

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAETEC COMMUNICATIONS, INC. : CIVIL ACTION
v. :
CORE COMM-ATX, INC. : No. 01-5298

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 3, 2002

Defendant CoreComm-ATX, Inc. ("CoreComm") moves to stay all proceedings and refer the claims of plaintiff PaeTec Communications, Inc. ("PaeTec") and the CoreComm counterclaims to the Federal Communications Commission (FCC) for determination.

For the following reasons, only CoreComm's counterclaim regarding cross-subsidization is referred to the FCC for determination under its primary jurisdiction over technical telecommunications matters and CoreComm's motion to stay pending FCC action is deferred for settlement discussions. All other issues will be determined by this court.

BACKGROUND

PaeTec is a telecommunications corporation providing local telephone service in Pennsylvania and New York. PaeTec also provides exchange access service for long distance telephone calls made by customers of other companies, such as CoreComm. Since at least 1999, CoreComm has availed itself of some of

PaeTec's services. In 2000, CoreComm, claiming it was being overcharged, stopped paying for the services. CoreComm claims it stopped paying because PaeTec charged unreasonable rates and failed to provide the services for which it had charged, in violation of 47 U.S.C. § 201.

PaeTec filed this "failure to pay" and "breach of contract" action to collect \$176,899.94 plus other fees under an alleged lawful tariff filed with the FCC. In response, CoreComm filed counterclaims against PaeTec to have the tariff and PaeTec's practices declared unreasonable and to collect damages for excessive payments. CoreComm alleges that PaeTec was charging 5-7 cents per minute when the FCC had determined that 2.5 cents per minute was reasonable in a third party tariff complaint to determine reasonableness of rates under 47 U.S.C. §§ 205, 208; PaeTec complied with the FCC's determination in that unrelated proceeding that no more than 2.5 cents per minute was reasonable and subsequently lowered its rates, but CoreComm still refuses to pay in order to recover for the alleged past overcharges.

CoreComm also alleges other violations of the Federal Communications Act ("FCA"). It claims: (1) PaeTec violated 47 U.S.C. § 203 by charging for services not provided; and (2) PaeTec violated 47 U.S.C. § 254 by subsidizing below-market local rates with excessive charges on long distance rates.

PaeTec argues that its rates were validly filed under 47

U.S.C. § 204(a)(3) so its rates are "deemed lawful" under the Telecommunications Act of 1996 and payment under those rates is immune from any "retroactive damage assessment." PaeTec asserts that even if the FCC found its 2000-2001 tariffs "unreasonable," only "prospective" damages could be awarded for excessive rates under lawfully filed tariffs.

CoreComm has filed a motion to stay proceedings in this court and refer the entire action to the FCC, which has "primary jurisdiction." CoreComm asserts that the FCC's expertise and specialized knowledge of telecommunications and communications law require it to decide reasonableness of rates and practices.

DISCUSSION

I. PRIMARY JURISDICTION

Referral to an administrative agency is appropriate if an action appears to involve technical or policy considerations beyond the trial court's ordinary competence and within the agency's field of expertise. Reiter v. Cooper, 507 U.S. 258 (1993), MCI Communications v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974). When enforcement of a claim originally cognizable in court requires resolution of issues within the special competence or expertise of an administrative body, the issues should be referred to the agency with primary jurisdiction. United States v. Western Pacific R. Co., 352 U.S. 59, 64 (1956). This ensures "a workable relationship between the courts and administrative

agencies wherein ... the court can have the benefit of the agency's views on issues within the agency's competence." MCI Telecomm. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1105 (3d Cir. 1995); see also Phone-Tel Communications, Inc. v. AT&T Corp., 100 F. Supp. 2d 313 (E.D. Pa. 2000).

No formula governs this primary jurisdiction doctrine; the court must decide whether the doctrine is applicable in the particular case. Factors generally considered are: (1) technical or policy considerations within an agency's specialized knowledge and insight gained through experience; (2) uniformity and consistency in matters over which an agency has power to adjudicate; and (3) the agency's administrative discretion to affect regulatory policy in its purview. Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-04 (1976); Audiotext Int'l, LTD v. MCI Worldcom Comm., Inc., 2001 WL 1580316, *5 (E.D. Pa. 2001); AT&T v. The People's Network, Inc., 1993 WL 248165, *4 (D.N.J. 1993). However, mere failures to pay should not be referred to the FCC, despite its expertise regarding communications, because the FCC is not a collection agency.

Three issues for referral have been identified in the instant action: reasonableness of PaeTec's filed rates, availability of retroactive damages for rates filed with the FCC, and propriety of PaeTec's practices.

A. Reasonableness of PaeTec's Rates under Tariffs in Question

The FCC has jurisdiction over complaints about tariff rates and relief for unreasonable rates. See AT&T Corp. v. PAB, Inc., 935 F. Supp. 584, 590-91 (E.D. Pa. 1996); The People's Network, 1993 WL 248165, at *5-*6; 47 U.S.C. §§ 205, 208.

The United States Court of Appeals for the District of Columbia in ACS of Anchorage, Inc. v. Federal Communications Commission, 290 F.3d 403 (D.C. Cir. 2002), and the FCC in the September 12, 2002, Federal Communications Commission Order on Reconsideration In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("Order on Reconsideration"), have recently made clear that tariffs filed under Section 204(a)(3) are conclusively presumed to be reasonable and lawful and the entity filing them cannot be liable for retroactive damages. There is no dispute that PaeTec filed the rates complained of under Section 204(a)(3). PaeTec later lowered its rates to 2.5 cents per minute, after the FCC ruling on reasonableness in In the Matter of Access Charge Reform, 16 F.C.C.R. 9923 (2001), but the prior filed rates are conclusively deemed reasonable and lawful for the period they were in effect. The court need not refer reasonableness of PaeTec's rates under the tariff in question, because they are presumed reasonable and lawful.

B. Availability of "Retroactive" Damages under Section 204(a)(3)

CoreComm argues that AT&T Corp., v. Business Telecom, Inc., 16 F.C.C.R. 12312 (FCC 2001) is controlling. Business Telecom supports referral to the FCC on matters of tariff reasonableness and the award of retroactive damages if the challenged tariff is deemed unreasonable. The ACS decision and the FCC's "Order on Reconsideration," filed after Business Telecom held conclusively that retroactive damages may not be awarded for a tariff filed under Section 204(a)(3) while it is "deemed lawful." There is no need to refer this issue as it has already been correctly and conclusively determined by the FCC.

C. Lawfulness of PaeTec's Practices - Including Cross-subsidization and Improper Billing Practices

The FCC is empowered to adjudicate the fairness, reasonableness or lawfulness of a practice, and to award damages to the complainant injured by an improper practice. Audiotext, 2001 WL 1580316, at *4. CoreComm claims certain PaeTec practices violated several provisions of the FCA, including a prohibition on charging high-rates for one service to compensate for below-market rates on another service and billing for services never provided.

The FCC has a regulatory scheme and can best evaluate cross-subsidization in the specific market involved. This evaluation

could include examining logging and billing software, bill preparation methodology, and other practices inside the market. This is not beyond this court's jurisdiction, but FCC expertise with the nuances and policies of telecommunications practice favors referral of these issues. See, e.g., Audiotext, 2001 WL 1580316, at *8 (determination of Section 201(b) reasonable practices in the long distance market should be made by the FCC).

FCC primary jurisdiction must be recognized where reasonableness of tariff practices is concerned to avoid allowing "artfully drafted pleadings" to "render inoperative the doctrine and the uniformity and consistency purposes of the FCC and the Act." Audiotext, 2001 WL 1580316, at *4; see also Unimat, Inc. v. MCI Telecommunications Corp., 1992 WL 391421 at *3, n.4 (E.D. Pa. 1992). The FCC is in the best position to provide consistent rulings and uniform solutions to disputes over practices of the companies it regulates. Audiotext, 2001 WL 1580316, at *8. Deference to the primary jurisdiction of the FCC as to PaeTec's allegedly improper practice of cross-subsidization is appropriate.

This court will retain jurisdiction over PaeTec's alleged practice of improper billing. The court need not refer to the FCC whether CoreComm paid for services that were never rendered or paid for customers who never existed.

II. STAY AND RETENTION OF JURISDICTION

When only certain issues require referral to the FCC, the court may retain jurisdiction over the underlying action. Reiter, 507 U.S. at 268-69 ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has the discretion to retain jurisdiction or, if the parties would not be unfairly disadvantaged, dismiss the case without prejudice."); Phone-Tel, 100 F. Supp. 2d at 321-22. CoreComm claims that this dispute will require review of several communications policies and technical assessments. PaeTec argues against any referral because it claims the entire action is a "simple collection" case.

The FCC is not a collection agency for communications carriers seeking payment. See, e.g., Tel-Central, Inc. v. United Tel. Co., 4 F.C.C.R. 8338, 8340-41 (FCC 1989). The court recognizes that the propriety of the alleged cross-subsidization practice is best decided by the agency with primary jurisdiction in the field. It is appropriate that this court retain jurisdiction over all claims, except the counterclaim of cross-subsidization referred to the FCC.

CoreComm seeks a stay of action on the non-referred issues until the FCC has determined whether there has been improper cross-subsidization. The court will defer ruling on the stay pending the outcome of current settlement discussions.

CONCLUSION

The issue of propriety of the cross-subsidization practice will be referred to the FCC for determination. By using the term "referral," this court recognizes that the FCA contains no procedure for official remand to the authority of the FCC. To refer an action, CoreComm must file an administrative complaint with the FCC. See Reiter, 507 U.S. at 269, n3. The agency complaint must include the issue requiring special FCC consideration. Id. This court retains jurisdiction on the underlying collection action and improper billing practices. The court will defer ruling on a stay pending the outcome of settlement discussions.

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ORDER

AND NOW, this day of October, 2002, upon consideration of the Motion of CoreComm-ATX, Inc. to Stay Proceedings and Refer All Claims to the Federal Communications Commission (FCC), the Motion is **GRANTED IN PART and DENIED IN PART**. It is further **ORDERED** that:

1. The reasonableness of PaeTec Communications, Inc.'s alleged cross-subsidization is **REFERRED** to the FCC for decision.

2. The court **RETAINS** jurisdiction over:
 - a. CoreComm-ATX, Inc.'s indebtedness to PaeTec Communications, Inc. from October, 2000 through October, 2001; and

 - b. Whether PaeTac Communications, Inc. has improperly billed CoreComm-ATX, Inc. for services never rendered.

3. CoreComm-ATX, Inc. shall file a complaint with the FCC within (20 days) regarding the cross-subsidization alleged in its answer and counterclaims.

4. This court **DEFERS** ruling on the Motion of CoreComm-ATX, Inc. to Stay pending the FCC decision for settlement discussions.

Norma L. Shapiro, S.J.