

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited enforcement of interconnection agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida.

DOCKET NO. 021006-TP
ORDER NO. PSC-02-1705-FOF-TP
ISSUED: December 6, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On September 20, 2002, Teleport Communications Group, Inc. and TCG South Florida (TCG) filed its Confidential Petition for Expedited Enforcement of an Interconnection Agreement with Verizon Florida, Inc. On October 11, 2002, Verizon Florida, Inc. (Verizon) filed its Motion to Dismiss the Complaint of TCG. On October 23, 2002, TCG filed its response to Verizon's Motion to Dismiss. In its Response, TCG notes that since Verizon did not claim confidential treatment, it appears that its Petition no longer needs to be treated as confidential.

In its Motion to Dismiss, Verizon states that the underlying dispute between the parties arose from TCG's claims for reciprocal compensation and Verizon's counter-claims for TCG's alleged breach of the interconnection agreement submitted to private arbitration pursuant to the parties' agreement. Verizon asserts that during the course of the arbitration, TCG filed a Motion to Compel the

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production of arbitration awards involving other Verizon interconnection agreements. Verizon states that it opposed TCG's Motion to Compel on procedural grounds based on TCG's failure to provide a written discovery request and that the motion was time barred. Further, Verizon states that it argued that the arbitration awards were confidential and therefore not subject to discovery.

However, on August 9, 2002, the Arbitrator granted TCG's Motion to Compel. Verizon states that it produced one of the previous awards not subject to a confidentiality provision, but did not produce the other awards because it believed the order exceeded the Arbitrator's authority. TCG requested a conference with the Arbitrator on August 26, 2002, and the Arbitrator issued another order. According to Verizon, TCG has not sought to enforce either of the Motions to Compel in court, but rather has filed a petition before this Commission.

MOTION TO DISMISS

Verizon's Motion

Verizon argues in its Motion that we should dismiss TCG's petition because TCG has not properly invoked this Commission's jurisdiction. Verizon states that under the parties' interconnection agreement, they were to submit all disputes arising out of the agreement or its breach to private arbitration. Verizon asserts that the arbitration provision is valid and enforceable under the Telecommunications Act of 1996. Verizon states that in fact the matter has been submitted to a private arbitrator and discovery has been completed and a hearing was scheduled for October 11, 2002.

Verizon states that TCG does not seek to enforce the interconnection agreement but rather TCG's complaint is directed at enforcing the Arbitrator's order. Verizon argues that enforcement of an Arbitrator's order, like the enforcement of a subpoena issued by a court, is a role for a court of general jurisdiction.¹

¹Verizon citing to Western Employer Ins. Co. v. Merit Inc. Co., 492 F. Supp. 53, 54 (N.D. Ill. 1979) (enforcing in part and

Verizon further argues that it is well-settled law that this Commission is not a court of general jurisdiction but rather only has those powers granted by statute expressly or by necessary implication.² Verizon cites to East Central Regional Wastewater Facilities Operating Bd. v. City of West Palm Beach, 659 So.2d 402,404 (Fla. Dist. Ct. App. 1995), for the proposition that "[A]s a creature of statute,' the Commission 'has no common law jurisdiction or inherent power.'"

Verizon contends that nothing in the statute grants this Commission the authority to enforce the type of private arbitration order at issue here. Verizon states that Section 364.162, Florida Statutes, on which TCG relies, is inapplicable by its plain terms. Verizon states that Section 364.162, Florida Statutes, provides that "the Commission 'shall have the authority to arbitrate any dispute *regarding interpretation of interconnection or resale prices and terms and conditions.*'" (emphasis in original) Verizon argues that the issue in dispute here has nothing to do with arbitration but rather the enforceability of a collateral discovery order issued in a private arbitration. Verizon points out that the issue that this Commission would be called on to resolve is the Arbitrator's power to compel Verizon to produce documents, which in no way implicates this Commission's regulatory responsibility or area of expertise.

Verizon concludes that nothing in Florida law provides this Commission with the authority to enforce a private arbitration order. As such, TCG's complaint should be dismissed. Verizon states that if its motion is granted, TCG still has a remedy to seek enforcement by going to a court of general jurisdiction.

TCG's Response

In its Response, TCG states that for Verizon's Motion to Dismiss to succeed, Verizon must show that this Commission cannot grant its petition. TCG argues that under Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993), Verizon's motion should be

quashing in part arbitrator's subpoena).

²Deltona Corp. v. Mayo, 342 So.2d 510, 512, n.4 (Fla. 1977)

denied because the relief requested by TCG is well within this Commission's authority to grant.

TCG argues that the parties have an interconnection agreement, approved by this Commission, that contains terms and conditions regarding submission of disputes to arbitration. TCG argues that Verizon has violated those terms and conditions. TCG asserts that it has sought this Commission's assistance in enforcing those terms and conditions and has requested that this Commission order Verizon to provide TCG with a specific document. TCG contends that this Commission has clear authority to enforce interconnection agreements, and equally clear authority to require a certificated Florida telecommunications company to produce records and documentation.

TCG states that as noted in its petition, Section 2.1 of the parties' interconnection agreement specifies that "[n]egotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between GTE and [TCG] arising out of this Agreement or its breach'." TCG argues that both parties have a duty to submit to arbitration and comply with orders issued by the assigned Arbitrator. TCG asserts that Verizon has refused to obey two lawful orders issued by the Arbitrator, thereby breaching its obligation to submit to arbitration.

TCG argues that contrary to Verizon's assertion that this Commission does not have authority to direct compliance with the Arbitrator's order, this Commission has authority to enforce all terms and conditions of the interconnection agreement and has the authority to require Verizon to provide the document. TCG states that this Commission clearly approved the agreement which was later adopted by TCG and therefore retains the authority to enforce the terms and conditions of the interconnection agreement it approved. TCG contends that this Commission has never declined to enforce its orders, or interconnection agreements approved by its orders, on the grounds it lacks jurisdiction to do so.

TCG contends that under Verizon's theory, this Commission may enforce some terms and conditions of an interconnection agreement, but lacks authority to enforce others. TCG argues that Section 364.162, Florida Statutes, does not support Verizon's narrow interpretation, but rather it grants this Commission full authority

to address any dispute regarding the interpretation of interconnection terms and conditions. Further, TCG asserts that this Commission has general regulatory authority over certificated Florida ILECs such as Verizon and that under Section 364.183, Florida Statutes, this Commission may require Verizon to produce records and documents with or without a request from a telecommunication company.

TCG concludes that the crucial issue in resolving Verizon's Motion is whether TCG has alleged facts sufficient to state a claim, not whether this Commission should grant TCG's claim. TCG asserts that the relief it has requested is well within this Commission's authority to grant and thus Verizon's Motion should be denied.

Decision

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. However, we note that Verizon's Motion to Dismiss questions our authority to hear the subject matter. Thus, regardless of whether all of TCG's allegations in its Complaint were facially correct, if we were to determine that we lack subject matter jurisdiction, the Complaint would have to be dismissed.

As noted by the parties, TCG's complaint arises from a private arbitration conducted in accordance with the parties' current interconnection agreement which was approved by us. Essentially, TCG requests that we order Verizon to comply with two orders issued by the private Arbitrator. TCG's argument is that we have

authority to grant this relief based on Section 364.162, Florida Statutes, which authorizes us to arbitrate disputes regarding terms and conditions of interconnection agreements.

We disagree with TCG's analysis that the discovery orders are terms and conditions of a Commission approved interconnection agreement thereby invoking our jurisdiction. The private Arbitrator's discovery orders are not terms or conditions of the interconnection agreement. Rather, the discovery orders are merely a consequence of compliance with the terms and conditions of the interconnection agreement which requires private arbitration. The alleged act of non-compliance with the Arbitrator's order by a party does not confer this Commission with jurisdiction over the Arbitrator's orders.

As noted by Verizon, in Deltona Corp. v. Mayo, the Court found that this Commission has only those powers granted by statute expressly or by necessary implication. Further, in East Central Regional Wastewater Facilities Bd., the Fourth Circuit noted that as a statutory creature, this Commission has no common law jurisdiction or inherent power. Id. at 404. Contrary to TCG's assertion, we find that Section 364.162, Florida Statutes, does not confer by necessary implication the power to enforce a foreign jurisdiction's discovery orders. Further, we note that Section 364.015, Florida Statutes, only authorizes this Commission to seek equitable relief in an appropriate circuit court, not to order equitable relief. Should the parties wish to enforce any orders issued from the private arbitration, we believe that the appropriate forum for such enforcement would be a court of general jurisdiction.

Thus, we find that this Commission lacks the subject matter jurisdiction to grant the relief sought by TCG to enforce the discovery orders issued by the private Arbitrator. Therefore, we grant Verizon Florida, Inc.'s Motion to Dismiss Teleport Communications Group, Inc. and TCG South Florida's Confidential Petition for Expedited Enforcement of an Interconnection Agreement.

Although we find this Commission is not the appropriate forum to enforce these discovery orders, we expect that the parties will comply with arbitration orders just as they comply with Commission

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orders. Further, we encourage the continued use of arbitration and negotiation.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon Florida, Inc.'s Motion to Dismiss Teleport Communications Group, Inc. and TCG South Florida's Confidential Petition for Expedited Enforcement of an Interconnection Agreement is hereby granted. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of December, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

PAC

Commissioner Palecki dissents as follows:

In this docket, Verizon, the moving party on a Motion to Dismiss, did not find it necessary to have a representative present at the agenda conference to address Commissioners' concerns. TCG's petition should not have been dismissed until a representative of Verizon was present to address the Commission.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any 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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.