

FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

AUGUST 6, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CULPEPPER) *AC NCB*
DIVISION OF COMMUNICATIONS (NORTON) *jm* *W*

RE: DOCKET NO. ~~970788~~-TP - COMPLAINT AND/OR PETITION FOR
ARBITRATION BY WIRELESS ONE NETWORK, L.P., D/B/A CELLULAR
ONE OF SOUTHWEST FLORIDA PURSUANT TO SECTION 252 OF THE
TELECOMMUNICATIONS ACT OF 1996 AND THE REQUEST FOR
EXPEDITED HEARING PURSUANT TO SECTION 364.058, F.S.

AGENDA: AUGUST 18, 1997 - REGULAR AGENDA - MOTION TO DISMISS -
PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\970788.RCM

Case Background

On June 27, 1997, Wireless One Network, L. P., d/b/a Cellular One of Southwest Florida (Wireless One), a Commercial Mobile Radio Service (CMRS) provider, filed a Complaint and/or Petition for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 and Request for Expedited Hearing Pursuant to FL. St. Section 364.058 (Petition) against Sprint Florida, Incorporated (Sprint).

In its Petition, Wireless One asks that the Commission order Sprint to make the terms and conditions of Sprint's interim agreement with Palmer Wireless, Inc. (Palmer) available to Wireless One. Wireless One also asks that the Commission find Sprint in

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violation of Sections 252(e), (h), and 252(i) of the Telecommunications Act of 1996 (the Act), and order Sprint to refund the difference between the rates that Wireless One is paying now under Sprint's tariff and the rates available under the Palmer agreement. In its Memorandum of Law in support of its petition, Wireless One acknowledges that its petition and the issues addressed therein are somewhat novel but states that it has styled it in this manner based on lack of guidance from the Act and from Commission rules. Wireless One also asserts in its Memorandum that while it wants the terms and conditions of the Sprint/Palmer agreement, arbitration of its issues with Sprint would lead to the results it seeks.

On July 22, 1997, Sprint timely filed its Motion to Dismiss and/or Answer to Wireless One's Petition. In its response, Sprint asks that the Commission dismiss Wireless One's petition for arbitration/complaint because it is premature and because the relief requested is based upon the availability of the Sprint/Palmer agreement, which was filed but not yet approved by the Commission.

On August 4, 1997, Wireless One responded to Sprint's Motion to Dismiss. At its August 5, 1997, Agenda Conference, the Commission approved the Sprint/Palmer interim agreement in Docket No. 970166-TP.

This recommendation addresses Sprint's Motion to Dismiss Wireless One's Complaint and/or Petition.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Sprint-Florida, Incorporated's Motion to Dismiss the Complaint and/or Petition of Wireless One Network, L.P.?

RECOMMENDATION: Yes. The Commission should grant Sprint's Motion to Dismiss Wireless One's Petition. Even when viewed in the light most favorable to the petitioner, Wireless One's Petition does not state a cause of action upon which relief can be granted at this time.

STAFF ANALYSIS: Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for

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relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief.

Wireless One's Petition should be viewed in the light most favorable to Wireless One, in order to determine whether Wireless One's claim is cognizable under the provisions of Section 252 of the Act. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action."

Wireless One's Petition

In its Petition, Wireless One asserts that by letter dated August 2, 1996, Wireless One requested interconnection negotiations with Sprint pursuant to Section 252 of the Telecommunications Act of 1996 (the Act). Wireless One also asserts that it monitored Commission dockets to determine whether Sprint had entered into interconnection agreements with other CMRS providers. As of January 31, 1997, Sprint had not filed any interconnection agreements with other CMRS providers. Wireless One asserts that it then requested, and Sprint provided, a Draft Master Network Interconnection and Resale Agreement (Draft Agreement) for Wireless One's review. The Draft Agreement was, however, intended for use in agreements with alternative local exchange providers (ALECs).

Wireless One states that on April 9, 1997, it informed Sprint that the Draft Agreement would not suffice. Sprint then provided Wireless One with a Draft CMRS Interconnection Agreement (CMRS Agreement). Sprint also informed Wireless One that it could get copies of other CMRS agreements from the Commission.

Wireless One further asserts that, at the time Sprint provided Wireless One with the Draft Agreement, Sprint was involved in ongoing negotiations with Palmer. Wireless One states that on February 11, 1997, Sprint executed an interim interconnection agreement with Palmer. Wireless One claims that Sprint did not inform Wireless One of its agreement with Palmer. Wireless One asserts that the Palmer/Sprint agreement became effective March 1, 1997, and contained rates that are approximately \$30,000 per month less than what Wireless One currently pays Sprint for CMRS interconnection under Sprint's tariff.

Wireless One next asserts that Sprint provided it with a copy

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of the Palmer/Sprint agreement on April 21, 1997. Sprint had not, however, submitted the agreement for Commission approval. On May 9, 1997, Wireless One requested the material terms of the interim Palmer interconnection agreement. Wireless One asserts that Sprint refused Wireless One's request by letter dated May 16, 1997. Wireless One states that it renewed its request for the material terms of the Sprint/Palmer agreement on June 6, 1997. Again, Sprint refused.

Wireless One then filed its Petition on June 27, 1997. Therein, Wireless One seeks the following:

1. that the matter be set for an expedited hearing;
2. that the Commission find that Sprint's failure to submit the interim Palmer agreement for approval violated Section 252(e) of the Act;
3. that the Commission order Sprint to submit the interim Sprint/Palmer agreement for approval;
4. that the Commission approve the Sprint/Palmer interconnection agreement in this proceeding;
5. that the Commission find that the terms and conditions of the interim Sprint/Palmer agreement are available to Wireless One effective March 1, 1997;
6. that the Commission find that Sprint's failure to provide Wireless One with the same terms and conditions of the interim Sprint/Palmer agreement violated Section 252(i) of the Act;
7. that the Commission order Sprint to refund, with interest, the difference between the rates it has paid Sprint since March 1, 1997, and the amount Wireless One would have paid Sprint during the period if Sprint had

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made the interim Sprint/Palmer agreement available to Wireless One; and

8. that the Commission order any additional or alternative relief as may be appropriate.

Sprint's Motion to Dismiss

On July 22, 1997, Sprint timely filed its Motion to Dismiss and/or Answer to Wireless One's Petition. In its response, Sprint asks that the Commission dismiss Wireless One's action for arbitration/complaint because it is premature and because the relief requested is based on the availability of the Palmer agreement, which was filed but not yet approved by the Commission.

Sprint argues that Wireless One's Petition states that negotiations began on April 9, 1997. As such, Sprint argues that the 135 day time period set by the Act for negotiation prior to arbitration will not end until August 23, 1997. Sprint, therefore, argues that Wireless One's request is premature. Citing Iowa Utilities Board v. FCC, 1997 WL 403401 at 10 (8th Cir.), Sprint states that the Petition should, therefore, be dismissed.

Furthermore, Sprint argues that even examining Wireless One's Petition in the light most favorable to Wireless One, the facts disclose that the petition is premature. Pursuant to Section 252(i) of the Act

A local exchange carrier shall make available any interconnection, service, or network element provided under an Agreement approved under this section to which it is a party to any other telecommunications carrier upon the same terms and conditions as those provided in the Agreement.

[Emphasis added by Sprint]

Sprint states that while the Palmer interim agreement has been filed with the Commission, the Commission has not yet approved the agreement. Sprint further notes that the Commission might have decided not to approve the agreement. Sprint, therefore, argues that Wireless One's petition is premature because the Palmer interim agreement was not yet approved. Thus, the action should be

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dismissed.

Wireless One's Response to the Motion

In its response, Wireless One argues that its Complaint/Petition is not premature under 47 U.S.C. § 252(b). Wireless One argues that it clearly explained in its petition that it only styled the petition as a complaint and/or petition for arbitration because of the lack of clear guidelines on how Wireless One should seek redress for its particular grievance. Wireless One states that the Act does not require a carrier to wait until the arbitration window opens before it may complain to the Commission about the incumbent LEC's unlawful conduct. Citing Order No. PSC-97-0722-PCO-TP, issued in Docket No. 970496-TP, Wireless One further asserts that the Commission has already recognized that a Rule 25-22.036, Florida Administrative Code, complaint is an appropriate means of enforcing the provisions of the Act. Wireless One notes that the Eighth Circuit has also recognized the state commissions' jurisdiction to enforce the Act's provisions. See Iowa Utilities Board, et al., v. Federal Communications Commission, 1997 WL 40401, at 11-13 (8th Cir., July 18, 1997).

Wireless One also argues that it is immaterial that the Palmer agreement has not yet been approved by the Commission. Wireless One argues that had Sprint filed the Palmer agreement for approval in a timely manner, the Commission would have already ruled upon the agreement.

In addition, Wireless One argues that it has a complaint against Sprint that is cognizable under Rule 25-22.036, Florida Administrative Code. Thus, Wireless One seeks a determination that Sprint's conduct violated Sections 252(e) and 252(i) of the Act, application of the Palmer agreement to Wireless One, and a refund of the amount Wireless One has paid to Sprint in excess of what Wireless One would have paid under the Sprint/Palmer agreement.

STAFF'S CONCLUSION

After reviewing Wireless One's Petition in the light most favorable to the petitioner, staff believes that the Petition and/or Complaint is premature because it seeks relief under the Act based upon an agreement that had not been approved at the time of the filing of the complaint.

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A. Wireless One's Complaint is Premature

Section 252(i) clearly requires that an agreement must be approved under Section 252 by the State commission before a local exchange company (LEC) is required to make the terms and conditions available to other carriers. If prior approval of agreements was not required, Commission denial of a particular original agreement would render any other carriers' adoption of that agreement unenforceable.

Although the Sprint/Palmer interim agreement was filed May 20, 1997, the agreement had not been approved as of the date of Wireless One's June 27, 1997, Petition. Wireless One has, therefore, failed to state a cause of action upon which the Commission may grant relief. Thus, Sprint's motion should be granted.

B. Sprint has not violated Section 252(e) of the Act

In concluding that Wireless One's Petition is premature under Section 252(i), staff believes it is appropriate to also briefly address Wireless One's assertion that Sprint violated Section 252(e) by not informing Wireless One of the Sprint/Palmer agreement and by not filing the agreement earlier. Section 252(e)(1) states

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

While the Act clearly requires that negotiated agreements be filed for approval by the Commission, it does not state that such agreements must be filed by a date certain following execution of the agreement. FCC Order 96-325 is also silent on the subject.

As stated above, the Sprint/Palmer interim agreement was filed on May 20, 1997. While the agreement was signed by Palmer on February 14, 1997, according to Sprint's response, Palmer did not notify Sprint that it had executed the agreement until March 17,

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1997. Until that date, Sprint asserts that it was not aware that its offer had been accepted. Sprint further alleges that once it knew that the agreement had been executed, it was unsure of whether it had to file the interim agreement for Commission approval. Sprint asserts that it did not file the Sprint/Palmer agreement sooner based upon a good faith belief that the interim agreement would be converted to a permanent agreement within a very short time. Staff does not condone Sprint's lack of action in not filing its interim agreement for Commission approval sooner. Nevertheless, staff does not believe that Sprint has violated Section 252(e) for the reasons set forth above. Staff notes that it is currently investigating this issue in an effort to find ways to prevent future misunderstandings and delays of this sort.

C. Untimely request for arbitration

In addition, if the Petition is viewed as a request for arbitration, staff believes that the Petition is untimely. Of the numerous letters transmitted from Wireless One to Sprint, two letters could be considered letters requesting negotiation of an interconnection agreement under Section 252 of the Act. Under Section 252(b), a party may only petition the Commission to arbitrate unresolved issues during the period from the 135th day to the 160th day following a request for negotiation under the Act. The first letter that could be considered a request for negotiation is the letter dated August 2, 1996. Using that date as the start date, the 135th day falls on December 15, 1996, and the 160th day falls on January 9, 1997. In this circumstance, the request for arbitration is late. The second letter was dated April 9, 1997. Using that date as the date of the request for negotiations, the 135th day falls on August 22, 1997. In this circumstance, the request is premature. In both circumstances, the petition is untimely.

D. Retroactive active application of agreements and resulting refunds not contemplated by the Act

Furthermore, regarding Wireless One's request for refund of the difference between the rates Wireless One has been paying since March 1, 1997, under Sprint's tariff and those rates set forth in the Sprint/Palmer interim agreement, staff believes that the relief requested is not contemplated under the Act for two reasons. First, since the Palmer agreement had not been approved as of the date of Wireless One's petition, the rates set forth in the Palmer

agreement were not yet available to Wireless One. Therefore, Wireless One should not be able seek a refund based on rates that were not yet available to it. Second, staff does not believe that Commission approval of an agreement under the Act was intended to require LECs to make the rates, terms, and conditions of negotiated agreements available to other carriers retroactively. If such were the case, any carrier could seek a refund based on rates set forth in any agreement that had an effective date prior to the date of Commission approval. In addition, staff notes that a great many of the negotiated interconnection and resale agreements already approved by the Commission had effective dates prior to the date the agreements were presented for Commission approval. A determination that, upon Commission approval, any company may obtain an agreement under 252(i) retroactive to the effective date of that agreement would, staff envisions, initiate a huge number of requests for refunds. After careful review of the Act, staff believes that the Act requires that the effective date of a negotiated agreement, for purposes of availability to other carriers under Section 252 (i), is the date of Commission approval of the agreement.

E. Effect of Commission approval of Sprint/Palmer Agreement

Staff also notes that in Wireless One's response to Sprint's Motion to Dismiss, Wireless One suggests that because the Commission will have ruled upon the Sprint/Palmer agreement before Sprint's Motion to Dismiss is considered, Sprint's argument that Wireless One must await Commission approval of the Sprint/Palmer agreement will be mooted. Then, in its statement of relief in its response to the Motion to Dismiss, Wireless One requests application of the Sprint/Palmer agreement to Wireless One. Staff, however, does not believe that Wireless One requested application of the Sprint/Palmer agreement to Wireless One in Wireless One's Petition. In its Petition, Wireless One only requests that the Commission ". . . rule that the terms and conditions of the interim Palmer interconnection agreement are available to Wireless One effective March 1, 1997, pursuant to 47 U.S.C. § 252(i)." Within the four corners of Wireless One's petition, this is the only statement regarding Wireless One's desire to have the terms and conditions of the Sprint/Palmer agreement made available to it.¹

¹In its Memorandum In Support at Page 4, Wireless One also requests that the Commission determine that the terms and

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See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2nd DCA 1994) (stating that it is improper to consider information extrinsic to the complaint). Wireless One's prayer for relief in its petition only requests that the terms and conditions be made available to Wireless One and it includes the additional request that the availability of those terms and conditions be retroactive to the agreement's effective date, March 1, 1997.² As previously discussed, staff does not believe that retroactive application of an agreement is contemplated by the Act.

Although staff believes that Wireless One's petition should be dismissed for all the reasons cited, we note that because the Sprint/Palmer interim agreement has now been approved, Wireless One can elect to take that interim agreement as of the date of its approval by this Commission, August 5, 1997, until the agreement's expiration, December 31, 1997.

Based on the foregoing, staff believes that Wireless One's Petition and/or Complaint has not been filed within the time period set by the Act for requests for arbitration, and it is premature for relief under Section 252(i). As such, the Petition does not

conditions of the Sprint/Palmer agreement are available to Wireless One as of March 1, 1997. The Memorandum is not, however, alluded to in the Petition. See Myers v. State, 539 So. 2d 525 at 526 and Footnote 2 (Fla. 1st DCA 1989) (separate memorandum considered part of the motion when separately sworn to and the memorandum was specifically incorporated by reference into the motion.)

²Staff further notes that if Wireless One's Memorandum in Support is to be considered a part of its Petition, Footnote 6 of the Memorandum should be considered in analyzing Wireless One's request for relief. At Footnote 6, Wireless One states, in part, that ". . . [Wireless One] is merely seeking a determination as to Sprint's present obligations under the statute to provide it with the same terms and conditions of interconnection that it provided to another telecommunications carrier." (Emphasis added). By its Petition, Wireless One does not appear to seek actual application of the entire interim agreement, but only the Commission's determination that the agreement must be made available in the manner in which Wireless One has requested.

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allege facts sufficient to state a cause of action upon which relief can be granted. Sprint's Motion to Dismiss should, therefore, be granted.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, no further issues will remain in this docket for the Commission to address. This docket should, therefore, be closed.

STAFF ANALYSIS: Yes. If the Commission approves staff's recommendation in Issue 1, no further issues will remain in this docket for the Commission to address. This docket should, therefore, be closed.