



Public Service Commission

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RECORDS AND REPORTING

DATE: MARCH 4, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BANKS)

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *B/K MCP*
DIVISION OF COMMUNICATIONS (FAVORS) *CRF*

RE: DOCKET NO. 981854-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF INTERMEDIA COMMUNICATIONS, INC., AND PETITION FOR EMERGENCY RELIEF AGAINST GTE FLORIDA INCORPORATED REGARDING REQUEST FOR PHYSICAL COLLOCATION IN SPECIFIC CENTRAL OFFICES.

AGENDA: MARCH 16, 1999 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981854.RCM

CASE BACKGROUND

On December 11, 1998, Intermedia Communications Inc. (Intermedia) filed a complaint against GTE Florida Incorporated (GTEFL) for denying Intermedia's request for physical collocation in certain GTEFL central offices. Intermedia claimed that GTEFL had violated the Telecommunications Act of 1996 (Act) and the parties' Commission-approved agreement by denying Intermedia space for physical collocation. Intermedia also indicated that it had filed its complaint in an effort to preserve its priority in the offices in which it had been denied space based upon the Commission's decision to give Supra priority in certain BellSouth central offices in Docket No. 980800-TP. Furthermore, Intermedia acknowledged its obligation under its agreement with GTEFL to enter into dispute resolution with GTEFL if GTEFL insists upon that

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course of action. Intermedia conceded that the parties had not entered into dispute resolution, but indicated that GTEFL might not insist on compliance with the dispute resolution provisions in the agreement.

The parties agreed to an extension of time for GTEFL to file its response to Intermedia's complaint beyond the time set forth in Rule 28-106.204(2), Florida Administrative Code. On January 15, 1999, GTEFL filed a Motion to Dismiss Intermedia's complaint. Intermedia does not object to the timeliness of the Motion.

GTEFL asserted in its Motion to Dismiss that the parties must use alternative dispute resolution to resolve any complaint arising out of the parties' agreement. GTEFL asked, therefore, that Intermedia's complaint be dismissed. On January 27, 1999, Intermedia filed its Response to GTEFL's Motion to Dismiss.

This is staff's recommendation on the Motion to Dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTEFL's Motion to Dismiss?

RECOMMENDATION: Yes. Intermedia has failed to state a cause of action upon which the Commission can grant relief at this time. The parties' agreement clearly requires that the parties submit to alternative dispute resolution prior to filing a complaint for breach of the parties' interconnection agreement. The parties have not entered into alternative dispute resolution regarding this matter.

STAFF ANALYSIS: Intermedia's Complaint should be viewed in the light most favorable to Intermedia, in order to determine whether its request is cognizable under the provisions of the parties' agreement, Chapter 364, Florida Statutes, and 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." In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flve v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Furthermore, the Commission should 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 (Fla. 2nd DCA 1960). Florida Statutes.

POSITIONS

GTEFL

GTEFL states that Article 12 of the parties' agreement controls this dispute. Article 12 states, in part, that:

The Parties desire to resolve disputes arising out of this Agreement without litigation. Accordingly, except for action seeking a temporary restraining order or an injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties agree to use the following alternative dispute resolution procedure as their sole remedy with respect to any controversy or claim arising out of or relating to this Agreement or its breach.

GTEFL explains that the Agreement further outlines a detailed process for negotiations and binding arbitration to be conducted pursuant to the Commercial Arbitration Rules of the American Arbitration Association. GTEFL notes that Intermedia concedes in its complaint that the dispute resolution provisions in the parties' Agreement control in this situation.

GTEFL further explains that when it received Intermedia's complaint, it contacted Intermedia to inform the company that GTEFL would insist on compliance with the dispute resolution provisions in the Agreement, and that GTEFL expected Intermedia to withdraw its Complaint. The Complaint was not, however, withdrawn. Thereafter, the parties agreed to an extension of time for GTEFL to file its response to Intermedia's complaint, and GTEFL filed this Motion to Dismiss.

GTEFL argues that Intermedia has no basis for its complaint, because the parties' Agreement clearly calls for alternative dispute resolution as the only means of resolving disputes arising out of the Agreement. GTEFL asserts that Intermedia has willfully violated the parties' Agreement by refusing to withdraw the Complaint, and that the Commission must now dismiss the Complaint.

Intermedia

Intermedia responds by agreeing with GTEFL that the parties' agreement requires that disputes arising out of the agreement must be resolved through binding arbitration. Intermedia argues, however, that simply dismissing its Complaint will not resolve one of Intermedia's main concerns identified in its Complaint. Intermedia explains that it filed its Complaint in order to "preserve its priority consistent with the Commission's decision in Docket No. 980800-TP." See Order No. PSC-98-1417-PCO-TP. Intermedia claims that it believed it was necessary to file this Complaint, because of the Commission's decision in Docket No. 980800-TP that Supra would be considered to have first priority in certain BellSouth central offices because Supra had been the first to file a complaint when BellSouth rejected its request for physical collocation, even though Supra was not the first company to request space in the offices as contemplated by Section 47 C.F.R. 51.323(f) of the FCC's Rules.

Intermedia claims that the facts set forth in its Complaint are very similar to those in Docket No. 980800-TP. As such, it believed it was necessary to file this Complaint in order to protect its priority for space in the offices in dispute. Intermedia notes that it would not oppose the issuance of an Order dismissing its Complaint if the Commission either acknowledged Intermedia's priority or explained that the "first-come, first-served" rule, Rule 51.323(f), is applicable and that a Complaint is not necessary to establish priority.

Staff's Analysis and Recommendation

Again, staff emphasizes that parties agreed to an extension of time for GTEFL to file its response to Intermedia's complaint beyond the time set forth Rule 28-106.204(2), Florida Administrative Code. On January 15, 1999, GTEFL filed a Motion to Dismiss Intermedia's complaint. Intermedia does not object to the timeliness of the Motion. Therefore, the Motion to Dismiss should be deemed to be timely filed for purposes of the Commission's review.

Taking all of the facts in Intermedia's Complaint as true, staff recommends that the Complaint should be dismissed. As set forth in Section 12 of the Agreement, the parties have agreed to utilize an alternative dispute resolution process for resolving any disputes that may arise out of the parties' Agreement. See Attachment A. The Commission approved this Agreement by Order No. PSC-97-0719-FOF-TP, issued June 19, 1997. Intermedia has conceded

that it did not comply with this process before it filed its Complaint. Proceeding with this Complaint would contravene the clear terms of the Agreement. As such, Intermedia has failed to state a cause of action upon which the Commission can grant relief. Thus, staff recommends that GTEFL's Motion to Dismiss be granted.

Staff notes that in Order No. PSC-98-1417-PCO-TP, the Commission clearly stated that:

We consider our determination that Supra has priority in these offices to be specific to this complaint proceeding. Our decision herein does not alter Supra's position as it applies to other central offices or to separate proceedings regarding the North Dade Golden Glades and West Palm Beach Gardens central offices.

Order at p. 10. The Commission further clarified its decision on this issue in Order No. PSC-99-0047-FOF-TP, issued January 5, 1999. Therein, the Commission clarified the applicability of the decision in that Order:

If any ALECs find it necessary and appropriate to file complaints regarding physical collocation, we shall address such complaints on a case-by-case basis. Retaliatory pleadings with no basis other than to attempt to improve an ALEC's place in line in a central office will not be condoned. In addition, we believe that it would be more appropriate to address any additional concerns regarding implementation of the "first come, first served" rule within BellSouth's pending waiver dockets.

Order at p. 11. The Commission further stated that:

. . . Supra should be allowed to have priority in these central offices for purposes of this complaint proceeding, because Supra brought to our attention the fact that BellSouth had been denying requests for physical collocation without seeking waivers from the state commission as required by the Act.

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[Emphasis added.] Order at p. 15. Based upon these statements, it appears that the Commission still considers the FCC's "first-come, first-served" rule applicable in most circumstances. As such, it was not necessary for Intermedia to file this Complaint to establish its priority in GTEFL's central offices.

ISSUE 2: Should this Docket be closed?

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

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