

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telenet of South Florida, Inc. for relief under Section 252(i) of the Telecommunications Act of 1996 with respect to rates, terms and conditions for interconnection and related arrangement with BellSouth Telecommunications, Inc.

DOCKET NO. 970730-TP  
ORDER NO. PSC-98-0332-PCO-TP  
ISSUED: February 26, 1998

ORDER GRANTING MOTION TO ACCEPT AMENDED REQUEST FOR RELIEF

BACKGROUND

On November 4, 1997, Telenet of South Florida, Inc., (Telenet) filed a Motion to Accept Telenet's Amended Request for Relief. Telenet requests that the Commission grant an amendment to its original Petition for Relief under 47 U.S.C. §252(i), which it filed June 17, 1997. On November 12, 1997, BellSouth Telecommunications, Inc., (BellSouth) filed a Response and Opposition to Telenet of South Florida, Inc.'s Motion to Accept Amended Request for Relief.

Telenet proposes to substitute the following paragraph for paragraph 3 at page 8 of its Request for Relief:

3. Telenet further requests that the Commission resolve the following specific questions regarding Telenet's access to call forwarding/call transfer features under the following scenarios:

- A. May Telenet, functioning as an Alternative Local Exchange Company ("ALEC") pursuant to a written interconnection agreement with BellSouth, acquire call forwarding/call transfer from BellSouth, either on a resale or unbundled network element ("UNE") basis, and use such call forwarding/call transfer in the same manner as Telenet previously utilized it before BellSouth

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terminated call forwarding/call transfer service to Telenet on October 8, 1997?

- B. May Telenet, functioning as an ALEC pursuant to a written interconnection agreement with BellSouth, acquire call forwarding/call transfer from BellSouth, either on a resale or UNE basis, and use such call forwarding/call transfer in the same manner as Telenet previously utilized it before BellSouth terminated call forwarding/call transfer service to Telenet on October 8, 1997, combined with Telenet's resale of BellSouth's local exchange service?
- C. May Telenet, functioning as an ALEC pursuant to a written interconnection agreement with BellSouth, acquire call forwarding/call transfer from BellSouth, either on a resale or UNE basis, and use the call forwarding/call transfer functionality as one part of a transmission network operated by Telenet?
- D. May Telenet, functioning as an ALEC pursuant to a written interconnection agreement with BellSouth, acquire call forwarding/call transfer from BellSouth, either on a resale or UNE basis, and use the call forwarding/call transfer functionality as one part of a transmission network operated by Telenet, combined with Telenet's resale of BellSouth local exchange service?

#### ARGUMENT

In its Petition, Telenet asks the Commission to require BellSouth to enter into an interconnection agreement with Telenet on the basis of the AT&T Communications of the Southern States, Inc., (AT&T)-BellSouth interconnection agreement, pursuant to Section 252(i) of the Telecommunications Act of 1996 (Act). Telenet alleges that BellSouth offers only to enter into an

interconnection agreement with Telenet that contains restrictive language not contained in its agreement with AT&T, language Telenet finds objectionable. Telenet, however, now believes that its dispute with BellSouth will not be resolved in this way. Rather, in its amended Request for Relief, Telenet advances four scenarios that it claims would provide Telenet with access to BellSouth's call forwarding/call transfer service in ways consistent with Order No. PSC-97-0462-FOF-TL, issued April 23, 1997, in Docket No. 961346-TP. It argues that its dispute with BellSouth can be resolved only if the Commission determines what services it is entitled to purchase under an interconnection agreement with BellSouth.

In its opposition, BellSouth argues that Telenet's motion to amend should be denied because it does nothing more than raise again the issue the Commission decided in Order No. PSC-97-0462-FOF-TP. There, the Commission ruled that BellSouth's General Subscribers Service Tariff SA.13.9.1.A.1 was harmonious with Section 364.16(3)(a), Florida Statutes, and that therefore Telenet could not use call forwarding in a manner that would systematically avoid payment of toll charges.

#### DECISION

Rule 25-22.036(8), Florida Administrative Code, provides in pertinent part that:

The petitioner ... may amend its initial pleading after the designation of the presiding officer only upon order of the presiding officer.

See, e.g., Order No. PSC-96-1145-PCO-EG, issued September 11, 1996, in Docket No. 951536-EG, where the Prehearing Officer granted the utility's motion for leave to amend its petition, good cause having been shown.

Rule 1.190, Florida Rules of Civil Procedure, provides that:

(a) **Amendments.** A party may amend a pleading once as a matter of course at any time before a responsive pleading is served ... Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse

party. Leave of court shall be given freely when justice so requires ....

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(e) **Amendments Generally.** At any time in furtherance of justice, upon such terms as may be just, the court may permit any ... pleading ... to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

In Turner v. Trade-Mor, Inc., 252 So.2d 383, 384 (Fla.App. 4 Dist. 1971, the court explicated the considerations that control a decision to grant a motion to amend pleadings, or not, as follows:

Under rule 1.190, Florida Rules of Civil Procedure, 30 F.S.A., the amendment of pleadings is a matter within the broad, though not unbridled, discretion of the trial court. E.g., McSwiggin v. Edson, Fla.1966, 186 So.2d 13; Triax, Inc. v. City of Treasure Island, Fla.App 1968, 208 So.2d 669. However, Florida courts have long followed the policy of allowing litigants to amend pleadings freely in order that causes may be tried on their merits. Town of Coreytown v. State ex rel Ervin, Fla. 1952, 60 So.2d 482; Richards v. West, Fla.App.1959, 110 So.2d 698; Fouts v. Margules, Fla.App.1957, 98 So.2d 394.

It is likewise the rule that amendments to pleadings should not be allowed where the basic cause of action is not changed. McNayr v. Cranbrook Investments, Inc., Fla.1963, 158 So.2d 129; contra, if amendments would change the basic issue or materially vary the grounds for relief. Warfield v. Drawdy, Fla.1949, 41

So.2d 877; United States v. State,  
Fla.App.1965, 179 So.2d 890.<sup>1</sup>

Thus, the courts inform that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on their merits. Telenet's new counsel has recognized that its petition for relief under Section 252(i) of the Act, if granted, would not in all likelihood result in the relief Telenet seeks. Accordingly, Telenet has filed an amended request for relief that it believes is a more effective and efficient statement of the relief it seeks. In its amended request, Telenet argues in effect that an interconnection arrangement of some kind with BellSouth is possible that is lawful and consistent with its business plan. It advances four specific arrangements that it alleges would satisfy both criteria and asks that this Commission rule on them.

In Order No. PSC-97-0462-FOF-TP, the Commission ruled that BellSouth could lawfully impose its General Subscribers Service Tariff SA.13.9.1.A.1 on the sale of its call forwarding services to Telenet. The Commission reasoned that the tariff was consistent with Section 364.16(3)(a), Florida Statutes, in prohibiting Telenet's use of call forwarding in a way that avoids access charges. There, Telenet put in issue the validity of a BellSouth tariff provision restricting the use of call forwarding. The amended request for relief, however, is not necessarily a restatement of the issue the Commission decided above. In this docket, Telenet alleges that BellSouth will not enter into an interconnection agreement with it on the same terms and conditions in BellSouth's agreement with AT&T and therefore violates Section 252(i) of the Act. In Order No. PSC-97-0989-PCO-TP, issued August 20, 1997, in this docket, the Commission denied BellSouth's motion to dismiss Telenet's petition, stating that:

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<sup>1</sup>See also, *Windham v. Florida Dept. of Transp.*, 476 So.2d 735, 744 n.8 (Fla.App 1 Dist. 1985), where the court stated that it adheres to the rule favoring liberality in the amendment of pleadings, citing *Townsend v. Ward*, 429 So.2d 404 (Fla. 1st DCA 1983); *Optiplan, Inc. v. School Bd. of Broward Co.*, 23 Fla.L.Weekly D331, D332 (Fla. 4th Dist. 1998), citing *Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So.2d 1099, 1103 (Fla. 3d Dist. 1997), *Nesbitt, J.*, dissenting.

In its petition, Telenet makes the prima facie case that, under Section 252(i), it has requested that BellSouth make available to Telenet the AT&T agreement on the same terms and conditions, and that BellSouth has offered a version of that agreement that contains different terms and conditions. This issue differs from the one we arbitrated in favor of BellSouth in Docket No. 961346-TP; to wit, whether BellSouth could sell its call forwarding services to Telenet subject to a tariff restriction.

Telenet's amended request does not, as BellSouth contends, convert the issue to be decided here into the same issue already decided. Here, Telenet asks the Commission to decide which, if any, of the four specific arrangements advanced in its amended request would be lawful if it were to elect BellSouth's interconnection agreement with AT&T pursuant to Section 252(i) of the Act. Even without the language proposed by BellSouth that Telenet finds offensive, Paragraph 7, General Terms and Conditions, of the BellSouth-AT&T agreement directs each party to comply with applicable law in carrying out the provisions of the agreement. If the Commission were simply to rule that Telenet is entitled pursuant to Section 252(i) to an interconnection agreement with BellSouth having the same terms and conditions as the BellSouth-AT&T agreement, it would not have addressed the question whether there exists any lawful arrangement between Telenet and BellSouth concerning the use of call forwarding that would coincide with the business interests of each of them. The commercial relationship between the two would remain uncertain. Therefore, the amendment does not change Telenet's original petition except to make more clear the relief it pursues and to facilitate a Commission decision that is fully dispositive of the parties' dispute. Telenet has not abused its Rule 1.190 privilege and no prejudice would accrue to BellSouth by the amendment of the petition.

Therefore, in consideration of the above, Telenet's motion to accept its amended request for relief is granted. Accordingly, the parties shall be guided by Rule 1.140(3), Florida Rules of Civil Procedure, which provides as follows:

If the court permits ... an amended ... pleading ..., the pleading shall be served within 10 days after notice of the court's

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action. Response[] to the pleading[] ...  
shall be served within 10 days of service of  
the pleading[] ....


Based on the foregoing, it is, therefore,

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer,  
that Telenet of South Florida, Inc.'s Motion to Accept Telenet's  
Amended Request for Relief is hereby granted. It is further

ORDERED that any response to the amended pleading shall be  
filed within 10 days of service. It is further

ORDERED that this docket shall remain open.

By ORDER of Commissioner Susan F. Clark, as Prehearing  
Officer, this 26th day of February, 1998.

  
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SUSAN F. CLARK  
Commissioner and Prehearing Officer

( S E A L )

CJP



NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 Director, Division of Records and Reporting, 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.