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Public Service Commission

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COMMISSION
CLERK

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

DATE: August 17, 2006

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

FROM: Office of the General Counsel (Teitzman, Scott) *KS*
Division of Competitive Markets & Enforcement (Pruitt) *PK*

RE: Docket No. 060455-TP – Complaint against AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a www.prepayserviceguide.com d/b/a CONQUEST for failure to pay intrastate access charges pursuant to Embarq's tariffs, by Embarq Florida, Inc., f/k/a Sprint-Florida, Incorporated.

AGENDA: 08/29/06 – Regular Agenda – Decision on Motion to Dismiss or Stay the Proceeding– Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Tew

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060455.RCM.DOC

Case Background

On June 14, 2006, Embarq Florida, Inc., f/k/a Sprint-Florida, Incorporated (Embarq) filed its Complaint against AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a www.prepayserviceguide.com d/b/a CONQUEST (AT&T) for failure to pay intrastate access charges pursuant to Embarq's tariffs.

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On February 23, 2005, the FCC issued a declaratory ruling finding that the jurisdiction of enhanced prepaid calling traffic is to be determined by the originating and terminating locations of the calling and called parties.¹ In its complaint, Embarq alleges that AT&T intentionally and unlawfully misrepresented to Embarq certain prepaid calling card traffic as interstate traffic through the manipulation of Percent Interstate Usage (PIU) reporting in violation of Embarq's Intrastate Access Tariff, state law and the rules and regulations of the Florida Public Service Commission.² Embarq contends that the PIU manipulation occurred specifically for prepaid calling card traffic. Consequently, Embarq asserts that AT&T has underpaid Embarq for intrastate access charges during the period August 2002 through April 2005.³

On July 10, 2006, AT&T filed its Motion to Dismiss Embarq's Complaint or, in the alternative, Stay the Proceeding (Motion). AT&T requests the Commission dismiss the complaint because the relief requested by Embarq involves intertwined federal issues relative to interstate access charges, FCC tariffs, and private contracts that are being addressed in a pending federal lawsuit that Embarq has filed against AT&T in the U.S. District Court for the Western District of Missouri.⁴ In the alternative, AT&T requests the Commission stay this proceeding pending the U.S. District Court's decision on the Federal Complaint. Embarq filed its Response on July 17, 2006.

¹ See, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, 20 FCC Rcd 4826, rel. February 23, 2005 (Enhanced Prepaid Calling Card Order).

² An ILEC does not have the ability to determine the jurisdiction of all IXC traffic on its network. PIU information is used to bill IXCs their appropriate charges for access services.

³ Embarq asserts that it has been underpaid in excess of \$26 million, including applicable late payment penalties.

⁴ See *Embarq Florida Inc., et al. v. AT&T Corp.*, Civil Case No. 06-0480-CV-W-RED filed on June 14, 2006 (Federal Complaint)

Discussion of Issues

ISSUE 1: Should AT&T's request for oral argument be granted?

RECOMMENDATION: Yes. Staff recommends that AT&T's request for oral argument be granted. If the Commission grants oral argument, staff recommends that each party be allowed ten minutes to present oral argument. (TEITZMAN)

STAFF ANALYSIS: In its Motion for Oral Argument, AT&T requests that it be granted the opportunity to present oral argument on the Motion to Dismiss in this case. In support of its request, AT&T asserts that oral argument will help the Commission achieve a full and complete understanding of the intertwined federal and state issues discussed in the Motion to Dismiss.

Staff believes that it would be beneficial for the Commission to hear from the parties regarding AT&T's Motion to Dismiss and the response thereto. Further, it appears to staff that this case raises an important issue regarding the Commission's jurisdiction. Thus, staff recommends that the Commission hear oral arguments from the parties. If the Commission grants oral argument, staff recommends that each party be allowed ten minutes to present oral argument.

Issue 2: Should the Commission grant AT&T's Motion to Dismiss or, in the alternative, Stay the Proceeding?

Recommendation: No. The Commission should deny AT&T's Motion to Dismiss or, in the alternative, Stay the Proceeding because the Motion fails to raise arguments sufficient to support dismissal of the Complaint and pursuant to Florida Statutes, the Commission is charged with enforcing the statutes raised in Embarq's complaint. **(TEITZMAN, SCOTT)**

Parties' Arguments

AT&T

In its Motion, AT&T asserts that Embarq's federal access tariff establishes a comprehensive methodology for calculating PIU factors and provides a mechanism for resolving inter-company disagreements over PIU calculations. AT&T argues further that PIU calculations are jurisdictional separations that involve the drawing of lines between interstate communications regulated by the FCC and intrastate communications regulated by the Commission. AT&T asserts that because of the inter-relationship between interstate and intrastate reporting for PIU purposes, Congress, the FCC and the Federal-State Joint Board recognize that disputes involving PIU calculations must be decided in a uniform manner.⁵ AT&T contends that uniformity cannot be achieved through duplicative cases initiated in different state and federal forums.

AT&T argues that the process of calculating PIU is federally-driven, and traffic allocated between the federal and state jurisdictions must equal 100%. Consequently, AT&T asserts that if the Commission finds that AT&T overpaid its interstate access charges, a corresponding refund of the excess interstate access payments paid by AT&T would be required. AT&T asserts the Commission does not have jurisdiction to order a change in the amount of interstate access charges that AT&T must pay. Therefore, AT&T contends that if this proceeding was to move forward and Embarq prevails in its claim, Embarq may receive compensation for more than 100% of the total traffic, since the Commission does not have the jurisdiction to make a corresponding refund to AT&T for overpayment of interstate access charges. AT&T cites the risk of over recovery as a primary reason why the Commission should defer to the federal court, which is reviewing these issues and has the authority to make adjustments to interstate as well as intrastate access charge levels.

AT&T opines that even if some of the issues in Embarq's Complaint are unique to Florida, the Commission should stay or hold the proceeding in abeyance until the dispute is resolved by the U.S. District Court. Citing Florida case law, AT&T asserts it is well-settled that when a federal action is pending between substantially the same parties on substantially the same issues, the parallel state action should be stayed pending disposition of the federal action.⁶

⁵ *Determination of Interstate and Intrastate usage of Feature Group A and Feature Group B Access Service*, 4 FCC Rcd 1966 (Fed. – State Jt. Bd. 1989)

⁶ *Wade v. Clower*, 94 Fla. 817, 14 So. 548 (1927); *Beckford v. General Motors Corp.*, 919 So.2d 612 (Fla. 3d DCA 2006); *Oviedo v. Ventura Music Group*, 797 So.2d 634 (Fla. 3d DCA 2001); *Polaris Public Income Funds v. Einhorn*, 625 So.2d 128 (Fla. 3d DCA 1993)

AT&T argues further that the Commission has previously recognized that abeyance of a PIU dispute pending the outcome of a federal proceeding with substantially the same parties and issues would advance the Commission's policies of judicial economy and avoid inconsistent federal and state rulings.⁷

AT&T does not dispute that the Commission has certain jurisdiction over Embarq's state tariffs; however, AT&T argues that Embarq's Complaint entails issues that far exceed provisions in a state tariff. AT&T asserts that the issues raised in Embarq's Complaint are intertwined with federal issues relative to interstate access charges and FCC tariffs, which are being addressed by the U.S. District Court. AT&T contends a stay of the proceeding would prevent the possibility of the Commission issuing a ruling that conflicts with the U.S. District Court's decisions on interstate access and federal tariffs.

AT&T argues further that resolution of Embarq's complaint will require a tribunal to review, interpret and apply the Settlement Agreement and the Operating Agreements between the parties which govern PIU calculations, PIU disputes and relief available to resolve such disputes. AT&T asserts that the Settlement Agreement is a multi-state compact that involves and will impact states other than Florida. AT&T argues further that the express terms of the Settlement agreement establish the parameters and timeframes within which Embarq's potential recovery in this proceeding may be obtained and is to be governed by and interpreted under the laws of Kansas. AT&T contends a stay of this proceeding would prevent the possibility of the Commission issuing a ruling that conflicts with the federal court's interpretation of private contracts, and prevent the Commission from actions that are inconsistent or in conflict with federal law pursuant to Section 364.012, Florida Statutes.

Finally, AT&T asserts that because many of the same witnesses, documents and exhibits would be called on or used in both this proceeding and the federal proceeding, holding the docket in abeyance would conserve administrative and judicial resources.

Embarq

In its Response, Embarq asserts that AT&T does not allege that the Complaint fails to state a cause of action but rather, that the Commission lacks subject matter jurisdiction. Embarq argues that the Commission and the FCC have previously ruled in similar instances that the Commission is in no way divested of jurisdiction when a decision related to payment of intrastate access charges would also impact the payment of interstate access charges. In support of its assertion Embarq cites In the Matter of LDDS Communications, Inc. v. United Telephone Company of Florida, 15 FCC Rcd 4950 (released March 8, 2000) where the FCC held that:

The regulatory scheme that has developed under the Act and the Commission's regulations requires that transmissions that use access service be identified as either interstate or intrastate. Once assigned to the appropriate category, charges

⁷ Order No. PSC-02-0081-PCO-TP, *In re: Complaint by BellSouth Telecommunications, Inc. against Global Crossing Telecommunications, Inc. regarding practices in reporting percent interstate usage for compensation for jurisdictional access services.*, Docket No. 011378-TP (January 14, 2002).

Date: August 17, 2006

for the transmissions are separately regulated under the dual regulatory regime prescribed by the Act. Thus, the two categories of traffic are regulated along two separate but parallel tracks by independent agencies – the FCC for interstate communications and the appropriate state commissions for intrastate communications. (15 FCC Rcd at 4951)

In further support of this contention Embarq cites *In re: Complaint by BellSouth Telecommunications, Inc. against Thrifty Call, Inc. regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services*, Order No. PSC-01-2309-FOF-TP, issued November 21, 2001 in Docket No. 000475-TP, where the Commission held that “[w]here the subject of the discrepancy being questioned is intrastate usage, it is entirely appropriate to look to the provisions of BellSouth’s Florida tariff for the resolution of discrepancies in reported usage and an audited PIU.”⁸

Embarq argues further that AT&T’s contention that a Commission decision may result in AT&T paying more than 100% of access charges due is specious. In its Response, Embarq clarifies that it is only asking AT&T to pay the difference between what it has already paid using a PIU counting all calling card traffic as interstate and an adjustment which utilizes the FCC’s determination that jurisdiction of calling card traffic should be based on the beginning and end point of the calls. Embarq asserts that AT&T’s payment of additional dollars would amount to an accounting adjustment for jurisdictional reporting purposes.

With regard to AT&T’s assertion that the Commission may be required to interpret contracts which it lacks authority to enforce, Embarq argues such a claim is without merit. Embarq contends that whether or not the contracts referenced by AT&T are relevant to this dispute is a factual issue outside the four corners of the Complaint and cannot serve as the basis for dismissal. Embarq argues further that the Commission has previously held that although it lacks authority to enforce private contracts, it has recognized it may consider and interpret such contracts when they are presented as evidence to determine the issues before it.⁹

In addressing AT&T’s request that the Commission hold the proceeding in abeyance, Embarq argues that although the federal case includes allegations related to Embarq’s Florida tariffs, the federal case includes different parties, different issues and different bases for relief. Embarq contends further that the federal case does not include the allegations of violations of

⁸ The Commission ultimately held the docket in abeyance pending the FCC resolution of a separate jurisdictional matter.

⁹ See, *In re: Complaint of KMC Telecom III LLC and KMC Telecom V, Inc. against Sprint-Florida, Incorporated and Sprint Communications Company Limited Partnership for alleged failure to pay intrastate access charges pursuant to interconnection agreements and Sprint’s tariffs and for alleged violations of Section 364.16(3)(a), F.S.*, Order No. PSC-05-1122-PCO-TP, issued November 7, 2005, in Docket No. 050581-TP at page 4. See also, *In re: Request for Arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes*, Order No. PSC-02-0484-FOF-TP, issued April 8, 2002, in Docket No. 001097-TP, at page 22 and *In re: Request for arbitration concerning complaint of AT7T Communications of the Southern States, LLC, Teleport Communications Group, Inc. and TCG South Florida for enforcement of interconnection agreement with BellSouth Telecommunications, Inc.*, Order No. PSC-03-0528-FOF-TP, issued April 21, 2003 in Docket No. 020919-TP at pages 11& 15.

state law. Embarq asserts that the Commission has exclusive jurisdiction to enforce the state statutes so that the allegations could not appropriately be included in the federal action.¹⁰

Embarq acknowledges that the Commission has previously granted Motions to Stay proceedings pending the results of federal proceedings; however, Embarq asserts that these instances have been based on pending proceedings that might result in policy rulings which could overrule the decision of the Commission. Embarq believes this proceeding should be differentiated since this proceeding does not involve a determination of regulatory policy because the jurisdictional issues have been resolved by the FCC in the Enhanced Prepaid Calling Card Order. Embarq contends the Commission clearly has the jurisdiction and authority to rule on these issues.¹¹

Embarq asserts the Commission should not stay the proceeding because the Commission clearly has the necessary expertise to resolve PIU disputes. Embarq argues further that if the proceeding is not held in abeyance, Commission resolution of this matter would likely inform the federal court's decision on the claims Embarq raised there.

Finally, Embarq asserts that if the Commission denies AT&T's request to hold the docket in abeyance, the Commission would be advancing the goal of ensuring full and fair competition in the telecommunications market. Embarq asserts that AT&T's "behavior" has distorted pricing in the marketplace for telecommunications services in Florida, and these distortions affect both consumers and other providers.

Staff Analysis:

Motion to Dismiss

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. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

As noted by Embarq in its Response, AT&T does not allege that Embarq's Complaint fails to state a cause of action for which relief can be granted. Alternatively, the basis of

¹⁰ In its Complaint, Embarq alleges that AT&T has violated Sections 364.02, 364.08, 364.09, 364.10, 364.336, and 350.113, Florida Statutes.

¹¹ Section 364.02(14), Florida Statutes

AT&T's Motion to Dismiss is that the Commission lacks subject matter jurisdiction to resolve the Complaint in its entirety. AT&T does not question the Commission's jurisdiction over intrastate access charges but rather the Commission's jurisdiction to interpret and apply private contracts and the Commission's lack of authority to order a refund of the excess interstate access payments paid by AT&T.

Staff believes neither argument has merit. As noted by Embarq in its Response, the Commission has routinely held that although it may not enforce a private contract, the Commission may consider and interpret private contracts when presented as evidence to determine the issues before it. Further, staff notes that in previous dockets the Commission has appropriately recognized that when interpreting contracts the Commission shall apply the laws of other states in accordance with the choice of law provisions of the contracts. Finally, staff believes that whether the private contracts are even applicable is a factual question outside the four corners of the complaint and is not appropriate for consideration in addressing AT&T's Motion.

With regard to AT&T's contention that the Commission lacks authority to order a refund of the excess interstate access payments paid by AT&T, staff agrees with Embarq that this is a non-issue. If the Commission ultimately determines that an adjustment to the amount of intrastate access charges AT&T has paid to Embarq is appropriate, staff agrees with Embarq that the Commission can appropriately take into consideration the amount of interstate access charges previously paid by AT&T. Consequently, no adjustment to AT&T's interstate access charges would be required and Embarq would not receive more than 100% compensation as alleged by AT&T.

For the reasons stated above, staff believes that AT&T has clearly failed to raise arguments sufficient to support dismissal of Embarq's complaint.

Request to Stay the Proceeding

If the Commission denies AT&T's Motion to Dismiss, AT&T alternatively requests that the Commission stay the proceeding pending resolution of Embarq's Federal Complaint. Staff acknowledges that the Commission has held dockets in abeyance when a similar or identical proceeding is pending before the FCC or a federal court. However, although a similar proceeding is currently before a federal court, staff does not believe holding the docket in abeyance is necessary or appropriate in this instance.

As noted by Embarq in its Response, the Commission has found it appropriate to hold dockets in abeyance pending the resolution of regulatory policy matters that may alter or overrule the decision of the Commission. In the instant case, the FCC has already issued a decision delineating the appropriate method for determining jurisdiction of calls made using enhanced prepaid calling cards. Embarq's Complaint only requests the Commission determine the appropriate amount of intrastate access charges AT&T should have paid using the FCC's methodology.

Staff acknowledges that there might be certain efficiencies gained by holding the docket in abeyance. It is inevitable that there will be overlap between the Federal Complaint and the Complaint before the Commission, i.e., scheduling of witnesses and discovery responses. However, Order No. PSC-06-0651-PCO-TP, issued August 3, 2006, granting a temporary abeyance of discovery in this docket, encourages the parties to work together to develop a discovery agreement to minimize unnecessary delays and regulatory costs. If the Commission denies the Motion, staff will work with the parties to develop discovery procedures that minimize any potential overlap.

Furthermore, Embarq's Complaint asserts violations of specific Florida Statutes, that the Commission is charged with enforcing, which are not raised in the Federal Complaint. Staff believes the Commission is uniquely situated to address the specific allegations raised by Embarq in its Complaint. Staff further believes that meeting the Commission's obligation to enforce these statutes is paramount to any gains in efficiency that may be realized by holding the docket in abeyance. Accordingly, staff recommends the Commission deny AT&T's request to hold the docket in abeyance pending resolution of Embarq's Federal Complaint.

In conclusion, staff recommends the Commission deny AT&T's Motion. Staff believes the Motion fails to raise arguments sufficient to support dismissal of the Complaint and, pursuant to Florida Statutes, the Commission is charged with enforcing the statutes raised in Embarq's complaint.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 2, this docket should remain open and be set for hearing. (TEITZMAN, SCOTT)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this docket should remain open and be set for hearing.