

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)	
)	
Staton Holdings, Inc. d/b/a)	
Staton Wholesale,)	
)	
Complainant,)	
)	
v.)	File No. EB-03-TC-F-003
)	
Mills Fleet Farm, Inc.,)	
)	
Defendant.)	
)	
Staton Holdings, Inc. d/b/a)	
Staton Wholesale,)	
)	
Complainant,)	
)	
v.)	File No. EB-03-TC-F-006
)	
First Data Voice Service,)	
)	
Defendant.)	

ORDER

Adopted: June 27, 2003

Released: June 30, 2003

By the Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. INTRODUCTION

1. On December 19, 2002, Staton Holdings, Inc., d/b/a/ Staton Wholesale (“Staton”) filed with the Federal Communications Commission (“Commission”) a formal complaint (“Mills Complaint”) against Mills Fleet Farm, Inc (“Mills”) as well as similar complaints against MCI WorldCom Communications, Inc. (“MCI”) and Sprint Communications Company, L.P., (“Sprint”).¹ On April 23, 2003, Staton filed a formal complaint against First Data Voice Service (“FDVS Complaint”) alleging essentially the same pertinent facts as against Mills. The

¹ See *Staton v. MCI*, File No. EB-02-TC-F-008; *Staton v. Sprint*, File No. EB-03-TC-F-002.

complaints allege that Staton had acquired the right to use the toll-free vanity number 888-888-8888,² and that defendants MCI, Sprint, and FDVS knowingly and intentionally took this vanity number from Staton without its consent, and that defendant Mills held the number.³ Mills filed a Motion for Dismissal on March 13, 2003,⁴ and FDVS filed a Motion to Dismiss on May 28, 2003.⁵

II. BACKGROUND

2. Staton is a clothing distributor based in Dallas, Texas, with annual revenues of approximately \$130,000,000.⁶ It is incorporated in Texas, and has been in business since 1981.

3. Mills states that it operates retail stores selling building supplies, hardware, and other general merchandise throughout the Midwestern United States. It alleges that it received access to the toll-free vanity number at issue here through a gift card vendor with whom Mills contracted to manufacture and supply gift cards for Mills' stores. According to Mills, these cards can be purchased at its stores, be given as gifts, and then used later to purchase merchandise. The vanity number in question is listed on the back of the card, so that the bearer of the card can call and determine the amount of credit remaining on the card.⁷ Mills alleges that it does not answer any calls placed to this vanity number.

4. FDVS provides data storage, retrieval, and processing services.⁸ Many of these services are provided via telecommunications connections that allow customers to deliver and retrieve data from remote locations.⁹ FDVS states that it has used the toll-free vanity number at issue here since April 26, 2001, to provide FDVS's Interactive Voice Response service to an affiliated entity which, in turn, uses the service to provide data services.¹⁰

5. On March 13, 2003, Mills filed a motion contending that the Mills Complaint should be dismissed because: (1) it fails to state a cause of action under the Communications Act of 1934, as amended (the "Act"); (2) the Commission lacks jurisdiction to grant Staton's requested relief as Mills is not a common carrier; and (3) Mills does not own or control the rights to the vanity number at issue.¹¹ Mills has attached a Responsible Organization Change Authorization Form dated April 1, 2001, to its Mills Motion. This form indicates that the

² Mills Complaint at 8; FDVS Complaint at 7.

³ Mills Complaint at 15; FDVS Complaint at 12.

⁴ See Motion for Dismissal of Mills Fleet Farm, Inc. and for an Award of Attorney's Fees, filed March 13, 2003 ("Mills Motion").

⁵ See Motion to Dismiss Formal Complaint, filed by FDVS on May 28, 2003 ("FDVS Motion").

⁶ Mills Complaint at 5, 6; FDVS Complaint at 4, 5.

⁷ Mills Motion at 2-3.

⁸ See FDVS Motion at 1.

⁹ See FDVS Motion, Affidavit of Teri Ring, at 2.

¹⁰ *Id.*

¹¹ Mills Motion at 3-7.

customer for the vanity number in question was FDC/Call Interactive.¹² This date is consistent with the Mills Complaint, which alleges that MCI disconnected the vanity number in April 2001.¹³ Mills also requests an award of its reasonable costs and the attorney' fees incurred in connection with this proceeding.¹⁴

6. Staton initially filed an Opposition to the Motion for Dismissal on March 24, 2003.¹⁵ Staton stated there that Mills was included as a defendant "to provide a means for the Commission to enforce the requested remedy."¹⁶ On April 14, 2003, Staton filed a letter requesting that Mills be dismissed without prejudice, on the express condition that should the Commission find that its involvement is essential to adjudicating the Mills Complaint, it be included to the extent necessary to resolve this matter.¹⁷

7. In a motion filed on May 28, 2003, FDVS contends that the FDVS Complaint should be dismissed on essentially the same grounds that Mills cites. Specifically, FDVS contends that the complaint against it fails to state a cause of action under the Act, and that the Commission lacks jurisdiction to grant Staton's requested relief as FDVS is not a common carrier.¹⁸

8. Staton filed an Opposition to the Motion to Dismiss Formal Complaint on June 2, 2003.¹⁹ Again, Staton states that FDVS was included as a defendant "to provide a means for the Commission to enforce the requested remedy."²⁰ It admits that FDVS is not a common carrier.²¹ Staton contends, however, that the Commission can assert limited jurisdiction over FDVS for the purpose of carrying out the Commission's statutory responsibilities.²²

III. DISCUSSION

9. As a threshold matter, we must determine whether Staton's complaints comply

¹² See *Id.*, Exhibit A.

¹³ Mills Complaint at 12.

¹⁴ *Id.* at 7.

¹⁵ See Staton's Opposition to Motion for Dismissal, filed March 25, 2003 ("Mills Opposition"). Under Section 1.727(e) of the Commission's rules, an opposition to a motion must be filed within five business days of the filing of the motion. 47 C.F.R. § 1.727(e). Therefore, Staton's Opposition was not timely filed. Under the circumstances here, however, we will nonetheless consider Staton's Opposition.

¹⁶ Mills Opposition at 2.

¹⁷ See Letter from Robert J. Miller, counsel for Staton Holdings, Inc., to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Federal Communications Commission, dated April 14, 2003 ("*April 14 Letter*").

¹⁸ See FDVS Motion at 2-8.

¹⁹ See Staton's Opposition to the Motion for Dismiss Formal Complaint, filed June 2, 2003 ("FDVS Opposition").

²⁰ FDVS Opposition at 2.

²¹ *Id.* at 3.

²² *Id.* at 7.

with the filing requirements of the Act and the Commission's rules. Section 208 of the Act states that a complaint must be directed against "any common carrier subject to this Act."²³ Further, section 1.720(b) of the Commission's rules states that a formal complaint "must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation."²⁴ Section 1.721(a) of the Commission's rules states that a formal complaint shall contain a "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated."²⁵

10. Staton does not allege that Mills is a common carrier subject to Section 208 of the Act.²⁶ Moreover, Staton's own pleadings admit that "the only reason Mills was included as a defendant in the Formal Complaint was to provide a means for the Commission to enforce the requested remedy and order the appropriate parties to return the All Eights Number to Staton."²⁷ Staton does not allege that Mills violated the Act or the Commission's rules or orders, but relies on sections 152(a) and 154(i) of the Act, contending that those sections give the Commission the flexibility to assert jurisdiction over Mills.²⁸ Finally, we note that Staton supports the dismissal of Mills, albeit without prejudice to allow Mills to be included in these proceedings in the future if deemed necessary by the Commission.²⁹

11. Regarding FDVS, again, Staton does not allege that it is a common carrier.³⁰ In fact, Staton readily admits that FDVS is "not directly subject to the Act."³¹ Staton states that its complaint against FDVS was intended as a means to enforce Staton's requested remedy.³² Staton again relies on sections 152(a) and 154(i) of the Act, contending that those sections give the Commission the flexibility to assert jurisdiction over FDVS.³³

12. We conclude that Staton's complaints against Mills and FDVS fail to comply with threshold requirements for a formal complaint. Specifically, these complaints fail to allege that common carriers have violated the Act or the Commission's rules or orders, as required by section 208 of the Act, and sections 1.720(b) and 1.721(a) of the Commission's rules. Hence, we find that these complaints do not state a cause of action upon which relief can be granted. We therefore dismiss, with prejudice, the complaints against Mills and FDVS. We note that Staton does not object to the dismissal of the Mills Complaint.

²³ 47 U.S.C. § 208(a).

²⁴ 47 C.F.R. § 1.720(b).

²⁵ 47 C.F.R. § 1.721(a)(4).

²⁶ Mills Complaint at 3.

²⁷ Mills Opposition at 2.

²⁸ *Id.*

²⁹ *See April 14 Letter.*

³⁰ FDVS Complaint at 3.

³¹ *Id.*

³² FDVS Opposition at 2.

³³ *Id.* at 3.

13. The Act and the Commission's rules do not allow the Commission to award attorney's fees or costs.³⁴ We therefore deny Mills' request for such an award.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Motion for Dismissal of Mills Fleet Farm, Inc. and for an Award of Attorney's Fees is GRANTED in part and DENIED in part, as set forth above.

15. IT IS FURTHER ORDERED that the above-captioned formal complaint IS DISMISSED WITH PREJUDICE as to Mills Fleet Farm, Inc., and that this proceeding IS TERMINATED with regard to Mills Fleet Farm, Inc.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Motion to Dismiss Formal Complaint filed by First Data Voice Services is GRANTED.

17. IT IS FURTHER ORDERED that the above-captioned formal complaint IS DISMISSED WITH PREJUDICE as to First Data Voice Services, and that this proceeding IS TERMINATED with regard to First Data Voice Services.

FEDERAL COMMUNICATIONS COMMISSION

Kurt A. Schroeder
Deputy Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

³⁴ *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, Memorandum Opinion and Hearing Designation Order, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 100 FCC 2d 1244, 1257, para. 31 n.51 (1985).