

FLORIDA PUBLIC SERVICE COMMISSION
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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (COX) *WPC*
DIVISION OF COMMUNICATIONS (KING) *W u*

RE: DOCKET NO. 970604-TL - PETITION FOR TRANSFER OF N11 CODES
BY 311 DIRECT, INC.

AGENDA: OCTOBER 21, 1997 - REGULAR AGENDA - MOTION TO DISMISS -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\970604.RCM

CASE BACKGROUND

The Petitioner, 311 Direct, Inc. (311 Direct), is the holder of the 311 service code in the following service areas of BellSouth Telecommunications, Inc. (BellSouth): Miami, Fort Lauderdale, West Palm Beach, Boca Raton, Delray Beach, Melbourne, Orlando, and Gainesville. 311 Direct is a commercial customer of BellSouth and provides a dating service through the 311 code. 311 Direct initially obtained this N11 code through a lottery conducted pursuant to Section A39, Abbreviated Dialing, of BellSouth's General Subscriber Tariff (GSST), effective July 15, 1996 (N11 tariff). This tariff made N11 codes available for commercial use in the geographic locations BellSouth serves.

The BellSouth N11 tariff provision, Section A39.1.2.D, states that "Use of N11 Service is subject to possible recall of the code by the NANP (North American Numbering Plan) Administrator for national use." The NANP is the system of allocating and administering telephone number resources in North America. The NANP, as it pertains to the United States, is under the exclusive control and jurisdiction of the Federal Communications Commission (FCC) pursuant to the Telecommunications Act of 1996, 47 U.S.C. §251(c)(1). It should also be noted that under Section 39.1.2(d)

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of the BellSouth N11 tariff, an N11 subscriber must, prior to the provisioning of service, sign a written authorization regarding the possible recall of the N11 code by the NANP Administrator and an agreement to return the N11 code if a recall occurs.

On February 19, 1997, the FCC issued its First Report and Order and Further Notice of Proposed Rulemaking In the Matter of the Use of N11 Codes and Other Abbreviated Dialing Arrangements, FCC 97-51 in CC Docket No. 92-105 (FCC Order). The FCC Order reserved nationally the use of the N11 service code 311 for non-emergency police telephone calls. As a result of the FCC Order, 311 Direct will be forced to give up its use of the 311 service code within six months of a bona fide request for the code from a police agency in a geographical location that 311 Direct serves. Confronted with this potential situation, 311 Direct has initiated plans to use the 211 code instead of 311 in the areas that it presently serves.

311 Direct filed a petition with the Florida Public Service Commission (Commission) on May 16, 1997, containing three specific requests related to its planned transfer from the 311 code to the 211 code in its designated service areas. First, 311 Direct requests that the Commission authorize its transfer from 311 to 211 in the following geographical areas served by BellSouth: Miami, Fort Lauderdale, West Palm Beach, Boca Raton, Delray Beach, Melbourne, Orlando, and Gainesville. Second, 311 Direct requests that the Commission prevent any utilization of the 211 service code in any of the above service areas during the pendency of this petition. Finally, 311 Direct requests that the Commission find that 311 Direct shall not have to pay an additional licensing fee for its transfer to and initiation of service on the 211 code. In the alternative, 311 Direct requests that it only be required to pay the actual costs incurred by BellSouth in providing the new 211 service code to 311 Direct, rather than the full deposit fee required by BellSouth's tariff.

On July 7, 1997, National Telephone Enterprises, Inc. (NTE) filed a Motion to Dismiss the Petition for Transfer of N11 Codes filed by 311 Direct, Inc. NTE, like 311 Direct, is the provider of a dating service. 311 Direct did not file a response to NTE's Motion to Dismiss.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant NTE's Motion to Dismiss 311 Direct's Petition for Transfer of N11 Code and Other Relief?

RECOMMENDATION: Yes. 311 Direct's Petition does not state a cause of action for which the Commission can grant the relief requested. (COX)

STAFF ANALYSIS:

STANDARD OF REVIEW

The function 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 or claim. See Augustine v. Southern Bell & Telegraph Co. 91 So.2d 320 (FL 1956). In other words, the issue is whether the pleadings (the petition) state a claim upon which the Commission can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Elve v. Jeffords 106 So.2d 229 (1 D.C.A. 1958). The Commission must take all material factual allegations of the petition as true. See Varnes v. Dawkins, 625 So.2d 349, 350 (1 D.C.A. 1993). The moving party must specify the grounds for the motion to dismiss. The Commission must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews 122 So.2d 571 (2 D.C.A. 1960).

COMMISSION AUTHORITY

It should be noted initially that the Commission has limited regulatory authority over non-basic services provided by price-regulated local exchange companies (LECs), in this case, N11 service provided by BellSouth. Chapter 364.051(6)(b), Florida Statutes, states in pertinent part:

(b) The Commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of non-basic services with revenue from

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basic services, and ensuring that all providers are treated fairly in the telecommunications market.

The Commission's ability to act on this petition is limited by the constraints of this statutory provision.

ANALYSIS OF PETITION

311 Direct's petition contains three separate requests. In its Motion to Dismiss addressing 311 Direct's requests, NTE states that Sprint-Florida, Inc. (Sprint) has assigned NTE the 211 code for the Orlando/Winter Park geographic area subject to the terms and conditions of Sprint's N11 service tariff. Likewise, BellSouth has assigned NTE the 211 code for the Orlando geographic area pursuant to BellSouth's N11 service tariff. NTE argues that 311 Direct has failed to show grounds upon which the Commission may grant the relief 311 Direct requests in the specified geographic areas under the terms and conditions of BellSouth's and Sprint's N11 tariffs, the Commission's rules, or other applicable law.

1. TRANSFER FROM 311 TO 211

311 Direct requests that the Commission authorize its transfer from 311 to 211 in Miami, Fort Lauderdale, West Palm Beach, Boca Raton, Delray Beach, Melbourne, Orlando, and Gainesville. NTE moves to dismiss this request on the grounds that NTE has subscribed to the 211 service, as a first in time applicant, in the Orlando geographic area under valid tariffs and thus the Commission has no basis to grant the relief requested. NTE alleges that it was the first in time to apply for the 211 code in the Orlando BellSouth territory and that it fully complied with all of the terms and conditions of BellSouth's N11 tariff. On April 7, 1997, NTE forwarded to BellSouth's designated representative, Coopers & Lybrand L.L.P., an application for the 211 code in Orlando, including the required \$16,500 deposit. NTE's Motion to Dismiss only addresses the Orlando geographic area and not the other areas in which 311 Direct requests transfers to 211.

Staff recommends that the Commission grant the Motion to Dismiss with regard to the transfer request. 311 Direct acknowledges in its petition that BellSouth notified it that a valid application existed for the 211 code in its Orlando territory at the time of 311 Direct's request for that N11 service code. 311

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Direct does not claim to have filed a competing application at any time. 311 Direct alleges no legitimate basis for the Commission to require BellSouth to transfer 311 Direct from 311 to 211 in the Orlando geographic area. 311 Direct simply claims that fairness requires the Commission to authorize this transfer and that NTE has no real plans to utilize the 211 code. 311 Direct's petition fails to allege a single fact that would substantiate either of these "justifications" for the Commission to authorize a transfer. Furthermore, no Commission authorization is necessary for the transfer in the undisputed geographic locations under the BellSouth tariff and Commission regulations. Accordingly, 311 Direct has failed to allege sufficient grounds associated with its transfer from 311 to 211 for which the Commission could grant relief.

2. PROHIBITION OF SERVICE ON 211

311 Direct requests that no one be permitted to offer service on the 211 code in the Orlando BellSouth territory until the Commission has resolved the dispute over the code for this geographic location. NTE asserts that the BellSouth tariff controls the provision of N11 service in the specified geographic area under these circumstances, and there is no action for the Commission to take.

Staff agrees with NTE. 311 Direct has failed to allege facts that warrant Commission relief for the transfer, and likewise has failed to provide any justification for requiring BellSouth to prevent use of the 211 code in its Orlando service territory. BellSouth's N11 tariff controls the N11 code transfer process. So long as BellSouth complies with its N11 tariff, the Commission should not take any action regarding the N11 code transfer. 311 Direct has failed to allege any facts that show BellSouth has not complied with its N11 tariff. Accordingly, staff recommends that the Commission grant the Motion to Dismiss with regard to this request.

3. WAIVER OR REDUCTION OF 211 SERVICE INITIATION DEPOSIT

311 Direct requests that the Commission waive any service initiation deposit associated with its transfer from 311 to 211, or in the alternative, order that BellSouth may require a deposit of

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no more than its cost of transferring 311 Direct to the new code. NTE moves to dismiss this request on the ground that the requested relief, a waiver or reduction in the deposit, would constitute a violation of the non-discrimination principle and would constitute unfair competition to the detriment of NTE. NTE also moves to dismiss this request to the extent it would contravene the BellSouth tariff for the specified geographic area.

Staff recommends that the Commission grant the Motion to Dismiss with regard to this third and final request. Under Section 364.051(6)(a), Florida Statutes, BellSouth can charge no more and no less than its tariffed rate for the N11 service. Further, the Commission cannot require BellSouth to provide a non-basic telecommunication service, such as N11 service, at a rate below its cost of providing the service. See Section 364.051(6)(c), Florida Statutes. Thus, Section 364.051, Florida Statutes, would effectively prohibit the Commission from granting a waiver of the initiation deposit fee. It should also be noted that BellSouth has filed a tariff amendment to its N11 tariff to allow some flexibility with regard to the initiation fee.

Most importantly, 311 Direct alleges no facts that would warrant the Commission ordering a waiver or reduction of the deposit, the relief requested. 311 Direct simply states that the Commission should grant relief "out of an abundance of fairness." There is not a single fact alleged supporting this statement or otherwise demonstrating a failure on BellSouth's part to comply with its N11 tariff regarding the initiation fee. Therefore, staff recommends that the Commission grant the Motion to Dismiss with regard to this request.

CONCLUSION

In summary, staff recommends that the Commission should grant NTE's Motion to Dismiss. It is clear that BellSouth's N11 tariff controls the N11 code application and transfer processes. Notably, 311 Direct admits that it was notified that a valid application existed for the 211 code in its Orlando territory at the time of its request for that N11 service code. Since that time, 311 Direct has failed to file a competing application for the vacant code, as required by the BellSouth N11 tariff. With regard to the undisputed geographic locations, no Commission authorization is required for 311 Direct's transfer from 311 to 211 under the BellSouth N11

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tariff. 311 Direct offers no valid justification for the Commission requiring BellSouth to prevent use of the 211 code for its Orlando service territory. Finally, 311 Direct has not alleged any facts that would warrant the Commission granting a waiver or reduction of the service initiation deposit associated with its move to 211. Assuming all of 311 Direct's allegations are true, and considering them in the light most favorable to 311 Direct, 311 Direct has failed to allege sufficient facts upon which the Commission can grant the relief requested.

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ISSUE 2: Should this docket be closed?

STAFF RECOMMENDATION: Yes, this docket should be closed upon the Commission's approval of staff's recommendation in Issue 1 and the issuance of the Commission's order. (COX)

STAFF ANALYSIS: This docket should be closed upon the Commission's approval of staff's recommendation in Issue 1 and the issuance of the Commission's order. There are no further matters for the Commission to address in this docket upon the dismissal of 311 Direct's petition.