Commission ("Commission") of the transit service (a/k/a transit traffic) agreements AT&T Florida has entered into with other named Incumbent Local Exchange Companies in Florida (collectively, the "Small LECs").¹ MetroPCS's Petition is nothing more than a negotiation ploy. Specifically, AT&T Florida and MetroPCS have been negotiating a transit rate to include in the parties' interconnection agreement ("ICA").² In the context of such negotiations, MetroPCS has requested that AT&T Florida disclose the transit traffic rates AT&T Florida has agreed to with the Small LECs.³

¹ Petition at ¶ 72.

² Petition at ¶ 26.

³ Petition at ¶ 27.

AT&T Florida has refused to do so.⁴ As such, MetroPCS filed this Petition for the sole purpose of gaining some perceived negotiation leverage that may arise out of the disclosure of such rates. As discussed below, there is no filing requirement under state or federal law that mandates the filing of the transit service agreements entered into between AT&T Florida and the Small LECs. As such, the Petition should be dismissed as a matter of law.

BACKGROUND

As the Commission is well aware, transit service is a service that allows customers of other carriers to complete calls in instances where the networks of an originating carrier and a terminating carrier are not directly interconnected. It is AT&T Florida's position that it has no obligation under § 251 of the federal Telecommunications Act of 1996 ("the Act") to provide a transit service, but is willing to do so as long as it is fairly compensated for the use of its network.⁵ Over two years ago, because AT&T Florida (then known as BellSouth) could not reach mutually acceptable transit terms with several carriers which used BellSouth as a transit traffic carrier without paying BellSouth for the use of its network, BellSouth filed a Transit Traffic Service Tariff ("Transit Tariff"). The Transit Tariff became effective on February 11, 2005, and contained a transit service rate of \$0.003 per minute of use. In the *BellSouth Transit Docket*, several parties – including MetroPCS – challenged the validity of the Transit Tariff. Following the completion of extensive discovery, a two-day evidentiary hearing, and the filing of post-hearing briefs, the Commission issued Order No. PSC-06-0776-FOF-TP on September 18, 2006 ("*BellSouth Transit Order*"). For purposes relevant here, in the *BellSouth Transit Order*, the Commission: (i) invalidated the Transit Tariff; (ii) declined to find that transit service is a §

⁴ Petition at ¶ 28.

⁵ See e.g. BellSouth Telecommunications, Inc.'s Post-Hearing Brief in consolidated Docket Nos. 050199-TP and 050125-TP ("*BellSouth Transit Docket*").

251(b) or (c) obligation; (iii) refused to establish a transit rate; and (iv) ordered the parties to negotiate mutually acceptable rates, terms and conditions for transit service.

STANDARD FOR GRANTING A MOTION TO DISMISS

The standard for reviewing a Motion to Dismiss is well known:

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.*⁶

As discussed below, MetroPCS has failed to plead a cause of action under applicable state or federal telecommunications law. Accordingly, MetroPCS’s Petition should be dismissed as a matter of law.

MetroPCS Count 1: Failure to File Transit Agreement as Required by Federal Law (Petition, at ¶¶ 39-55)

SUMMARY OF AT&T FLORIDA’S POSITION:

This Commission has repeatedly refused to find that transiting is a § 251(c)(2) obligation. Accordingly, there is no requirement under § 252 to file a transit service agreement.

MetroPCS’s federal claim is based on its erroneous assertion that AT&T Florida has an obligation under § 251(c)(2) of the Act to provide transit service. According to MetroPCS, because transit service is a form of interconnection under § 251(c)(2), AT&T Florida has an obligation under § 252 of the Act to seek Commission approval of any transit traffic agreement

⁶ Docket No. 060083-TP, Order No. PSC-06-0506-PCO-TP, issued June 14, 2006, at 2.

AT&T Florida has entered into with other carriers operating in Florida.⁷ In support of its position that transit service is a § 251(c)(2) obligation, MetroPCS relies heavily (if not exclusively) on an order issued by the Federal Communications Commission (“FCC”) in response to a petition regarding the scope of the mandatory filing requirements set forth in § 252 of the Act (“*Qwest Declaratory Ruling*”).⁸ In the *Qwest Declaratory Ruling*, the FCC held that “an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).”⁹ In so ruling, the FCC flatly rejected the notion that all agreements between an incumbent local exchange carrier (“ILEC”) and a requesting carrier must be filed:

We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. . . . Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).¹⁰

MetroPCS (and several other parties) made the exact same § 251(c)(2) argument regarding the characterization of transit service in the *BellSouth Transit Docket*.¹¹ Of course, in the *BellSouth Transit Order*, the Commission rejected such arguments and declined to find that AT&T Florida (then known as BellSouth) had an obligation under either § 251(b) or § 251(c) to provide transit service.

⁷ Petition at ¶ 45.

⁸ Memorandum Opinion and Order, *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, FCC 02-276 (rel. October 4, 2002).

⁹ *Qwest Declaratory Ruling* at ¶ 8.

¹⁰ *Qwest Declaratory Ruling* at ¶ 8, footnote 26.

¹¹ *BellSouth Transit Docket*, Post-Hearing Brief and Statement of Issues and Positions of T-Mobile USA, Inc., Sprint Nextel, and MetroPCS Florida, LLC at 24-30.

We agree that §251 contains no explicit obligation to provide transit service, but as the FCC has stated, the question is whether there is an implied obligation. Indeed, the FCC has acknowledged that this issue needs to be decided and has tied it up in the *ICF FNPRM*. (*ICF FNPRM* ¶128. [*In Re: Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulingmaking, Order No. 05-33, CC Docket No. 01-92 (rel. March 3, 2005)]. This Commission need only acknowledge in this proceeding that §251(a) requires all telecommunications carriers to interconnect directly or indirectly, and that transit service has been expressly recognized by the FCC as a means to establish indirect interconnection. (*ICF FNPRM* ¶125)¹²

Even if the above-quoted paragraph is considered a finding by the Commission that transit service is a form of an indirect interconnection under § 251(a) of the Act, the FCC has made clear that such a finding does not trigger any § 252 filing requirement.¹³

Moreover, in declining to find that transit service is a § 251(b) or (c) obligation, the Commission squarely rejected MetroPCS's argument that in the *Qwest Declaratory Ruling* the FCC necessarily determined that transit service is an ongoing obligation relating to Section 251(b) or (c) of the Act. As the Commission aptly observed:

Some parties may conclude from the *Qwest* rulings that transit service is an ongoing §251 obligation. However, if the answer were so clear, the FCC would not be seeking comment on this very issue in the *ICF FNPRM*.¹⁴

The Commission's decision in the *BellSouth Transit Order* is completely consistent with the Commission's holding in an arbitration docket regarding the characterization of transit service. Specifically, in the context of an arbitration involving NuVox, Xspedius, and AT&T

¹² *BellSouth Transit Order* at p. 44.

¹³ *Qwest Declaratory Ruling* at ¶ 8, footnote 26.

¹⁴ *BellSouth Transit Order* at p. 44.

Florida (then known as BellSouth), this Commission concluded that transit service has not been determined to be a § 251 obligation and therefore should not be priced at TELRIC.¹⁵

In sum, on at least two occasions, the Commission has declined to find that AT&T Florida has an obligation under § 251(c)(2) to provide transit service. Accordingly, the Commission should follow its well-reasoned precedent and therefore reject MetroPCS's argument that AT&T Florida has a § 252(c)(2) obligation to provide transit service.¹⁶ In doing so, the Commission would eliminate the sole basis for MetroPCS's claim that AT&T Florida has an obligation under Section 252 of the Act to file transit traffic agreements with the Commission.

MetroPCS Count 2: Failure to File Transit Agreement as Required by State Law (Petition, at ¶¶ 55-66)

SUMMARY OF AT&T FLORIDA'S POSITION:

There is no State law provision that mandates the filing of the transit service agreements AT&T Florida has entered into with the Small LECs.

Regarding its state law claim, MetroPCS asserts that AT&T Florida has an obligation to file its transit service agreements with the Small LECs pursuant to Florida Statutes 364.16 and 364.162.¹⁷ MetroPCS's assertion is incorrect. In the *BellSouth Transit Order*, the Commission found that it had "stand-alone authority under Section 364.16(1), Florida Statutes, to require

¹⁵ Order No. PSC-05-0975-FOF-TP, Docket No. 040130-TP, at p. 52 ("A TELRIC rate is inappropriate because transit service has not been determined to be a § 251 UNE. We agree with the reasoning of the FCC Wireline Competition Bureau I rendering the Virginia Arbitration Order that found no precedent to require the transiting function to be priced at TELRIC under § 251(c)(2).")

¹⁶ The Commission should disregard MetroPCS's erroneous and irrelevant assertion that in the context of its § 252 arbitration with AT&T Florida (then known as BellSouth) that AT&T Florida somehow acknowledged that transit service is "subject to the provisions of Sections 251 and 252 of the 1996 Act." Petition at ¶ 24. First, as MetroPCS concedes, MetroPCS dismissed with prejudice its § 252 arbitration petition. Petition at ¶ 25. Thus, what BellSouth stated (or did not state) in response to MetroPCS's arbitration petition is irrelevant. Moreover, in neither its § 252 arbitration petition (filed on March 2, 2005), nor in its proposed issues list (filed on April 26, 2005) did MetroPCS state (or even suggest) that BellSouth had a § 252(c)(2) obligation to provide transit service. See Docket No. 050160-TP. Thus, the assertion that BellSouth has somehow conceded that transit service is a § 251 obligation is incorrect.

¹⁷ Petition at ¶ 56 ("the Commission should now expressly order that the Transit Agreements [between AT&T and the Small LECs] be filed and approved pursuant to Sections 364.16 and 364.162.")

parties to interconnect for the purposes of transiting.”¹⁸ As an initial matter, Florida Statutes, Section 364.16(1) contains no filing requirement.

Additionally, the Commission found that “Section 364.16(2) read in conjunction with Section 364.162, Florida Statutes” gave the Commission “the authority to require carriers to interconnect directly or indirectly” upon mutually acceptable price, terms, and conditions.¹⁹ Based on such authority, the Commission ordered “BellSouth and any other parties to this proceeding who do not have a transit arrangement in place with BellSouth to establish rates, terms, and conditions for transiting.”²⁰ Notably, the Commission did not order the parties to file any transit arrangement or transit agreement. This is consistent with the Commission’s refusal to find that transiting is an obligation under §§ 252(b) or (c) of the Act.

Moreover, under the express language of Section 364.162(1), the filing requirement relied upon by MetroPCS to support its claim,²¹ only applies to agreements between a competitive local exchange telecommunications company (“CLEC”) and a local exchange telecommunications company (“LEC”). Here, the transit traffic agreements at issue are between two ILECs – AT&T Florida and the Small LECs.²² Accordingly, the filing requirement set forth in Section 364.162 does not apply to these agreements.

Furthermore, even if the filing requirement of Section 364.162 did apply to agreements between two ILECs (which AT&T Florida denies), Section 364.012, entitled “Consistency with federal law,” makes clear that the Legislature intended for the Commission to promote

¹⁸ *BellSouth Transit Order* at p. 17.

¹⁹ *Id.*

²⁰ *Id.* at 18.

²¹ Petition at ¶ 59

²² Indeed, MetroPCS alleges that AT&T Florida and the Small LECs are ILECs. Petition at ¶¶ 3-18.

“coordination with federal policy makers and regulatory agencies”²³ As stated above, there is no federal requirement to file transit traffic agreements. Accordingly, for the sake of consistency and pursuant to Section 364.012, the Commission should find that the filing requirements of Section 364.162(1) do not apply to transit service agreements between two ILECs.

Similarly, MetroPCS’s assertion that Commission precedent requires the filing of transit agreements is simply incorrect.²⁴ As an initial matter, the Commission’s most relevant precedent – the *BellSouth Transit Order* – does not require the filing of transit agreements. In any event, none of the Commission Orders cited by MetroPCS in its Petition even address transit service, much less do such Orders require the filing of transit service agreements under state law.²⁵

Finally, Metro PCS has no standing to bring this complaint. To establish standing, MetroPCS must satisfy the following two-prong test established in *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981):

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to

²³ Section 364.012(1).

²⁴ See Petition at ¶ 63.

²⁵ In ¶ 63 of its Petition, MetroPCS quotes out of context Order No. PSC-96-0668-FOF-TP. In Section V of Order No. PSC-96-0688-FOF-TP, the Commission cited Section 364.162(2) in support of its finding “that the interconnection rates, terms, and conditions set in this proceeding shall be tariffed.” Of course, in the *BellSouth Transit Order*, the Commission found that transit traffic rates, terms, and conditions should not be tariffed. As such, the Order is not applicable. The other Orders cited in ¶ 63 of MetroPCS’s Petition are likewise inapplicable. In Order No. PSC-97-0462-FOF-TP, the Commission determined whether or not BellSouth Telecommunications, Inc. had an obligation to resell its call forwarding service to Telenet of South Florida, Inc. The remaining Orders cited by MetroPCS -- Order No. PSC-02-1096-FOF-TP, Order No. PSC-03-1082-FOF-TP, and Order No. PSC-03-0048-FOF-TP – involve either petitions for arbitration under federal law (Section 252) or a request to interpret portions of an interconnection agreement approved under federal law. Given the fact that the Commission was acting under federal law (Section 252) in such cases, any reference to state law in the aforementioned Order was, at best, dicta.

protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.²⁶

Here, MetroPCS cannot establish the first prong of the *Agrico* test – injury in fact. As conceded by MetroPCS, “it is not a telecommunications carrier subject to the jurisdiction of the Commission.”²⁷ Indeed, Florida law makes it clear that the Commission has no jurisdiction over wireless telecommunications, “including commercial mobile radio service providers.”²⁸ Nevertheless, in this Complaint, MetroPCS seeks to invoke the jurisdiction of the Commission and enforce rights under Chapter 364 – rights that it does not have as a non-regulated entity. Accordingly, because Metro PCS has no rights under Sections 364.16 or 364.162, MetroPCS cannot establish that it will suffer any injury in fact as a result of the purported violation of these statutes. Further, unlike federal law, there are no adoption rights under Florida law. Accordingly, even if transit agreements were filed with the Commission under Florida law, MetroPCS would not have any right under state law to adopt another carrier’s transit agreement. As such, MetroPCS cannot establish any injury based on the fact that transit agreements are not filed with the Commission.

Likewise, MetroPCS also cannot establish the second prong of the *Agrico* test – zone of interest. Specifically, Metro PCS cannot establish that its purported injury is the type of injury that Section 364.162 is designed to protect. This is so because Section 364.162 governs how a CLEC and a LEC are to establish rates, terms, and conditions for interconnection and resale under state law. MetroPCS is neither a CLEC nor a LEC, and is not regulated by the Commission. Thus, Section 364.162 does not apply to MetroPCS; and it is therefore impossible

²⁶ *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

²⁷ See Petition at ¶ 2.

²⁸ § 364.011(4).

for MetroPCS to establish that its injury, assuming it even has one, is the type that the statute is designed to protect.

In a similar manner, MetroPCS's Petition for a Declaratory Statement should be dismissed as a matter of law. The Commission's rule regarding the purpose and use of a declaratory statement makes clear that "[a] declaratory statement is not the appropriate means for determining the conduct of another person."²⁹ Accordingly, MetroPCS cannot rely on the Commission's Declaratory Statement Rule to support its core allegation that AT&T Florida and the Small LECs engaged in some form of misconduct by failing to file transit agreements – despite the fact that the Commission did not require the filing of transit agreements in the *BellSouth Transit Order*. In any event, the petition for a declaratory statement must include, among other things: "[a] description of how the statutes, rules or orders may substantially affect the petitioners in the petitioners' particular set of circumstances."³⁰ Again, the filing of the transit agreements would not substantially affect MetroPCS' particular set of circumstances because: (i) MetroPCS is an unregulated entity that has no rights under Section 364.162; (ii) MetroPCS has no right under state law to adopt a transit agreement; and (iii) AT&T Florida has no obligation to offer MetroPCS the transit rate that AT&T Florida may have offered to another carrier.³¹

²⁹ Rule 28-105.001.

³⁰ Rule 28-105.002(5).

³¹ *BellSouth Transit Order* at 44.

CONCLUSION

As discussed above, neither state nor federal law requires the filing of transit service agreements. Accordingly, MetroPCS's Petition, which seeks the filing of such agreements, must be dismissed as a matter of law.

Respectfully submitted this 21st day of August, 2007.

James Meza BY *RAC*

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³² The undersigned is licensed in Louisiana only, is certified by the Florida Bar as Authorized House Counsel (No. 464260) per Rule 17 of the Rules Regulating the Florida Bar, and has been granted qualified representative status by the Commission in Order No. PSC-07-0211-FOF-OT.