

ARTER & HADDEN

ATTORNEYS AT LAW

founded 1843

ORIGINAL  
FILE COPY

Cleveland  
Dallas  
Washington, D.C.

One Columbus  
10 West Broad Street, Suite 2100  
Columbus, Ohio 43215-3422

Irvine  
Los Angeles  
San Francisco

614/221-3155 telephone  
614/221-0479 facsimile

Direct Dial: (614) 229-3278  
Internet Address: WAdams@arterhadden.com

August 1, 1997

VIA FEDERAL EXPRESS

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

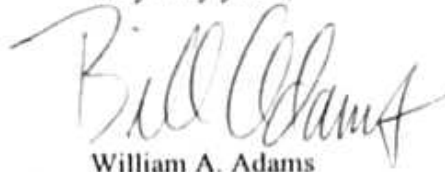
Re: Docket No. **970788-TP**; *Wireless One Network's Memorandum  
Contra Sprint-Florida's Motion to Dismiss*

Dear Ms. Bayo:

Please find enclosed for filing the original and fifteen copies of Wireless One Network's Memorandum Contra Sprint-Florida's Motion to Dismiss. Also enclosed, pursuant to Rule 25-22.028, Florida Administrative Code, is a double-sided, high-density diskette containing the memorandum. The memorandum was formatted as WordPerfect for Windows documents under the Windows 95 operating system.

Enclosed are an additional three copies of Wireless One Network's Memorandum Contra Sprint-Florida's Motion to Dismiss. Please date stamp and return these three copies in the enclosed self-addressed envelope.

Very truly yours,

  
William A. Adams

cc: James A. Dwyer  
Frank Heaton  
Charles J. Rehwinkel, Esq.  
Beth Culpepper, Esq.

DOCUMENT NUMBER - DATE

07851 AUG-4 97

FPSC-RECORDS/REPORTING

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint and/or Petition for Arbitration )  
Against Sprint-Florida, Incorporated by Wireless )  
One Network, L.P. d/b/a Cellular One of Southwest )  
Florida, Pursuant to Section 252 of the Telecommun- )  
ications Act of 1996 and Request for Expedited )  
Hearing Pursuant to Section 364.058, F.S. )

Docket No. 970788-TP

**WIRELESS ONE NETWORK'S MEMORANDUM CONTRA  
SPRINT-FLORIDA'S MOTION TO DISMISS**

**I. Introduction**

This is a case about an incumbent local exchange company, respondent Sprint-Florida, Incorporated ("Sprint"), that negotiated and implemented an interconnection agreement with one Commercial Mobile Radio Service ("CMRS") provider, Palmer Wireless, Inc. ("Palmer"), and then went to unlawful lengths to deny other CMRS providers, including Wireless One Network, L.P. ("Wireless One"), the terms of that agreement. As alleged in Wireless One's complaint, Sprint's conduct violated the specific provisions of the Telecommunications Act of 1996 that required it to submit ALL of its interconnection agreements to the Florida Public Service Commission ("FPSC") for approval (47 U.S.C. § 252(e)) and, indeed, violated the overall intent of the Act that all telecommunications carriers, including CMRS providers, be provided interconnection on a nondiscriminatory basis.

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FPSC-RECORDS/REPORTING

Sprint's failure to timely file the Palmer interconnection agreement with the FPSC<sup>1</sup> in turn prevented the FPSC from timely approving the agreement and making it available to other CMRS providers, as required by 47 U.S.C. § 252(h). Sprint's delay prevented Wireless One from adopting the agreement under 47 U.S.C. § 252(i) and has resulted in Wireless One's overpayment to Sprint of approximately \$30,000 per month.

It is rather remarkable that Sprint now seeks dismissal of this action on the basis that the FPSC has not yet approved the Palmer interconnection agreement when Sprint's unlawful conduct is responsible for the delay. Indeed, to support this basis for dismissal, Sprint mischaracterizes this action only as a formal arbitration proceeding under which Wireless One seeks only to adopt the Palmer agreement. Sprint has ignored that Wireless One has invoked the FPSC's complaint jurisdiction to require Sprint to comply with the terms of the Telecommunications Act and to provide redress for Sprint's unlawful conduct.<sup>2</sup>

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<sup>1</sup> Wireless One recognizes that Sprint filed the Palmer interconnection agreement with the FPSC on May 20, 1997, which moots Wireless One's request that the FPSC compel Sprint to file the agreement in this proceeding. Sprint made the filing only after its nonfeasance was reported to the FPSC staff, which directed that the agreement be filed. The untimely filing of the Palmer agreement on May 20, 1997, well after its March 1, 1997 effective date, does not alter Wireless One's complaint that Sprint's failure to timely submit the agreement prevented the FPSC from approving it and Wireless One from adopting its terms, which resulted in an overpayment to Sprint of approximately \$30,000 a month.

<sup>2</sup> Specifically, Sprint bases its motion to dismiss on the following grounds:

1. The complaint and/or petition actually is a formal petition for arbitration only. As a formal arbitration petition, the action is premature because it was filed prior to the arbitration window established in 47 U.S.C. § 252(b)(1).
2. This action is premature because a telecommunications carrier cannot opt into an interconnection agreement under 47 U.S.C. § 252(i) that the FPSC has not yet approved.

## II. *Argument*

### A. *The Complaint/Petition Is Not Premature Under 47 U.S.C. § 252(b)*

Sprint bases its motion to dismiss upon the false premise that the scope of this action is limited to a formal petition for arbitration. It is on this basis that it reasons that the petition is premature because the arbitration window has not yet opened.<sup>3</sup> Wireless One clearly explained the following in its memorandum supporting its Complaint and/or Petition:

Wireless One has styled this action as a complaint and/or petition for arbitration due to lack of guidance in the Telecommunications Act and the FPSC's rules as to the appropriate mechanism for a third party to obtain the terms and conditions of an existing interconnection agreement. Indeed, in its order implementing the Act, the Federal Communications Commission urged state commissions to establish an expedited process for the adoption of such agreements outside of the confines of the negotiation and arbitration procedures set forth in 47 U.S.C. § 252. See *In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996), ¶ 1321. Accordingly, Wireless One seeks to invoke the FPSC's complaint jurisdiction over Sprint, on an expedited basis pursuant to Fl. St. § 364.058. In addition, Wireless One has included the information required in a petition for arbitration under 47 U.S.C. 252(b)(2)(A) should the FPSC choose to treat this matter consistent with the procedure for arbitration.

See Wireless One's Memorandum in Support, fn1.

Wireless One filed this action as a complaint proceeding under § 25-22.036, Fla. Admin. Code, and, because of the lack of guidelines by the FCC and the FPSC, presented

<sup>3</sup> Sprint incorrectly assumes that the arbitration window is calculated from the date of receipt of Wireless One's letter of April 9, 1997, which requested additional negotiations with Sprint. However, Wireless One first requested negotiations by letter of August 2, 1996. Sprint's continued negotiations through and past the arbitration window established upon its receipt of this letter has operated to stay the closure of the formal arbitration window, as has its delay in filing the Palmer interconnection agreement. Thus, Sprint's argument that this action is premature fares no better under its erroneous presumption that the request for arbitration is based on the April 9, 1997 letter.

the FPSC with the information required by the FCC's arbitration guidelines (see 47 U.S.C. § 252(b)(2)(A)) should the FPSC process the complaint consistent with the arbitration procedure in 47 U.S.C. §§ 252(c) and (d). Neither the complaint statute nor the Telecommunications Act of 1996 requires that a telecommunications carrier wait until the arbitration window opens before seeking redress of an incumbent LEC's unlawful conduct in failing to timely file an interconnection agreement and to make it available to other carriers on a nondiscriminatory basis. Indeed, the FPSC has recognized that a § 25-22.036, Fla. Admin. Code, complaint lies for enforcing the provisions of Telecommunications Act of 1996. See *In Re: Petition by KMC Telecom Inc. for Relief in Accordance with Section 252(i) of the Telecommunications Act of 1996, with Respect to Refusal by Sprint-Florida, Incorporated to Make Available One Term in a Previously Approved Interconnection Agreement*, Docket No. 970496-TP (Order No. PSC-97-0722-PCO-TP, Issued June 19, 1997). Moreover, the United States Court of Appeals for the Eight Circuit recently recognized the state commission's complaint jurisdiction to enforce the provisions of 47 U.S.C. §§ 251 and 252, when it expressly rejected the FCC's jurisdictional claims under its own complaint statute, 47 U.S.C. § 208. See *Iowa Utilities Board, et al., v. Federal Communications Commission*, \_\_\_ F.3d \_\_\_, 1997 WL 40401, at 11-13 (8th Cir., July 18, 1997).

Simply put, the formal arbitration window plays no part in this proceeding. The FPSC has jurisdiction to process this action under its complaint statute and, in determining whether Wireless One is entitled, *inter alia*, to the Palmer agreement, may consider the arbitration standards of 47 U.S.C. § 252(b) and (c).

***B. It is Immaterial that the FPSC Has Yet to Approve the Palmer Agreement.***

As its second ground for dismissal, Sprint asserts that the FPSC first must approve the Palmer interconnection agreement for this matter to be ripe for adjudication. Of course, had Sprint timely submitted the Palmer agreement to the Commission as required by 47 U.S.C. § 252(e), the FPSC already would have made its ruling and this issue would be moot. The FPSC should not permit Sprint to use the nonfeasance which is the basis of this complaint to its own benefit, and to delay further Wireless One's right to opt into the Palmer agreement.

Indeed, it is because of the already lengthy delay in submitting the Palmer agreement to the FPSC that Wireless One requested that this complaint be expedited and that the FPSC approve the Palmer agreement within the context of this proceeding. Sprint cites no law that would prevent the FPSC from doing so.

Regardless, and as a practical matter, the Palmer agreement must be approved or rejected by August 18, 1997 or it will be deemed approved pursuant to 47 U.S.C. § 252(e)(4). Because that date may precede the ruling on this motion and certainly precede the resolution of this case, Sprint's argument on this point will become moot and the FPSC will be able to make the merit determination of whether the Palmer agreement should be made available to Wireless One.

***C. The Complaint Alleges Facts Which, if Established, Would Entitle Wireless One to Relief.***

In order to sustain a motion to dismiss, the moving party must show that the complaint fails to state a cause of action for which relief may be granted. The allegations in the complaint must be taken as true and considered in the light most favorable to the

petitioner. See, e.g., *In Re: Petition for Arbitration of Dispute with BellSouth Telecommunications, Inc., Regarding Call Forwarding, by Telenet of South Florida, Inc.*, Docket No. 961346-TP, Order No. PSC-97-0072-FOF-TP; 1997 WL 40927 (January 23, 1997); *Ralph v. City of Daytona Beach*, 471 So.2d 1, 2 (Fla. 1983).

Wireless One's complaint is cognizable under § 25-22.036, Fla. Admin. Code, which provides:

A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction<sup>4</sup> which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or Commission rule or order.

Wireless One's complaint alleges that Sprint failed to timely submit the Palmer interconnection agreement to the FPSC as required under 47 U.S.C. § 252(e) and that this unlawful conduct prevented the FPSC from timely approving the agreement and Wireless One from adopting it pursuant to 47 U.S.C. §§ 252 (h) and (i). Sprint's unlawful conduct affected Wireless One's substantial interest by depriving it of the agreement commencing on March 1, 1997, and resulted in an overpayment to Sprint of approximately \$30,000 per month. Sprint's duty to comply with the provisions of 47 U.S.C. § 252 is enforceable by the FPSC (See *Iowa Utilities Board, supra*), and the facts alleged, if proven, would permit the FPSC to provide Wireless One the relief it seeks:

1. a determination that Sprint's conduct violated 252(c) and 252(i);
2. application of the Palmer agreement to Wireless One pursuant to 252(i);
3. a refund in the amount of overpayment that Sprint's unlawful conduct has caused, pursuant to § 25-4.114, Florida Admin. Code; and

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<sup>4</sup> Sprint does not contest that it is subject to the FPSC's jurisdiction.

4. other relief determined by the FPSC, which would include sanctions against Sprint for its unlawful conduct.

Wherefore, Wireless One requests that Sprint's motion to dismiss this action be denied.

Respectfully submitted,



William A. Adams

Dane Stinson

Laura A. Hauser (Florida Reg. No.0782114)

ARTER & HADDEN

10 West Broad Street

Suite 2100

Columbus, Ohio 43215

614/221-3155 (phone)

614/221-0479 (facsimile)

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra Sprint's Motion to Dismiss was served upon the following parties by ordinary U.S. Mail, postage prepaid, on this 1st day of August, 1997.



William A. Adams

Charles J. Rehwinkel, Esq.  
General Attorney  
Sprint Florida, Incorporated  
1313 Blair Stone Road  
MC FLTLHO0107  
Tallahassee, Florida 32301

Beth Culpepper, Esq.  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

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