

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and/or petition for arbitration against Sprint Florida, Incorporated 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 request for expedited hearing pursuant to Section 364.058, F.S.

DOCKET NO. 970788-TP
ORDER NO. PSC-97-1043-PCO-TP
ISSUED: September 4, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER ON MOTION TO DISMISS

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 we 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 we find Sprint in 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

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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 its petition 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 Motion, Sprint asks that we 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 our August 5, 1997, Agenda Conference, we approved the Sprint/Palmer interim agreement in Docket No. 970166-TP. On August 15, 1997, Wireless One filed a Motion for Leave to Amend its Petition, along with an amended petition.

This Order addresses only Sprint's Motion to Dismiss Wireless One's Complaint and/or Petition. We reserve consideration of Wireless One's Motion for Leave to Amend and its Amended Complaint and/or Petition in order to allow Sprint sufficient opportunity to respond.

Standard of Review

Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief.

We have reviewed Wireless One's Petition 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."

I. 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 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 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.

II. 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 asked us to dismiss Wireless One's action for arbitration/complaint because it was premature and because the relief requested was based on the availability of the Palmer agreement, which was filed but not yet approved by us as of the date of Wireless One's Petition.

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

Furthermore, Sprint argued that even examining Wireless One's Petition in the light most favorable to Wireless One, the facts disclosed that the petition was 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 stated that while the Palmer interim agreement had been filed with the Commission, we had not yet approved the agreement. Sprint further noted that we might have decided not to approve the agreement. Sprint, therefore, argues that Wireless One's petition was premature because the Palmer interim agreement was not yet approved. Thus, the action should be dismissed.

III. Wireless One's Response to the Motion

In its response, Wireless One argued that its Complaint/Petition was not premature under 47 U.S.C. § 252(b). Wireless One argued 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 stated that the Act does not require a carrier to wait until the arbitration window opens before it may complain to us about the incumbent LEC's unlawful conduct. Citing Order No. PSC-97-0722-PCO-TP, issued in Docket No. 970496-TP, Wireless One further asserted that we have 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 noted 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 argued that it was immaterial that the Palmer agreement had not yet been approved by the Commission. Wireless One argued that had Sprint filed the Palmer agreement for approval in a timely manner, we would have already ruled upon the agreement.

In addition, Wireless One argued that its complaint against Sprint is cognizable under Rule 25-22.036, Florida Administrative Code. Thus, Wireless One sought 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 had paid to Sprint in excess of what Wireless One would have paid under the Sprint/Palmer agreement.

IV. Determination

After reviewing Wireless One's Petition in the light most favorable to the petitioner, we believe 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. We also believe that the Petition and/or

Complaint seeks relief that cannot be granted under the arbitration provisions of the Act, because the relief was requested either too soon under Section 252 of the Act, or too late.

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, our 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 yet 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. Untimely request for arbitration

In addition, if the Petition is viewed as a request for arbitration, 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 us 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.

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

In concluding that Wireless One's Petition is premature under Section 252(I), we believe 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 state commissions, 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, 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. We certainly do not condone Sprint's lack of action in not filing its interim agreement for our approval sooner. Nevertheless, we do not believe that Sprint has violated Section 252(e) for the reasons set forth above. We note that our staff is currently investigating this issue in an effort to find ways to prevent future misunderstandings and delays of this sort.

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Upon consideration, we find that Wireless One's Complaint and/or Petition is premature. Thus, we hereby dismiss Wireless One's Complaint and/or Petition without prejudice to amend its Petition. Although Wireless One's petition shall 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 pursuant to Section 252(I) of the Act.

At our August 18, 1997, Agenda Conference, counsel for Sprint also agreed that the Sprint/Palmer interim agreement must now be made available to other carriers.

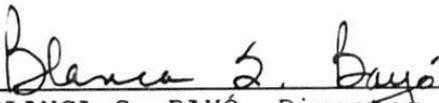
Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Motion to Dismiss filed by Sprint-Florida, Inc. is granted. It is further

ORDERED that the Complaint and/or Petition filed by Wireless One Network, L.P. d/b/a Cellular One of Southwest Florida is dismissed without prejudice to amend its Complaint and/or Petition. It is further

ORDERED that this docket shall remain open to address all remaining matters.

By ORDER of the Florida Public Service Commission this 4th day of September, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.