



BellSouth's \$75 Cash Back Promotion violated Florida law and that BellSouth was allegedly using carrier-to-carrier information for marketing purposes in violation of 47 U.S.C. Section 222(b) and Section 364.01(4)(g), Florida Statutes. In its Amended complaint, Supra removed the allegations regarding the \$75 Cash Back Promotion.

On June 12, 2003, BellSouth filed a Motion for Continuance and/or Rescheduling to extend the date of the hearing. On June 17, 2003, by Order No. PSC-03-0721-PCO-TP, Supra was granted leave to amend its petition. On the same date, Order No. PSC-03-0718-PCO-TP, the Order Establishing Procedure, was issued. Supra also filed its response to BellSouth's Motion for Continuance and/or Rescheduling on June 17, 2003. BellSouth's Motion for Continuance was denied by Order No. PSC-03-0763-PCO-TP, issued on June 25, 2003. This matter is set for hearing on August 29, 2003.

On June 20, 2003, BellSouth filed its Answer to Supra's Amended Petition and a Partial Motion to Dismiss. On June 24, 2003, Supra filed its response to the Partial Motion to Dismiss. This Order addresses the Partial Motion to Dismiss and Supra's response.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant BellSouth's Partial Motion to Dismiss Supra's Amended Petition?

**RECOMMENDATION:** The Commission should grant in part, and deny in part, BellSouth Telecommunications, Inc.'s (BellSouth) Partial Motion to Dismiss. To the extent that Supra asks the Commission to remedy BellSouth's alleged violations of 47 U.S.C. Section 222(b), the motion should be granted. However, to the extent that Supra's petition asks the Commission to impose applicable penalties for any anti-competitive impacts resulting from alleged violations of that provision, the Partial Motion to Dismiss should be denied.  
**(DODSON, HARRIS)**

**STAFF ANALYSIS:**

Partial Motion to Dismiss

Under Florida law, the purpose of a Motion to Dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a Motion to Dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290- S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

In its motion, BellSouth states that this Commission does not have jurisdiction to resolve Supra's contention that BellSouth has violated 47 U.S.C. Section 222(b).

47 U.S.C. Section 222(b) reads as follows:

CONFIDENTIALITY OF CARRIER INFORMATION. - A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

BellSouth argues that in order to hear and determine a petition, a court or agency must be vested with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So.2d 665, 666 (Fla. 1st DCA 1971). Subject matter jurisdiction must be conferred by constitution or statute and cannot be conferred by waiver or acquiescence. Jesse v. State, 711, So. 2d 1179, 1180 (Fla. 2nd DCA 1998). The Legislature, BellSouth argues, has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See City of Cape Coral v. GAC Util., Inc., 281 So.2d 493, 496 (Fla. 1973). Instead, BellSouth argues, "[t]he Commission has only those powers granted by statute expressly or by necessary

implication." See Deltona Corp. v. Mayo, 342 So.2d 510, 512 n.4 (Fla. 1977).

Moreover, BellSouth adds, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917; State v. Louisville & N. R. Co., 49 So. 30 (Fla. 1909). Finally, BellSouth states, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." State v. Mayo, 354 So.2d 359, 361 (Fla. 1977).

BellSouth further argues, that in Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to regulate, interpret, or enforce federal law regarding a carrier's use of "wholesale information" for marketing purposes. Further, BellSouth contends, while the Commission has authority under the Telecommunications Act of 1996 (Act), to interpret and resolve issues of federal law in Section 252 arbitration proceedings, the Act does not grant the Commission any authority to resolve and enforce purported violations of Section 222(b) of the Act.

BellSouth distinguishes this Commission's Order No. PSC-03-0578-FOF-TP in Docket No. 030200-TP, issued May 6, 2003. In that Order, BellSouth contends, Supra stated that the Commission did not have jurisdiction to "enforce an FCC statute." BellSouth states that the Commission rejected Supra's argument and determined that "under Section 364.01, Florida Statutes, we have jurisdiction to review conduct that is alleged to violate an FCC rule if such violation could be deemed anticompetitive behavior under Florida law." See Order No. PSC-03-0578-FOF-TP at p. 15. However, BellSouth states, in Docket No. 030200-TP the Commission was never asked to find that Supra actually violated Section 222(b) of the Act. Rather, AT&T limited its request for relief to purported violations of Florida law. In this docket, BellSouth is asking that the Commission dismiss Supra's Amended Complaint to the extent it alleges that BellSouth is in violation of 47 U.S.C. Section 222(b).

Supra's Response

Supra states that 47 U.S.C. Section 222(b) expressly prohibits the use of proprietary customer information for a carrier's own marketing. Supra contends that in Order No. PSC-03-0726-FOF-TP, issued June 19, 2003 in Docket No. 020119-TP, this Commission quoted the FCC as stating in Order FCC 99-223<sup>1</sup> at Paragraph 76, with respect to the Section 222 prohibition: "We conclude that competition is harmed if any carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly." See Order No. PSC-03-0726-FOF-TP at p. 45.

Further, in Order No. PSC-03-0578-FOF-TP, in Docket No. 030200-TP, Supra states, this Commission stated that "The main thrust of the Telecommunications Act is the promotion of fairness and competition in the telecommunications industry." See Order No. PSC-03-0578-FOF-TP at pg. 14. Additionally, Supra adds, the Commission stated "Chapter 364.01, Florida Statutes, grants broad powers to this Commission in the enforcement of the intent of the Act." Id.

Therefore, Supra contends, since the use of carrier-to-carrier information has already been found to harm competition, it follows that this Commission has jurisdiction to review conduct that is alleged to violate Section 222(b) because such a violation would be anti-competitive under Section 364.01(4)(g), Florida Statutes.

Supra alleges that BellSouth has misconstrued AT&T's request for relief in Docket No. 030200-TP. Supra asserts that Paragraph 20 of AT&T's complaint, which describes the basis for the relief AT&T requests, is devoid of any reference to any state statute, rule or Commission order, and cites only 47 U.S.C. Section 222(b).

---

<sup>1</sup>Order FCC 99-223, Order on Reconsideration and Petitions for Forbearance, (CC Docket No. 96-115, In the Matter of: Implementation of the Telecommunications Act of 1996: Telecommunications Carrier Use of Customer Proprietary Network Information and Other Customer Information and CC Docket No. 96-149, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended), Adopted: August 16, 1999; Released: September 3, 1999 (Order FCC 99-223).

Further, Supra cites *Order FCC 03-42*, paragraph 28<sup>2</sup>:

We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. . . . In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

Supra contends that this language means that incumbent carriers cannot argue that State utility commissions are preempted and therefore prohibited from taking action in this area. Supra adds that Section 120.80(13)(d), Florida Statutes, further supports this Commission's authority to enforce matters involving the Act because it states: "Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with the act."

#### Staff's Analysis

To the extent that Supra asks the Commission specifically to remedy BellSouth's violations of 47 U.S.C. Section 222(b), staff recommends the Partial Motion to Dismiss should be granted, as this Commission lacks subject matter jurisdiction to remedy violations of federal law.

However, viewing Supra's allegation that BellSouth is using carrier to carrier information for marketing purposes in the light most favorable to the petitioner, it appears that Supra has stated a cause of action for which relief can be granted by the Commission. To the extent that Supra's petition asks the Commission to impose applicable penalties for anti-competitive impacts arising from 47 U.S.C. Section 222(b), the Motion to

---

<sup>2</sup>Order FCC 03-42, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, (CC Docket No. 94-129 In the Matter of: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996: Policies and Rules Concerning Unauthorized Changers of Consumers' Long Distance Carriers) Adopted: February 28, 2003, Released March 17, 2003 (*Order FCC 03-42*).

Dismiss should be denied. In other words, to the extent that the Commission finds that any violations of 47 U.S.C. Section 222(b) constitute anticompetitive behavior as prohibited by Section 364.01(4)(g), Florida Statutes, the Commission may impose penalties as provided in Section 369.285, Florida Statutes.

The main thrust of the Telecommunications Act is the promotion of fairness and competition in the telecommunications industry. Chapter 364.01, Florida Statutes, grants broad powers to this Commission in the enforcement of the intent of the Act. In addition to the broad general powers contained in that Chapter, 364.01(4)(g) provides:

- (4) The Commission shall exercise its exclusive jurisdiction in order to:
- (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . .

Thus, staff recommends that under Section 364.01, Florida Statutes, the Commission has jurisdiction to review conduct that is alleged to violate a FCC rule if such violation could be deemed anticompetitive behavior under Florida law.

Based on the foregoing, staff believes Supra has stated a cause of action, at least in part, for which relief can be granted. Therefore, staff recommends the Partial Motion to Dismiss should be granted in part and denied in part, as discussed above.

**ISSUE 2:** Should Docket No. 030349-TP be closed?

**RECOMMENDATION:** No. If staff's recommendation in Issue 1 is approved, Docket No. 030349-TP should remain open pending final disposition by the Commission. (DODSON, HARRIS)

**STAFF ANALYSIS:** If staff's recommendation in Issue 1 is approved, Docket No. 030349-TP should remain open pending final disposition by the Commission.