

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of FLORIDA PAY)	DOCKET NO. 910590-TL
TELEPHONE ASSOCIATION, INC. against)	
SOUTHERN BELL TELEPHONE AND TELEGRAPH)	ORDER NO. 25743
COMPANY for expedited relief to cease)	
payment of commissions on monopoly)	ISSUED: 2/17/92
revenues)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 SUSAN F. CLARK
 J. TERRY DEASON
 BETTY EASLEY

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

On May 10, 1991, the Florida Pay Telephone Association, Inc. (FPTA) filed a Complaint Against Southern Bell Telephone and Telegraph Company (Southern Bell) for Expedited Relief to Cease Payment of Commissions on Monopoly Telephone Revenues (Complaint). On June 7, 1991, Southern Bell filed a Motion to Dismiss FPTA's Complaint (Motion to Dismiss). By Order No. 25150, issued October 1, 1991, we denied Southern Bell's Motion to Dismiss and directed Southern Bell to file its answer to FPTA's Complaint within ten days.

On October 11, 1991, Southern Bell filed its Answer, Affirmative Defense, and Counterclaim to FPTA's Complaint (Counterclaim). On November 12, 1991, FPTA filed a Motion to Dismiss Southern Bell's Counterclaim (Motion to Dismiss). On November 20, 1991, Southern Bell filed its Memorandum in Opposition to FPTA's Motion to Dismiss (Memorandum).

The issue before us at this time is the status of FPTA's Motion to Dismiss. As grounds for its Motion to Dismiss, FPTA asserts that Southern Bell's Counterclaim fails to state a cause of action upon which relief can be granted by this Commission. Pursuant to Rule 25-22.037(2)(a), Florida Administrative Code, service of a motion to dismiss tolls the time for filing an answer to a counterclaim. Therefore, until a ruling is entered on FPTA's Motion to Dismiss, an answer to Southern Bell's Counterclaim is not required. If we grant FPTA's Motion to Dismiss, then no answer to the Counterclaim will be necessary.

DOCUMENT NUMBER-DATE

01638 FEB 17 1992

FPSC-RECORDS/REPORTING

ORDER NO. 25743
DOCKET NO. 910590-TL
PAGE 2

The essence of Southern Bell's Counterclaim is that FPTA members receive certain sources of revenue that are unavailable to Southern Bell and that FPTA members then pay commission payments to location providers from these revenue sources. This, Southern Bell asserts, is contrary to Section 364.01(3)(d), Florida Statutes, which provides that:

The Commission shall ensure that all providers of telecommunications services are treated fairly by preventing anti-competitive behavior and eliminating unnecessary regulatory restraint.

Southern Bell essentially argues that FPTA members are "doing the same thing" as Southern Bell, so that if Southern Bell's conduct potentially violates this statutory provision, then so would FPTA's.

FPTA's Motion to Dismiss sets forth three grounds for dismissing the Counterclaim: 1) the legal basis cited by Southern Bell is insufficient; 2) the factual basis cited by Southern Bell is insufficient; and 3) the Counterclaim is internally inconsistent. In its Memorandum, Southern Bell asks that we deny FPTA's Motion to Dismiss or, in the alternative, that Southern Bell be granted leave to amend its Counterclaim.

FPTA has demonstrated that the Counterclaim, viewed in the light most favorable to Southern Bell, fails to set forth any claim cognizable by this Commission. Southern Bell bases its Counterclaim solely on Section 364.01(3)(d), which only imposes a duty on the Commission, not on Southern Bell or FPTA. Although this Section could conceivably provide support for an independent cause of action based upon anti-competitive conduct, Southern Bell has not alleged such conduct. Rather, Southern Bell has attempted to file a "mirror image" of FPTA's Complaint. This attempt has failed because of important distinctions between these entities. Southern Bell has not alleged anti-competitive conduct by FPTA members on these facts because such an allegation would be unsupportable. Revenues received by FPTA members (and other nonLEC PATS providers) that are not available to Southern Bell do not constitute "monopoly revenues" in the same sense as revenues received only by Southern Bell could constitute "monopoly revenues." Southern Bell, as a certificated local exchange company (LEC), does have certain monopolies in place. This includes sources of revenue not available to any other entity (except other

ORDER NO. 25743
DOCKET NO. 910590-TL
PAGE 3

LECs in their respective geographic territories). The reverse is simply not true for nonLEC PATS providers.

For the above reasons, we find that Southern Bell's Counterclaim is both legally and factually insufficient and shall be dismissed. Southern Bell shall not be granted leave to amend, as an amendment would not cure the insufficiency of the Counterclaim. It is not necessary to reach FPTA's third basis for dismissal (internal inconsistency) as the legal and factual grounds are dispositive.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by the Florida Pay Telephone Association, Inc. on November 12, 1991, is hereby granted. It is further

ORDERED that the Counterclaim filed by Southern Bell Telephone and Telegraph Company on October 11, 1991, is hereby dismissed without leave to amend. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 17th day of FEBRUARY, 1992.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

ABG

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

ORDER NO. 25743
DOCKET NO. 910590-TL
PAGE 4

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.