



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECORDS AND REPORTING

99 MAR 19 PM 3:08

RECEIVED-FPSC

DATE: MARCH 18, 1999

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

FROM: DIVISION OF LEGAL SERVICES (MILLER, COX) *Jam*
DIVISION OF COMMUNICATIONS (SIMMONS) *SAS* *MCB for WPC* *MCB* *SAS for WDH*

RE: DOCKET NO. 990132-TP - COMPLAINT OF AGI PUBLISHING, INC. D/B/A VALLEY YELLOW PAGES AGAINST GTE FLORIDA INCORPORATED FOR VIOLATION OF SECTIONS 364.08 AND 364.10, FLORIDA STATUTES, AND REQUEST FOR RELIEF.

AGENDA: 03/30/99 - REGULAR AGENDA - MOTION TO DISMISS AND OPPOSITION TO PETITION FOR DECLARATORY STATEMENT - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990132.RCM

CASE BACKGROUND

On February 5, 1999, AGI Publishing, Inc. d/b/a Valley Yellow Pages (Valley) filed a complaint with this Commission against GTE Florida Incorporated/GTE Telephone Operating Companies (GTEFL) for alleged violation of Sections 364.08 and 364.10, Florida Statutes. GTEFL provides billing and collection services to Valley for yellow pages advertising pursuant to a Billing Services Agreement. In its complaint, Valley alleges that GTEFL has notified Valley that GTEFL intends to terminate the billing and collection services to Valley on March 31, 1999.

According to Valley, GTEFL has stated that GTEFL will no longer provide billing and collection for non-telecommunication services, as part of GTEFL's efforts to reduce customer cramming complaints. Because GTEFL intends to continue to provide billing

DOCUMENT NUMBER-DATE

03610 MAR 19 99

FPSC-RECORDS/REPORTING

DATE: MARCH 18, 1999

and collection services for yellow pages advertising to its own affiliate (GTE Directories Corporation), Valley asserts that GTEFL's behavior is discriminatory. Thus, Valley requests that the Commission exercise jurisdiction under Sections 364.08 and 364.10, Florida Statutes. Valley requests that the Commission issue an Order directing GTEFL to offer its billing and collection services for yellow pages advertising to Valley on a non-discriminatory basis and grant such other relief as the Commission deems appropriate.

On February 9, 1999, Valley filed a petition for declaratory statement regarding the applicability of Sections 364.08 and 364.10, Florida Statutes, to billing and collection services for Valley's yellow pages advertising, and the Commission's jurisdiction to regulate these services. The petition is based on the same facts alleged in Valley's February 5, 1999 complaint. On February 23, 1999, Valley filed a Request for Expedited Treatment under Section 364.058, Florida Statutes, to enable a hearing of the matters underlying the complaint not later than March 31, 1999.

On February 25, 1999, GTEFL filed a Motion to Dismiss and Opposition to Request for Expedited Treatment. On March 1, 1999, GTEFL filed its Opposition to Valley's Petition for Declaratory Statement. Valley filed a Response to GTEFL's Motion to Dismiss and Opposition to Request for Expedited Treatment on March 9, 1999. On March 11, 1999, Valley filed a request for a pre-hearing conference on an expedited basis to consider Valley's Request for Expedited Hearing and GTEFL's Motion to Dismiss and Opposition to Valley's Petition for Declaratory Statement. This recommendation primarily addresses GTEFL's Motion to Dismiss, and Valley's Petition for Declaratory Statement.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTEFL's Motion to Dismiss and deny Valley's Petition for Declaratory Statement?

RECOMMENDATION: Yes. The Commission should grant GTEFL's Motion to Dismiss and deny Valley's Petition for Declaratory Statement. The complaint and petition seek relief that is beyond the Commission's jurisdiction to provide. Thus, Valley has failed to state a cause of action upon which relief can be granted. The petition is based upon the same facts alleged in the complaint.

STAFF ANALYSIS:

Standard of Review

The standard of review for a motion to dismiss is that it must show that the petition fails to state a cause of action upon which the Commission may grant the requested relief. All allegations in the petition must be taken as though true, and be considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

The Complaint

In its Complaint, Valley alleges that GTEFL intends to terminate, on March 31, 1999, billing and collection services provided to Valley for yellow pages advertising. Valley alleges that GTEFL intends to continue to provide yellow pages billing and collections service to its affiliate, GTE Directories Corporation. Valley argues that the Commission has jurisdiction to intervene where a telecommunications carrier "deliberately seeks to use its monopoly-based billing and collection power to favor its own yellow pages operations over that of a yellow pages competitor". Valley requests the Commission to issue an Order directing GTEFL to offer its yellow pages billing and collection service to Valley on a non-discriminatory basis, and grant such other relief as the Commission deems appropriate.

GTEFL's Motion to Dismiss

GTEFL states that the Billing Services Agreement itself, which GTEFL and Valley agreed to, provides for and entitles GTEFL to

terminate Valley's contract: "Either party may terminate this Agreement for any reason upon one hundred eighty days (180) Calendar Days after written notice". GTEFL states that Valley, in effect, wants the Commission to reform the agreement to remove this provision. GTEFL asserts that the Commission does not have jurisdiction over the contract at issue, and so cannot alter the contract.

GTEFL argues that the Commission does not have the authority to grant the relief Valley requests. GTEFL argues that granting Valley's request for relief would require the Commission to determine that billing for yellow pages advertising is (1) regulated; (2) tariffed, and (3) a telecommunications service. GTEFL argues that its billing service is none of these.

GTEFL asserts that Sections 364.08 and 364.10, Florida Statutes, embody the traditional obligations that apply to communications common carriage in Florida, and as such pertain only to telecommunications services provided by telephone utilities. The Commission has never interpreted them more expansively to extend beyond telecommunications to any non-telecommunications, non-regulated features or services a telephone company might provide.

GTEFL argues that neither yellow pages advertising nor billing for such advertising is a telecommunications service. Yellow pages involve publishing and advertising, not telecommunications. GTEFL's billing service tariff in Florida applies only to telecommunications access service. GTEFL points out that at the federal level, all billing for even telecommunications services was detariffed by the FCC over 12 years ago. In Detariffing of Billing and Collection Services, 102 FCC 2d 1150, 1169 (1986), the FCC held that billing and collections is not a communications service and does not qualify as communications common carriage, but, rather, is an administrative service. Given that billing for even communications services is not a communications service, GTEFL contends it must follow that billing for non-communications services is not a communications service.

Valley's Response to the Motion to Dismiss

Valley re-asserts its position that the non-discrimination obligation imposed by Sections 364.08 and 364.10, Florida Statutes, gives the Commission the authority and responsibility to evaluate the complaint. Valley contends that in some ways billing services for non-telecommunications services are subject to regulation and in some ways they are not. "While neither [state or federal

telecommunication regulations] 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." Valley refers to the September 1998 Notice of Proposed Rulemaking regarding truth in billing and billing format rule, where 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. Valley also refers to this Commission's staff's released draft of Rule 25-4.119, Florida Administrative Code, regarding advertising disclosure, which would impose specific requirements upon "any company that bills for itself or on behalf of companies providing regulated or non-regulated services . . ." See Staff's Proposed Draft Rules for Cramming and Truth-in-Billing, dated February 1, 1999.

Staff Recommendation

Having reviewed the facts set forth by both parties regarding the Billing Service Agreement and the statutory provisions in question, staff does not believe the Commission can grant the relief requested by Valley in this particular situation.

Valley itself stated that Valley agrees that the method of contract termination and related issues are issues for a court to decide, and not this Commission. Staff believes and agrees with Valley that the Commission has no authority to alter or reform the contract.

The Billing Service Agreement concerns billing for Valley's customers' advertising in Valley's yellow pages directories. Billing for yellow pages is not a regulated service, nor is it considered a telecommunications service. Section 364.07(1), Florida Statutes, states:

Every telecommunications company shall file with the Commission, as and when required by it, a copy of any contract, agreement, or arrangement in writing with any other telecommunications company, or with any other corporation, association, or person relating in any way to the construction, maintenance, or use of a telecommunications facility or service by, or rates and charges over and upon, any such telecommunications facility.

There is no filing requirement for yellow pages billing contracts, as there is for telecommunications contracts. Yellow pages advertising, as well as the billing service associated with it, is not a regulated telecommunications service.

In its complaint, Valley has stated its belief that GTEFL's actions are in violation of Sections 364.08 and 364.10, Florida Statutes. Section 364.08, Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited, states:

(1) A telecommunications company may not charge, demand, collect, or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time. A telecommunications company may not refund or remit, directly or indirectly, any portion of the rate or charge so specified or extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) A telecommunications company subject to this chapter may not, directly or indirectly, give any free or reduced service between points within this state. However, it shall be lawful for the commission to authorize employee concessions if in the public interest.

Section 364.10, Undue advantage to person or locality prohibited; exception, states:

(1) A telecommunications company may not make or give undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(2) The prohibitions of subsection (1) notwithstanding, a telecommunications company serving as carrier of last resort shall provide a Lifeline Assistance Plan to qualified residential subscribers, as defined in a commissioned-approved tariff and a preferential rate to eligible facilities as provided for in part II.

DOCKET NO. 990132-1P
DATE: MARCH 18, 1999

In interpreting the above statutes in regard to its jurisdiction, the Commission has held that they pertain to telecommunications services. In Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecomm. Services Using the Internet, by America's Carriers Telecommunications Ass'n, 96 FPSC 12:385 (1996), the Commission stated that its jurisdiction depends upon the "critical issue" of whether the service or product at issue "constitutes 'telecommunications services for hire'", where the Commission refused to take jurisdiction over a dispute involving Internet telephony software.

Finally, it is well established that administrative agencies only have the power conferred upon them by statute and must exercise their authority in accordance with the controlling law. 1 Fla. Jur. § 71, p. 289. As such, grants of authority to an administrative body are generally limited to those powers either expressly enumerated or clearly implied by necessity. See Sutherland, Statutory Construction, 5th Ed., Volume 3, §65.02; and Keating v. State ex rel. Ausebel, 167 So. 2d 46 (Fla. 1st DCA 1964). If there is reasonable doubt as to the scope of a power, it should be resolved against the exercise of that power. State ex rel. Burr et al., State Railroad Commissioners v. Jacksonville Terminal Co., 71 So.474 (1916).

For all of the foregoing reasons, staff recommends that the Commission grant GTEFL's motion to dismiss Valley's complaint, and deny Valley's Petition for Declaratory Statement.

DOCKET NO. 990132-TP
DATE: MARCH 18, 1999

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission accepts staff's recommendation in Issue 1, this docket should be closed. The issues contained in the Request for Expedited Treatment, the Request for Prehearing Conference, the responses and oppositions contained in this docket would then be moot.

STAFF ANALYSIS: Yes. If the Commission accepts staff's recommendation in Issue 1, this docket should be closed. The issues contained in the Request for Expedited Treatment, the Request for Prehearing Conference, the responses and oppositions contained in this docket would then be moot.

If the Commission denies staff's recommendation in Issue 1, the docket should remain open pending resolution of the issues.