

State of Florida



## Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

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**DATE:** May 25, 2006

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Fordham, Fudge)  
Division of Competitive Markets & Enforcement (Lee, Dowds, King)

**RE:** Docket No. 060083-TP – Complaint of Northeast Florida Telephone Company d/b/a NEFCOM against Southeastern Services, Inc. for alleged failure to pay intrastate access charges pursuant to NEFCOM's tariffs, and for alleged violation of Section 364.16(3)(a), F.S.

**AGENDA:** 06/06/06 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested – Participation at the Discretion of the Commission

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Tew

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\060083.RCM.DOC

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### Case Background

Northeast Florida Telephone Company (NEFCOM) is a rural LEC providing telecommunication services in Baker County, Florida. Southeastern Services, Inc. (SSI) is a CLEC and IXC, providing services in Baker County via an interconnection agreement with NEFCOM.

On September 4, 2003, NEFCOM filed a civil suit against SSI in the Circuit Court of the Eighth Judicial Circuit for Baker County, Florida, titled Northeast Florida Telephone Company v. Southeastern Services, Inc., Case No. 02-2003-CA-0141. The suit involves a dispute over the

payment of access charges for alleged Voice over Internet Protocol (VoIP) traffic provided by SSI to its customers. The dispute resolution clause of the parties' agreement provided that disputes be resolved in the Circuit Court of Baker County.

On January 30, 2006, NEFCOM filed with this Commission its Complaint against SSI alleging failure to pay intrastate access charges pursuant to NEFCOM's tariffs, and for violation of Section 364.16(3)(a). On February 21, 2006, SSI filed its response to that Complaint, and also filed a Motion to Dismiss or, in the Alternative, to Abate said Complaint. On March 22, 2006, NEFCOM withdrew Count II of its Complaint, addressing alleged violations of Section 364.16(3)(a), and its request for assessment of penalties against SSI.

On March 27, 2006, NEFCOM filed its Amended Complaint, and on March 28, 2006, NEFCOM filed its Response to SSI's Motion to Dismiss. SSI filed no response to NEFCOM's Amended Complaint.

On February 28, 2006, the Baker County Circuit Court entered an Order referring to this Commission the question: "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." Also, the Court stayed the court action pending this Commission's findings on the referral. A docket was opened on this referral from the Circuit Court of Baker County, and assigned Docket No. 060296-TP.

### **Discussion of Issues**

**Issue 1:** Should SSI's Motion to Dismiss, or alternative request for abatement of these proceedings, be granted?

**Recommendation:** No. Staff believes that the Commission has jurisdiction to act and address all of the issues in this case, and that the Amended Complaint is legally sufficient. Accepting all allegations in the Amended Complaint as facially correct, staff recommends that the Amended Complaint does state a cause of action for which relief can be granted. Accordingly, staff recommends that the Motion to Dismiss be denied. Staff also recommends against abating the proceedings in this Docket pending the outcome of any referenced FCC proceedings. The Florida Public Service Commission is under order of the Circuit Court of Baker County in Docket No. 060296-TP to address these issues. For that reason also, this Docket may not be abated. **(Fordham, Fudge)**

### **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 this case, however, SSI also alleges that the Commission lacks subject matter jurisdiction to hear the complaint, because the traffic at issue is within the exclusive purview of the FCC. 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). 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).

## II. ARGUMENTS

### A. NEFCOM's amended Complaint

NEFCOM is a Local Exchange Telecommunications Company as defined by Section 364.02(7), Florida Statutes, providing local telecommunications services pursuant to rates, terms and conditions of service reflected in its General Subscriber Service Tariff (GSST) on file with this Commission. NEFCOM also provides exchange access services to interexchange carriers pursuant to its intrastate access charge tariffs on file with the Commission and interstate access charge tariffs approved and on file with the FCC. The rates, terms and conditions applicable to the intrastate originating access services provided by NEFCOM to interexchange carriers are set forth in BellSouth Telecommunications, Inc.'s intrastate access services tariffs, in which NEFCOM concurs.

NEFCOM alleges that at all times material hereto, SSI provided retail local exchange services in the State of Florida pursuant to an agreement with NEFCOM dated September 22, 1999, setting forth the rates, terms and conditions by which SSI would purchase local telecommunications services from NEFCOM for resale by SSI to SSI's end users. The Resale Agreement incorporates by reference Resale Guidelines issued by NEFCOM and provided to SSI.

During the same time, SSI allegedly also provided intrastate and interstate interexchange telecommunications services. NEFCOM avers that SSI utilized, but failed to purchase and pay for, NEFCOM's originating access service pursuant to NEFCOM's intrastate and interstate access tariffs. According to NEFCOM, following the execution of the Resale Agreement, SSI ordered a digital signal service known as Advanced Digital Service - Primary Rate Interface Access Service (ADS-PRI). These ADS-PRIs were ordered by SSI from NEFCOM exclusively for use in the provision of SSI's Internet Service Provider (ISP) access service. The rates, terms and conditions for the provision of ADS-PRI service are set forth in Section A19 of the GSST. NEFCOM states it provided SSI with the ADS-PRI channels at the wholesale discount rate set forth in the Resale Agreement.

According to NEFCOM, in October 2000, SSI executed a Local Service Request (LSR) form ordering another ADS-PRI from NEFCOM. Based upon the Request Form, NEFCOM understood that the additional ADS-PRI would also be used by SSI for SSI's ISP service or for SSI's own official use. NEFCOM states it provisioned the October 2000 ADS-PRI as ordered, and the 7-digit local number, 653-2111, was established for all channels associated with the ADS-PRI, with an in-service date of November 6, 2000. NEFCOM also states that SSI subsequently executed a LSR ordering two additional ADS-PRIs associated with the local 653-2111 number.

NEFCOM claims that around June 2001, it became aware that SSI was advertising in a local newspaper offering a monthly flat rated long distance plan that allowed unlimited calling throughout the 50 states and Canada. From the advertisement, it was apparent to NEFCOM that the unlimited long distance calling plan offered by SSI could be accessed by dialing the local seven digit number (653-2111) assigned by NEFCOM to the digital ADS-PRI services purchased

by SSI. Toward the end of 2001, NEFCOM claims it also became aware that SSI was claiming in material published on its website that its long distance service was being provided by using a new technology called IP telephony. According to NEFCOM, SSI's website indicated that SSI customers subscribing to SSI's flat rated long distance plan were using the local number 653-2111 to access SSI's long distance service.

NEFCOM alleges the long distance service provided by SSI consisted of the following: (a) an SSI long distance customer (who could be a Northeast Florida or SSI local customer) used an ordinary handset telephone and dialed the local PRI number, 653-2111; (b) Northeast Florida's network originated and delivered the long distance call over the PRI line purchased by SSI and transported the call to SSI's switching facility; (c) SSI's long distance customer was then prompted to dial the terminating 10-digit number; and (d) the call was then transported by Internet protocol facilities to the terminating local exchange company who would then terminate the call to the called party.

According to NEFCOM, the Resale Agreement limits SSI to the purchase of local services out of the GSST at wholesale rates for the purpose of reselling those local services to an SSI end user. The Resale Agreement does not permit SSI to purchase local services at the wholesale rate for resale as interexchange (long distance) services. NEFCOM claims the long distance services marketed by SSI and provided to SSI's customers pursuant to its flat rate long distance plan should have been ordered and provided through a tariff described in NEFCOM's FPSC Access Tariff as Feature Group A (FGA).

NEFCOM claims that, by letter dated September 12, 2002, it put SSI on notice that its flat rate, long distance calling service was subject to the FGA originating access charges set forth in NEFCOM's FPSC Access Tariff. Therefore, states NEFCOM, SSI improperly and unlawfully utilized local service ordered through Northeast Florida's GSST and the Resale Agreement to provide SSI end users with nationwide long distance calling, thereby unlawfully avoiding the payment of intrastate originating access charges due and owing under NEFCOM's FPSC Access Tariff. On October 3, 2002, NEFCOM sent a bill dated October 1, 2002, to SSI reflecting the intrastate originating access charges from Northeast Florida's FPSC Access Tariff calculated based upon the minutes of use terminated by Northeast Florida to the 653-2111 number during the month of September 2002. NEFCOM states SSI failed to pay the October 2002, bill. NEFCOM states it subsequently billed SSI the applicable FGA intrastate originating access charges for the provision of intrastate originating access service to SSI for the period of January 1, 2001, through July 31, 2003, in accordance with the rates set forth in NEFCOM's FPSC Access Tariff.

NEFCOM notes that under standard industry practice, and as set forth under Section E2.3.14 of its FPSC Access Tariff, if an interexchange carrier fails to provide "call detail" designating the number or percentage of long distance calls that are interstate versus intrastate, then it falls to NEFCOM to calculate a "percent interstate usage" (PIU) to apply to the total minutes of use. NEFCOM was not provided the call detail by SSI to determine the interstate versus intrastate jurisdiction of the traffic originated on NEFCOM's network by SSI's long distance customers. NEFCOM claims SSI also refused to cooperate and did not provide NEFCOM with a PIU of its own. Since all of SSI's long distance service was provided over

FGA facilities, NEFCOM states it was not able to develop a PIU based on traffic from SSI's customers that could be used to allocate between the interstate versus intrastate jurisdictions. NEFCOM assumed a zero PIU for the purposes of determining the jurisdiction of the traffic, thereby rendering all traffic classified as one hundred percent intrastate usage.

NEFCOM avers the amount of intrastate originating access charges billed for the FGA access was limited to the Local Switching and Carrier Common Line elements under NEFCOM's FPSC Access Tariff. These billing elements apply only to the facilities of NEFCOM that were used by SSI for the origination and delivery of the long distance calls from NEFCOM's local switch to SSI's premises. The bills did not include the transport rate element under NEFCOM's FPSC Access Tariff since SSI's purchase of the PRI line provided the transport from Northeast Florida's local switch to SSI's switching premises.

NEFCOM reports that on or about July 25, 2003, it learned that SSI had discontinued the use of the local 653-2111 number to provide long distance service to its customers. Thereafter, SSI ordered "800" originating access service from Qwest, paid Qwest for such originating access, and Qwest in turn remitted NEFCOM's tariffed originating access charges to NEFCOM.

NEFCOM claims that during the period of January 1, 2001, through July 25, 2003, it had on file with this Commission access tariffs by which it provided interexchange carriers access services and billed and received charges for such services. That tariff requires payment of intrastate originating access charges by interexchange carriers for NEFCOM's origination of interexchange traffic to SSI's end users, without regard to whether the interexchange traffic is transported by SSI or another exchange carrier and without regard to whether Internet protocol is utilized for the intermediary transport of the call between NEFCOM's switch and the terminating local exchange carrier.

According to NEFCOM, the interexchange calls originated by SSI's long distance customers at issue in this Complaint involve the use of traditional telephone handsets by the originating SSI customer and the terminating called party. The only difference between SSI's service and more traditional long distance service is that the call is transported between NEFCOM's switch and the terminating local carrier's switch by the use of Internet protocol rather than a traditional long distance network. NEFCOM claims SSI's service was used solely for voice calling and did not provide any enhanced information or data functionality to SSI's end users.

NEFCOM claims the FCC has already ruled that a long distance calling service such as that provided by SSI is subject to access charges. In In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges ("AT&T Declaratory Ruling) the FCC considered the issue of whether AT&T's Internet Protocol ("IP")-enabled long distance service was subject to interstate terminating access charges. AT&T's service was described in Paragraph 11 of the AT&T Declaratory Ruling as follows:

11. In its petition, AT&T seeks a ruling that access charges do not apply to its specific service. AT&T's specific service consists of a portion of its *interexchange voice traffic routed over AT&T'S Internet backbone*. Customers

using this service place and receive calls with the *same telephones they use for all other circuit-switched calls*. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and *AT&T pays originating interstate access charges to the calling party's LEC*. Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, *then AT&T transports the call over its Internet backbone*. *This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network*. To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. Therefore, AT&T does not pay terminating interstate access charges on these calls. (footnotes omitted; emphasis supplied).

NEFCOM notes the FCC held that AT&T's service was a "telecommunications service" as defined under 47 U.S.C. §153(43) subject to interstate access charges. Further, argues NEFCOM, the service provided by AT&T at issue in the AT&T Declaratory Ruling is substantially similar to the long distance service provided by SSI at issue in this Complaint. Both are interexchange services that: (1) use ordinary customer premises equipment with no enhanced functionality; (2) originate and terminate on the public switch telephone network; and (3) undergo no net protocol conversion and provide no enhanced functionality to end users due to the telecommunications provider's use of IP technology. Accordingly, claims NEFCOM, SSI's interexchange service, like AT&T's service in the AT&T Declaratory Ruling, is subject to access charges.

Therefore, NEFCOM claims SSI has committed a material breach of NEFCOM's FPSC Access Tariff by failing to order and pay for FGA originating access service as required by such tariffs, and as a direct and proximate cause of SSI's material breach, SSI owes NEFCOM originating intrastate access charges in the amount of \$1,025,523.43, in addition to interest and late payment penalties

B. SSI's Motion to Dismiss

A number of the points in SSI's Motion to Dismiss have been rendered moot by a.) the filing of NEFCOM's Amended Complaint, and b.) the referral of the issue by the Circuit Court of Baker County. Those moot points will be identified, but not discussed in this recommendation.

The Action is Barred in Whole or in Part Due to Service Being Jurisdictionally Interstate and Limitations in Federal Law

According to SSI, NEFCOM's Complaint addresses alleged wrongful acts that by NEFCOM's own admission in Paragraph 20 ended on or about July 25, 2003. NEFCOM's pleading makes it clear that NEFCOM was aware of the alleged acts before that time. NEFCOM's complaint was filed on January 30, 2006, more than two years after the last act that could have given rise to any liability on SSI's part. SSI claims that 47 U.S.C. §415 imposes a two year limit on actions seeking recovery of charges. It 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."

Further, argues SSI, the VoIP service provided during the period involved in this proceeding is jurisdictionally interstate. The service is an "enhanced service" under 47 C.F.R. § 64.702(a) and an "information service" under 47 U.S.C. §153(20). SSI claims there is both a change in form and a change in content, and the conversion to IP from Time Division Multiplexing (TDM) provides the foundation for and is an essential prerequisite to the offering of enhanced functionalities. Enhanced and information services are jurisdictionally interstate services. Memorandum Opinion and Order, In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, FCC 04-27, WC Docket No.03-45 (re1. Feb. 2004).

SSI argues that, regardless of the regulatory classification of SSI's VoIP service, at least some of the traffic involved communications between points within Florida and points outside of Florida. NEFCOM acknowledges the distinct possibility there is some such traffic, but claims it can assume all the traffic is intrastate based on SSI's failure to provide a jurisdictional factor. SSI claims NEFCOM was on notice long before July of 2003, of SSI's position regarding the jurisdiction of the service and that at least some of the traffic involved communications between points within Florida and points outside of Florida, regardless of the regulatory classification.

NEFCOM Has Failed to Comply with the Provisions of Rule 28-106.21, Florida Administrative Code

SSI argues that NEFCOM has attempted to base its Complaint on Rule 28-106.21, Florida Administrative Code (FAC), but that NEFCOM has not complied with the requirements of Rule 28-106.21, FAC. (Staff believes SSI intended to cite to Rule 28-106.201) According to SSI, NEFCOM has failed to comply with:

- a.) Rule 28-106.201(b), FAC, in that complainant or petitioner did not state how its substantial interests will be affected by the agency determination.
- b.) Rule 28-106.201(c), FAC, in that the Complaint does not state how the complainant or petitioner received notice of the agency decisions it claims apply.
- c.) Rule 28-106.201(d), FAC, in that the Complaint does not present a statement of all disputed issues of material fact.



d.) Rule 28-106.201(e), FAC, in that the Complaint does not provide a concise statement of the ultimate facts alleged, including the specific facts warranting reversal or modification of any proposed action.

Accordingly, claims SSI, the Complaint must be dismissed for failure to comply with the requirements of Rule 28-106.201, FAC.

The Florida Public Service Commission has no Jurisdiction Over Defendant

Separate and apart from state law, claims SSI, the VoIP services provided by SSI are (1) jurisdictionally interstate and (2) not telecommunications service but, instead, enhanced or information services. Since SSI's VoIP services are both jurisdictionally interstate and not "telecommunications service," this state commission is precluded by federal law from asserting regulatory jurisdiction over the services or the entity that provides them. "SSI the VoIP provider" is not subject to this Commission's jurisdiction.

SSI next argues that this Commission has no jurisdiction in this matter because the ICA between SSI and NEFCOM has a Venue Selection Clause providing that jurisdiction for resolving disputes between the parties shall be in the Circuit Court of Baker County. However, subsequent to the filing of the Motion to Dismiss, the Circuit Court of Baker specifically referred to this Commission the jurisdiction and a directive to resolve the issues therein. That referral was docketed as Docket No. 060296-TP. Accordingly, staff will not address the venue challenge in this recommendation.

Additionally, argues SSI, under the Resale Agreement and the FCC's rules, SSI (as a CLEC providing a resold NEFCOM local service) is not responsible for paying, collecting or remitting any access charges NEFCOM may be entitled to receive when one of its end users initiates a call or when SSI's resold service customer receives a call. SSI claims it is not the guarantor of any access charge liability. Rather, NEFCOM must collect from the "access customer" to the extent there is one. Section 8.17 of the Resale Agreement provides that "[any switched access charges associated with interexchange carrier access will be billed by, and due to, [NEFCOM]." See also 47 C.F.R. 51.605(b) and (c), 51.607, and 51.617(b). SSI argues "SSI the CLEC" is not responsible for access charges that may be due to NEFCOM as a matter of law, and under the Resale Agreement the Commission does not have jurisdiction over the dispute insofar as it pertains to a dispute arising from the Resale Agreement.

SSI claims it was not acting as an IXC for purposes of the activities and traffic in issue, and the service SSI provided was not a telecommunications service and was not rendered pursuant to SSI's IXC authority. In any event, argues SSI, (1) the service is jurisdictionally interstate and therefore exempt from state regulation; and (2) is an enhanced or information service that was not offered on a common carrier basis. "SSI the intrastate IXC regulated by the Commission" was not involved in the matters giving rise to this dispute.

The Commission Has No Jurisdiction Over This Controversy Or Subject Matter

In this section SSI again argues the ongoing litigation in the Circuit Court of Baker County, pursuant to the venue selection clause of the interconnection agreement. This argument has been rendered moot by the referral of jurisdiction from the Court to this Commission and, accordingly, will not be discussed further in this recommendation.

Commission Has No Jurisdiction To Award Damages; Asserting Jurisdiction Would Deny SSI's Right To Jury Trial

Subsequent to the filing of this Motion, NEFCOM's Amended Complaint was filed. The request for damages was deleted in the Amended Complaint, rendering this argument moot. Accordingly, staff's recommendation will contain no further discussion of this point.

Complaints By Private Parties Are Not A Lawful Vehicle For Consideration Of Administrative Penalties

Again, subsequent to the filing of this Motion, NEFCOM's Amended Complaint was filed. The request for administrative penalties was deleted in the Amended Complaint, rendering this argument moot. Accordingly, staff's recommendation will contain no further discussion of this point.

C. NEFCOM's Response

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

NEFCOM notes that, 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.

NEFCOM argues that these characterizations of SSI's service are factual assertions and legal arguments that are inappropriate in a motion to dismiss and must ultimately be resolved by the Commission through a formal administrative hearing. In addition, claims NEFCOM, SSI's statute of limitations defense 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). Accordingly, states NEFCOM, 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 So.2d 991 (Fla. 3d DCA 2004).

NEFCOM argues that its 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 US. 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).

In sum, argues NEFCOM, its Amended Complaint alleges that SSI provided interexchange, long distance calling services subject to NEFCOM's intrastate access tariffs approved by this Commission. SSI's characterization of the service at issue as an interstate service or information service to import a federal statute of limitations has no application in this proceeding. Further, argues NEFCOM, 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.

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

NEFCOM argues its Amended Complaint is not subject to Rule 28-106.201 because it 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. NEFCOM notes that in Docket No. 060038-E1, 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), FAC. 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, claims NEFCOM, 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 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, the 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 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.

Order No. PSC-06-0240-PSC-E1 issued March 28, 2006.

Accordingly, NEFCOM argues, its Amended Complaint is not subject to the pleading requirements of Rule 28-106.201, FAC.

#### The Florida Public Service Commission has Jurisdiction over SSI

NEFCOM argues that 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. NEFCOM's Amended Complaint alleges that SSI is a CLEC, as defined by Section 364.02(4), Florida Statutes, and an 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.

NEFCOM notes that 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, urges NEFCOM, 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. NEFCOM further argues that 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. According to NEFCOM, 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. NEFCOM urges that its 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.

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

As discussed earlier in this recommendation, this point has been rendered moot by Docket No. 060296-TP. Accordingly, it need not be discussed further.

### III. ANALYSIS

#### Is the Action Which is the Subject of This Docket Barred in Whole or in Part Due to Service Being Jurisdictionally Interstate and Limitations in Federal Law

Staff believes that this Commission has authority under both state and federal law to resolve the dispute before it. Whether the traffic in question is "jurisdictionally interstate" is a

question of ultimate fact to be determined through the administrative hearing process. However, for purposes of evaluating the Motion to Dismiss, the Commission must confine its consideration to the four corners of the Amended Complaint and assume those allegations to be true. Varnes v. Dawkins The Complaint alleges that some, if not all, of the traffic in question is intrastate in nature and, therefore, subject to the jurisdiction of this Commission.

With regard to SSI's statute of limitations argument, it could only be valid if SSI's allegations regarding the nature of the subject traffic were an established fact. However, the nature of the traffic is the gravamen of the proceedings in this Docket and may or may not be ultimately determined in SSI's favor. Meantime, consideration of the request for dismissal must be confined to the four corners of the Complaint. Additionally, SSI's statute of limitations defense 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). Accordingly, 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 So.2d 991 (Fla. 3d DCA 2004) Factual arguments and characterizations are inappropriate on a motion to dismiss and cannot form the basis for dismissal of NEFCOM's Amended Complaint.

#### Has NEFCOM Failed to Comply with the Provisions of Rule 28-106.21, Florida Administrative Code

Staff notes that in its introductory paragraph of its Amended Complaint NEFCOM provides: “. . . pursuant to Rules 28-106.201 and 25-22.036, Florida Administrative Code, NEFCOM hereby files this Amended Complaint against Southeastern Services, Inc.” Rule 28-106.201 deals specifically with petitions, and contains the cited criteria which SSI complains were not met by NEFCOM. Rule 25-22.036, a uniquely FPSC rule, deals specifically with complaints, and has somewhat less stringent requirements. The Complaint must contain:

1. The rule, order, or statute that has been violated;
2. The actions that constitute the violation;
3. The name and address of the person against whom the complaint is lodged;
4. The specific relief requested, including any penalty sought.

NEFCOM's Complaint does appear to meet these criteria.

Though it may constitute inartful draftsmanship by NEFCOM, staff does not believe the citing of both rules should be fatal. The correct rule was cited and its criteria met. NEFCOM's pleading was properly styled as an Amended Complaint. Accordingly, this should not be a basis for dismissal.

#### Does The Florida Public Service Commission Have Jurisdiction Over Defendant

Staff concurs with NEFCOM's position on this issue. There is no dispute that this Commission generally has jurisdiction over the Defendant, SSI, who is certificated by the Commission. SSI's argument that jurisdiction does not exist in this particular instance is not

consistent with the very nature of this Docket. Again, the reasons stated by SSI for lack of jurisdiction are the ultimate issues of fact which can only be determined through the hearing process. Staff believes SSI's factual arguments in this regard are inappropriate in a motion to dismiss. Accordingly, staff recommends there is no basis for dismissal in this issue.

Does The Commission Have Jurisdiction Over This Controversy Or Subject Matter

Commission Has No Jurisdiction To Award Damages; Asserting Jurisdiction Would Deny SSI's Right To Jury Trial

Complaints By Private Parties Are Not A Lawful Vehicle For Consideration Of Administrative Penalties

As discussed earlier in this recommendation, each of these final three issues has been rendered moot by the filing of the Amended Complaint and/or the referral of jurisdiction from the Circuit Court of Baker County. Accordingly, staff need not discuss the merits on these three issues

IV. CONCLUSION

Based on the foregoing, staff believes that the Commission has jurisdiction to act and address all of the issues in this case, and that the Amended Complaint is legally sufficient. Accepting all allegations in the Complaint as facially correct, staff recommends that the Complaint does state a cause of action for which relief can be granted. Accordingly, staff recommends that the Motion to Dismiss be denied. Staff also recommends against abating the proceedings in this Docket pending the outcome of any referenced FCC proceedings. The Florida Public Service Commission is under order of the Circuit Court of Baker County in Docket No. 060296-TP to address these issues. For that reason also, this Docket may not be abated.

Docket No. 060083-TP

Date: May 25, 2006

**Issue 2:** Should Docket No. 060296-TP be consolidated with this Docket for resolution with a single hearing?

**Recommendation:** Yes. The parties are the same in both dockets and the ultimate issues to be determined are the same. In the interest of Judicial economy and elimination of redundancy the two dockets should be consolidated. **(Fordham, Fudge)**

**Staff Analysis:** The parties are the same in both dockets and the ultimate issues to be determined are the same. In the interest of judicial economy and elimination of redundancy the two dockets should be consolidated.

Docket No. 060083-TP

Date: May 25, 2006

**Issue 3**: Should this docket be closed?

**Recommendation**: No. The docket should remain open pending resolution of the issues therein. **(Fordham, Fudge)**

**Staff Analysis**: The docket should remain open pending resolution of the issues therein.