

ORIGINAL

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Sent: Tuesday, August 29, 2006 5:04 PM
To: Filings@psc.state.fl.us
Cc: Allison Smith; Joshua Jones
Subject: PSC BellSouth Manhole Docket 050194-TL, Petition Protesting PAA
Attachments: Bellsouth Appeal.doc

Attached, please send confirmation of receipt.

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CORRESPONDENCE

August 29, 2006

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Re: Docket No. 050194-TL

To Whom It May Concern:

Enclosed please find a courtesy copy of the Petition of Protest to Proposed Agency Action that was e-filed yesterday at approximately 5:00 pm (EST). If you have any questions, please feel free to contact me.

Sincerely,

Allison Smith

/ats

Enclosure

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

DOCKET No. 050194-TL

Filed: August 29, 2006

PETITION OF PROTEST TO PROPOSED AGENCY ACTION

By and through undersigned counsel, pursuant to Florida Statutes § 120.57, and Rules 25-22.029 and 28-106.201 of the Florida Administrative Code, Karla Hightshoe, Timothy McCall, and Manuel Garcia, individuals, and Best Investment Realty, Inc., a Florida Corporation, bring this protest against the Public Service Commission's Proposed Agency Action, Order No. PSC-06-0685-PAA-TL ("PAA"), on behalf of all BellSouth Customers (collectively "Petitioners") who have paid the Miami-Dade County Ordinance #83-3 ("Tariff").

I. Agency and other Parties Affected

- A. The Florida Public Service Commission**
2540 Shumard Oak Bouelavard
Tallahassee, Florida 32399-0850
1-800-342-3552
The Docket Number in this case is 050194-TL.

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B. BellSouth Telecommunications, Inc.
J. Meza/E. Edenfield/M. Gurdian/S. Liebman
c/o Ms. Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556
Phone: 850-577-5555
FAX: 222-8640
Email: nancy.sims@bellsouth.com

II. Petitioners

A. Karla Hightshoe
A Miami-Dade County resident.

B. Timothy McCall
A Miami-Dade County resident.

C. Manuel Garcia
A Miami-Dade County resident.

D. Best Investment Realty, Inc.
A Miami-Dade County business.

E. Petitioners' Counsel Where Service Can Be Produced

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3. Aronovitz Trial Lawyers
Tod Aronovitz/Chris Marowitz
Museum Tower, Suite 2700
150 West Flagler Street
Miami, FL 33130
Phone: 305-372-2772
Fax: 305-375-0243

III. Notice of Proposed Agency Action

Petitioners only received notice of the Proposed Agency Action, Order No. PSC-06-0685-PAA-TL via the PSC website on August 8, 2006.

IV. Issues of Material Fact

Florida courts may set aside or remand final agency actions that depend on findings of fact that are not supported by competent and substantial evidence. *See Cain v. Unemployment Appeals Com'n*, 876 So.2d 592 (Fla. 5th DCA 2004); *see also DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957) (describing “competent substantial evidence” being that which a reasonable mind would accept as adequate to support the conclusion reached)). Petitioners protest this proposed agency action because there is a lack of competent substantial evidence to support any of the findings of fact or conclusions made to support the action.

Petitioners are not alone in noting the fact that the investigation or discovery process undertaken by the Public Service Commission Staff has yielded far more questions than answers. In fact, at page three of the PAA, it is specifically noted by Blanca Bayo, Director, Division of the Commission Clerk and Administrative Services, that “Due to the passage of time and the unavailability of data...it is difficult to perform an analysis for each six-month period since the inception of the fee.” Later on the same page, it is noted that, “the supporting data necessary to confirm [the] result is not available.” The data limitations are noted yet again on page five in a discussion indicating that the only thing that is clear is that the tariff has been administered inconsistently. Such recurring notations concerning a lack of information have been commonplace throughout the history of this docket and can be found in any of the Staff Recommendations to the Commissioners. It is a mystery and a disservice to Florida

Consumers that the Commissioners could make such strong conclusions and findings of facts as those in the PAA with only a limited amount of information and a lack of competent substantial evidence.

From the information provided by BellSouth via PSC Staff's discovery requests, Staff learned virtually nothing of the early years. Information is missing from 1983 until June of 1987. Though three sets of discovery were requested by PSC Staff to BellSouth, no great effort was expended by PSC Staff to propound further discovery or unique discovery methods beyond those interrogatories or requests for production of documents to uncover who might have information or who may be able to answer questions; it seems that assumptions were simply made that such information was lost forever—to the benefit of BellSouth and to the detriment of Miami-Dade County consumers. The hard questions were never asked, and documentation to back up the limited data produced was never sequestered. Information sporadically goes missing throughout the years, until finally, staff, "On balance, and in consideration of data limitations [] find[s] that BellSouth's approach of setting cumulative under/over balance to zero at the beginning of 1998 is reasonable." PAA, p. 4. However, discovery was limited to asking BellSouth to produce self-serving numbers, with no independent accounting or request for production of the actual documents that created the numbers.

While the concept of a theoretical distribution to consumers through the Rate of Return and Sharing Plan regulation and accounting scheme may seem "reasonable" to PSC staff for allowing BellSouth to reset the over collection balance to zero in 1998, it simply doesn't make sense. This method and distribution applied to all of BellSouth's Florida consumers, not just Miami-Dade County customers. Thus, when

such distribution or return to customers was made, all Florida customers benefited at the expense of what was robbed from Miami-Dade County customers, i.e. what was taken in violation of the Tariff from Miami-Dade County customers was redistributed to customers across the state. The affected Miami-Dade County customers have still not been made whole for the economic injuries they suffered prior to 1998 or from 1998 to the present. Further, because the overhead accounting method was questionable at best, it is unclear, and again, as Staff points out, impossible to know, what overhead expenses that resulted in an overage/underage during the time frame before 1998 was related to the Tariff and what was related to other expenses. However, despite the lack of information and the lack of diligent discovery to uncover additional information, Staff and the Commissioners are ready to conclude and take action using a very specific date from which Miami-Dade County BellSouth customers should cut their losses and a very specific dollar amount from which BellSouth should adjust its accounts going forward. Essentially, the Florida Public Service Commission is turning a blind eye on twenty-three years of poor accounting practices by a major telecommunications company at the expense of Florida consumers.

Ultimately, the PSC finds a specifically random dollar amount for which BellSouth over collected on the Tariff. Yet, the PSC makes no finding as to whether the Tariff has been violated. This conclusion, or lack thereof, is baffling. Further, rather than have BellSouth return this money to the consumers from which it was wrongfully taken, the PSC intends to allow BellSouth to adjust for the overage in the future because there is no finding of a violation of the Tariff (though there is no clear indication of what caused the accounting problem that lead to the overage other than inconsistent application

of the Tariff). The PSC also notes that affected customers may no longer be BellSouth customers and that the refund per line would be less than \$.50. Again, without competent substantial evidence to support a finding of the exact amount of overage/underage, it is impossible for the PSC to conclude the exact amount of refund per line, and to Petitioners' knowledge, there was no discovery conducted on the issue of the number of BellSouth customers or the rate of customer retention or population studies in Miami-Dade County between 1983—2006 to support such conclusions.

Specifically, Petitioners disagree with the following findings of fact or conclusions:

A. **That there was an over collection pursuant to the Manhole Ordinance tariff A.2.4.6 but no finding of a violation of the Tariff.** If BellSouth over collected from its customers by virtue of the Tariff and failed to return those funds to its customers, it violated the Tariff.

B. **That no customer credit or refund is required.** There has been a violation of Section A.2.4.6 of the General Subscriber Service Tariff. Staff concludes that a specific number of customers would probably be affected and that many are probably no longer customers of BellSouth, and therefore the per line refund would probably be less than \$.50. These are random conclusions—to Petitioners' knowledge, no discovery was conducted on the issue of how many Miami-Dade County customers BellSouth currently has. Further, no discovery was

conducted on the issue of the retention rate of BellSouth customers from 1983--present. Petitioners doubt there has been a mass exodus from Miami-Dade County and without competent substantial evidence to support the amount of over collection, PSC staff cannot conclude that a refund would be less than \$.50 per line.

C. That the cumulative overage in collections, with interest, as of year-end 2005 shall be set at \$469,176. As explained above, there is not competent substantial evidence to make this conclusion. Petitioners and PSC staff have pointed out that data is missing for a number of years, and even if accepting the "Rate of Return" argument that the balance should be reset at \$0 beginning in 1998, "the supporting data necessary to confirm this result is not available, and there is a question as to the appropriate method for calculating overhead expenses." PAA, p.5.

D. That future accounting and reconciliation for each six-month period be applied as accounting adjustment. Petitioners interpret the Tariff to require a refund of any overage collected, not an accounting "adjustment."

V. Relief Sought

Petitioners ask for a full evidentiary hearing or in the alternative that this matter be returned to the Honorable Judge Henry Harnage in the 11th Judicial Circuit Court in and for Miami-Dade County Florida, where it was abated pending action by the Public

Service Commission, so that full discovery can be undertaken at the Parties' expense rather than taxpayers' expense. If the matter is returned to Judge Harnage, Petitioners ask that the PAA be abated pending final resolution by the court. Petitioners also ask that any adjustments made by BellSouth pursuant to the PAA beginning August 1, 2006 or while the evidentiary proceeding requested herein is pending be readjusted pursuant to any order arising from such evidentiary proceeding.

/s/JUSTIN WITKIN
Justin G. Witkin, Esa.—FL 0109584
Joshua A. Jones, Esq.—FL 0847291
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4400 Bayou Boulevard, Suite 58
Pensacola, FL 32503
Phone: (850) 916-7450
Fax: (850) 916-7449

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Petition of Protest to Proposed Agency

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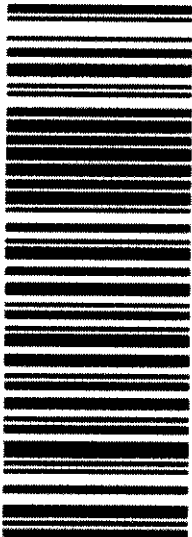
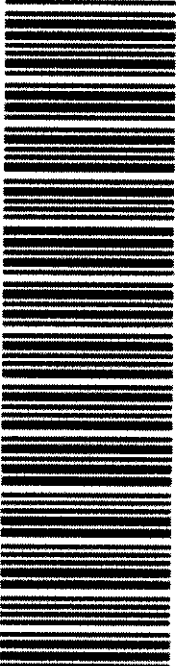
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2540 Shumard Oak Bouelavard
Tallahassee, Florida 32399-0850

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J.Meza/E.Edenfield/M.Gurdian/S.Liebman
c/o Ms. Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

/s/JUSTIN WITKIN
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