

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against MCI Communications Services, Inc. d/b/a Verizon Business Services for failure to pay intrastate access charges pursuant to Embarq's tariffs, by Embarq Florida, Inc.

DOCKET NO. 080308-TP
ORDER NO. PSC-08-0752-PCO-TP
ISSUED: November 13, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MCI COMMUNICATIONS SERVICES, INC. d/b/a VERIZON
BUSINESS SERVICES' MOTION TO DISMISS COMPLAINT

BY THE COMMISSION:

Background

On June 6, 2008, Embarq Florida, Inc. ("Embarq") filed its complaint ("Complaint") with this Commission in which Embarq alleges that MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon") is failing to pay intrastate access charges pursuant to Embarq's tariffs.¹ Embarq asks us to do the following: 1) find that Verizon has violated the terms of Embarq's tariffs and Florida law by wrongfully designating certain intrastate interexchange traffic as interstate interexchange traffic and by failing to pay intrastate access charges due to Embarq; 2) order Verizon to pay Embarq the difference between the access charges on intrastate calls Verizon has paid and the access charges on intrastate calls Verizon is required to pay under Embarq's tariffs; and 3) order Verizon to pay Embarq late payment penalties on the difference between the access charges on intrastate calls Verizon has paid and the access charges on intrastate calls Verizon is required to pay under Embarq's tariffs.

On June 26, 2008, Verizon filed its Motion to Dismiss Complaint ("Motion"), as well as its Request for Oral Argument. Verizon alleges that Embarq's Complaint should be dismissed

¹ Access charges refer to payments made by interexchange carriers (IXCs) to local service providers for originating and terminating calls on local telephone networks. Both ILECs and CLECs charge IXCs interstate and intrastate access charges. The rates for intrastate access were designed to compensate the ILEC for the use of its local facilities while maintaining universal service.

DOCUMENT NUMBER-DATE

10562 NOV 13 08

FPSC-COMMISSION CLERK

because it would require this Commission to assert jurisdiction over VoIP services and the provider of those services, in violation of Florida Statutes that, Verizon argues, exempt all VoIP services from our jurisdiction. On July 1, 2008, Verizon filed a Supplement to its Motion (“Supplement”), to advise us that Embarq had filed a complaint in federal district court regarding intrastate access charges on VoIP traffic.

On July 8, 2008, Embarq filed its Response to Verizon’s Motion (“Response”). Embarq argues that Verizon’s Motion should be rejected because Embarq has stated a claim for which relief can be granted.

We granted and then heard oral argument on Verizon’s Motion to Dismiss at our October 28, 2008, Agenda Conference.

Analysis and Decision

Embarq’s tariffs, which carry the force and effect of law and are enforceable by the Commission,² provide a substantial difference between the rate for intrastate access charges (\$.023424 per minute-of-use) and the rate for interstate access charges (\$.006426 per minute-of-use). Embarq alleges that at some point in 2005, Verizon unilaterally decided, without any support from a change in federal or state law, that it would no longer be required to pay intrastate access tariff rates to Embarq for its VoIP intrastate traffic. Embarq’s Complaint also encompasses intrastate access charges related to non-VoIP Verizon traffic.

Verizon argues we do not have subject matter jurisdiction over the class of cases to which Embarq’s Complaint belongs and that the subject of Embarq’s Complaint is Verizon’s VoIP traffic that is terminated on Embarq’s network. Verizon’s Motion is based on the proposition that all of its VoIP traffic, whether interstate or intrastate, must be charged at the interstate rate; Verizon does not address non-VoIP intrastate traffic in its Motion. However, in oral argument, Verizon acknowledged that this Commission has jurisdiction over non-VoIP traffic and, in this context, that we would determine whether the traffic at issue is VoIP or non-VoIP.

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 complaint as facially correct, the complaint 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., Order No. PSC-95-0614-FOF-WS, Docket No. 941121, 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

² See Magdalena v. Southern Bell, 382 So.2d 1246 (Fla. 4th DCA 1980); and In re: Complaint by Mr. Paul Leon and Mr. Joseph Loadable against Florida Power and Light Company regarding tariffs for moving electric light poles, Order No. PSC-98-1385-FOF-EI, in Docket No. 981216-EI.

construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Jurisdiction of the subject matter does not mean jurisdiction of a particular case, but rather jurisdiction of the class of cases to which the particular controversy belongs. See Lusker v. Guardianship of Lusker, 434 So. 2d 951 (Fla. 2d DCA 1983). The subject matter jurisdiction of the court must be shown by the allegations of the initial pleading. See Tobin & Thomson P.A. v. Golan, 568 So. 2d 100 (Fla. 3d DCA 1990).

We have jurisdiction over intrastate access charge disputes between ILECs and IXC's, pursuant to Sections 364.163 and 364.02(14), Florida Statutes. Accordingly, we find that Embarq's Complaint, as it relates to non-VoIP traffic, states a cause of action that is within our jurisdiction to address. As such, we hereby deny Verizon's Motion to Dismiss.

We make no determination at this time with respect to Verizon's argument that this Commission lacks jurisdiction to address access charges that may be applicable to VoIP services. Our staff is hereby directed to gather additional information concerning this Commission's subject matter jurisdiction over access charges that may apply to VoIP traffic.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon's Motion to Dismiss is hereby denied. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 13th day of November, 2008.



ANN COLE
Commission Clerk

(S E A L)

CWM

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 Office of Commission Clerk, 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.