

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION MAR -9 PM 2:45

In re: Complaint of)
AGI Publishing, Inc. against)
GTE Florida Inc.)
GTE Telephone Operating Companies)
for violation of Sections 364.08)
and 364.10, Florida Statutes,)
and request for relief.)

DOCKET NO.: 990132-TR
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RECORDS AND
REPORTING

RESPONSE OF AGI PUBLISHING, INC. D/B/A VALLEY YELLOW PAGES
TO GTE'S MOTION TO DISMISS AND OPPOSITION TO
REQUEST FOR EXPEDITED TREATMENT

AGI Publishing, Inc. d/b/a Valley Yellow Pages ("Valley"), through its undersigned counsel, hereby responds to the Motion to Dismiss of GTE Operating Companies ("GTE"), dated February 25, 1999. In its Motion to Dismiss, GTE alleges that Valley has failed to state a claim for which the Commission can grant relief. GTE's motion fails to recognize the hybrid or dual nature of both yellow pages and billing and collection services.

Stated briefly, Valley's complaint arises out of GTE's decision to discontinue provision of billing and collection services to Valley Yellow Pages, and Valley's understanding that

ACK — GTE intends to continue to provide these services to a GTE
AFA —
APP — affiliate, GTE Directories. Valley is a publisher of yellow pages
CAF — advertising, in direct competition with GTE Directories. As part
CMU — of what it has described as an anti-cramming policy, GTE notified
CTR —
EAG — Valley by letter that it is discontinuing billing and collection
LEG — on behalf of third parties for non-telecommunication services, and
LIN — that its billing and collection arrangement with Valley will
OPC —
RCH — terminate as of March 31, 1999. Notwithstanding this fact, Valley

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understands that GTE intends to continue provision of billing and collection for GTE Directories' advertising. GTE has received no cramming complaints from Valley customers.

A motion to dismiss raises as a question of law, whether the complaint alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard for disposing of motions to dismiss is whether, with all allegations in the complaint or petition assumed to be true, the petition states a cause of action upon which relief may be granted. When making this determination, the tribunal must consider only the complaint. All reasonable inferences drawn from this pleading must be made in favor of Valley. See In re: Petition By Tampa Electric Company For Approval Of Cost Recovery For A New Environmental Program, The Big Bend Units 1 & 2 Flue Gas Desulfurization System, Docket No. 980693-EI, Order No. PSC-98-1260-PCO-EI, issued September 22, 1998, pg. 6.

In its complaint, Valley has stated its belief that GTE's actions are in violation of Sections 364.08 and 364.10, Florida Statutes. GTE has moved to dismiss the complaint in part because Valley did not quote the text of these statutes in its complaint, and did not link the statutes to GTE's behavior. However, it is clear from GTE's motion that it is well aware of the text of these statutes, and that it understands the link to its proposed actions. On page 7 of its Motion, GTE cites the case of Investigation into the Regulatory Safeguards Required to

Prevent Cross-Subsidization by Telephone Companies, 93 FPSC 7:272

(1993) as authority for the proposition that

future policy decisions 'relating to the availability of monopoly services and inputs' would need to consider the Legislature's directive of 'encouraging competition in the telecommunications industry where it is deemed to be in the public interest.'

It is important to note that in this same decision, the Commission specifically stated that "where instances of undue discrimination by the LECs are identified, Section 364.10 expressly gives the Commission the authority and responsibility to evaluate these matters." Id., at 13. Valley's complaint against GTE is a request that the Commission evaluate GTE's conduct pursuant to this statute.

Regarding Section 364.08, also cited in Valley's complaint, Valley believes that the non-discrimination obligation imposed by this statute should be applied to GTE's conduct in this case. GTE argues otherwise, citing the Commission's previous decision to refuse jurisdiction over Internet telephone software. See Motion at p. 2, citing Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecommunications Services Using the Internet, by America's Carriers Telecommunications Association, 96 FPSC 12:385 (1996). However, the ACTA decision concerned the Commission's decision not to assert jurisdiction over software manufacturers providing what the Commission deemed the functional

equivalent of CPE. Valley's complaint arises out of the decision¹ of a regulated local exchange carrier which has traditionally enjoyed a monopoly in the provision of telecommunications, billing and collection, and directory services in the area at issue, to discontinue billing and collection for a yellow pages competitor in favor of a GTE affiliate. As such, Valley believes that its complaint may properly be evaluated by the Commission under Sections 364.08 and 364.10.

As is evident from GTE's Motion to Dismiss, the heart of this controversy is GTE's position that it has absolutely no contractual or regulatory obligation to offer billing and collection for yellow pages advertising in a non-discriminatory manner. In its Motion, GTE contends that billing services for non-telecommunications products and services are not subject to state or federal telecommunications regulation. GTE fails to recognize that in some ways these services are subject to regulation and in some ways they are not. While neither currently requires tariffing of billing services, recent actions by the FCC and this Commission suggest that both believe they have some degree of authority to regulate these services. In its September

¹ Valley agrees that the method of contract termination and related breach of contract issues are issues for a court, and not this Commission. However, where a regulated carrier's conduct violates Chapter 364, the fact that the conduct occurs via a generic contract termination clause should not preclude the Commission from reviewing the carrier's conduct.

1998 Notice of Proposed Rulemaking regarding truth in billing and billing format rules, the FCC stated that "although a carrier's provision of billing and collection services for an unaffiliated carrier is not subject to Title II, such third party billing services may be subject to the Commission's ancillary jurisdiction pursuant to Title I of the Act". See NPRM: In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170 (September 17, 1998) Par.12, FN 28. More importantly, this Commission's staff has released draft Rule 25-4.119, regarding advertising disclosure, which would impose specific requirements upon "any company that bills for itself or on behalf of companies providing regulated or nonregulated services..." See Staff's Proposed Draft Rules for Cramming and Truth-in-Billing, dated February 1, 1999.

While the language of the Florida draft rule would apply to both telecommunications and non-telecommunications services, Valley's complaint is all the more compelling because it concerns yellow pages advertising, and not t-shirts or psychic club fees. Indeed, yellow page advertising is in effect recognized under Chapter 364 as a telecommunications activity.

Section 364.037, Florida Statutes, provides that a portion of LEC's gross profits from directory advertising within its franchise area must be considered as revenues for telecommunications services in determining the company's local rates. Indeed, this statutory provision was a dilution of the previous standard that all revenues from yellow pages within the

franchise area were to be considered "above the line"; i.e., as revenues from telecommunications services. Thus regulatory treatment of the LEC yellow page revenues is grounded on the legislative finding that yellow pages are telecommunication services. Although GTE elected price regulation under Section 364.051, this simply changed the way GTE is regulated in its pricing, not what constitutes regulated services.

As far back as 1983, directory advertising was viewed in some ways to be a regulated telecommunication service and some ways not. This statutory approach is flatly inconsistent with GTE's apparent "either-or" model of regulation under Chapter 364. GTE proposes a two-pronged test for allowing this Commission jurisdiction over the instant dispute. Under GTE's test, yellow pages is either a telecommunications service or it is not, and billing and collection is either a monopoly service or it is not.

And if the former is not a telecommunications service and the latter is not a monopoly service, then this Commission has no jurisdiction and the complaint must be dismissed. This is a convenient test that defines the boundaries of the Commission's jurisdiction in crisp bright lines; unfortunately, it is an atavistic read of a statutory scheme that contemplates a flexible regulatory hand in addressing the anticompetitive behavior of the entrenched local telephone companies.

Turning to billing and collection services, these also have an hybrid or dual nature for regulatory purposes. Specifically, billing and collection is a monopoly service for

some purposes under Chapter 364, and for others it is not. As already noted, GTE has ignored the FCC's ability to address billing and collection issues under Title I. In addition, GTE ignores that Congress emphasized the critical importance of billing and collection to local competition in the Telecommunications Act of 1996. Specifically, Congress recognized that billing and collection is so important to competition developing in the local markets that the RBOCs must bill for their competitors if they wish to enter the long distance market. These provisions, of course, do not presently² apply to GTE, but the regulatory underpinnings do. The competitive nature of billing and collection might allow detariffing, but this does not conclusively establish that adequate competitive alternatives for billing and collection are available to the LEC's competitors. It is GTE's view of these enterprises in "black and white" terms that leads it to insist that under Chapter 364 the Florida Legislature intended to leave the Commission powerless to address the regulatory and competitive problems that arise in this hybrid environment.

GTE suggests in its Motion that if Valley's complaint is permitted to move forward, the ultimate result will be "a dramatic rise in the number of cramming complaints." Motion, at p. 8. Nothing in Valley's complaint suggests that parties who engage in cramming are nevertheless entitled to demand billing and

² This is subject to change via GTE's merger with an RBOC, Bell Atlantic.

collection services; instead, Valley specifically states that GTE has received no cramming complaints from Valley customers. In truth, Valley's position that the Commission has jurisdiction to address regulatory and competitive problems arising in the new competitive environment supports Commission efforts to reduce cramming offenses. By contrast, while various LECs (including GTE) appear to be cooperating with anti-cramming efforts at this time, it is equally clear that GTE would like for the Commission to dismiss Valley's complaint with a statement that the Commission has no control over the relevant billing and collection issues. GTE is seeking unfettered discretion in its billing and collection services, despite its clear intention to utilize its position to discourage competition in the yellow pages industry.

Valley acknowledges that neither of the statutes cited above specifically addresses billing and collection services of a local exchange carrier, or yellow pages services. It believes that this is a case of first impression in the post-Act competitive arena. To that end, Valley has sought information from the Commission regarding this issue in a declaratory statement format, as well as in this Complaint proceeding. Valley has pursued this course of action because it believes that resolution of the jurisdiction issue will effectively resolve this controversy, and seeks to do so in the most timely and efficient manner possible. It has requested expedited treatment of this Complaint for the same reason, and has proposed a format for resolution which it believes in good faith will minimize the

expenditure of time and effort by all parties involved. Valley has explored and will continue to explore any appropriate mechanisms for resolution of this controversy with GTE. However, at this juncture, it appears that the only means for resolution of this matter is a determination by this Commission regarding its jurisdiction over the issues discussed here.

WHEREFORE, AGI Publishing, Inc. d/b/a Valley Yellow Pages requests that the Commission deny GTE's Motion to Dismiss and order an expedited hearing of this matter before a panel of three Commissioners, to commence not later than March 31, 1999, with a decision to be rendered at that time.

Respectfully submitted this 9th day of March, 1999.



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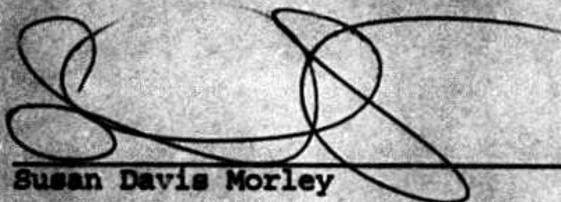
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile or U.S. Mail this 9th day of March, 1999, to the following:

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