State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 27, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Scott) KS DS CSB PK
Division of Competitive Markets & Enforcement (Beard, Casey)

RE: Docket No. 070263-TP – Petition for declaratory statement regarding 911 fee and TASA charges to Florida counties and agencies, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

AGENDA: 07/10/07 – Regular Agenda – Ruling on Petition for Declaratory Statement – Participation at the Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 07/13/07 (Statutory Deadline – Order Must Be Issued)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070263.RCM.DOC

Case Background

Pursuant to Section 120.565, Florida Statutes ("F.S."), and Rules 28-105.001 and 28-105.002, Florida Administrative Code ("F.A.C."), BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T" or "company") filed a Petition for Declaratory Statement ("Petition") on April 16, 2007. In its Petition, AT&T seeks a determination as to whether the company is required to bill and collect 911 fees[1] and TASA[2] surcharges, pursuant to Sections 365.171 and

[1] Since the filing of AT&T's Petition, the Legislature passed House Bill 919, which amended Sections 365.171 and 365.172, F.S. The bill was subsequently signed into law on May 24, 2007. *See* Chapter No. 2007-78, Laws of Florida. Staff notes that although AT&T was aware of this change in law as it relates to the 911 fee, it did not amend its Petition accordingly. Section 365.171, F.S., "Florida Emergency Telephone Act," establishes and

427.704, F.S., and Rule 25-4.160, F.A.C., from the Orange County Sheriff's Office ("Sheriff's Office") when the Sheriff's Office claims it is not subject to the fees and surcharges and objects to the fees and surcharges.

A Notice of Declaratory Statement ("Notice") was published in the May 4, 2007, Florida Administrative Weekly, informing interested persons of AT&T's Petition. No comments were received in response to the Notice.

Pursuant to Section 120.565, F.S., and Rule 28-105.003, F.A.C., an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. Thus, the Commission must issue an order on AT&T's Petition for declaratory statement by July 13, 2007.

The Commission has jurisdiction in this matter pursuant to Section 120.565, F.S.

implements a cohesive statewide emergency telephone number 911 plan by providing citizens rapid direct access to public safety agencies by dialing the telephone number 911 with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.

[2] *See* Sections 427.701- 427.708, F.S., "Telecommunications Access System Act of 1991," which establishes a system whereby the citizens of Florida who are hearing impaired, speech impaired, or dual sensory impaired have access to basic telecommunications services at a cost no greater than that paid by other telecommunications services customers.

Discussion of Issues

Issue 1: Should the Commission grant AT&T's Petition for Declaratory Statement?

Recommendation: No. AT&T's Petition for Declaratory Statement should be denied. (Scott, Beard, Casey)

Staff Analysis: As stated in the Case Background, AT&T has filed a Petition for a Declaratory Statement seeking the Commission's determination as to whether AT&T is required to bill and collect 911 fees and TASA charges from the Orange County Sheriff's Office. Pursuant to Rule 28-105.003, F.A.C., an agency may rely on the statement of facts contained in the petition for declaratory statement without taking a position on the validity of the facts when making a determination on the petition.

AT&T's Petition

Factual Background

AT&T asserts that in October of 2003, it was informed by the Sheriff's Office that it was not liable for 911 fees, surcharges, or taxes or the Communications Tax, and that the Sheriff's Office no longer intended to pay the 911 fees. Attorney General Opinion 87-20 ("Opinion") (April 8, 1987) is the basis for the Sheriff's Office's stated intent not to pay the fees. According to AT&T, the Opinion states that the 911 fee is "not a fee imposed upon the telephone company which, as authorized by tariff of the Public Service Commission, is passed on to the consumer of such utility services; but rather is a fee or charge on the consumer for which the telephone company merely acts as a collection agent" and "appears to be in the nature of a tax imposed to defray nonrecurring charges incurred by a county in implementing the '911' service in that county."

Furthermore, AT&T asserts that the Opinion provides that "Section 365.171(13), F.S., does not, either expressly or by implication, make provision for imposing the '911' fee upon agencies of the state or upon the state itself." AT&T also states that the Opinion provides that a state agency is "not authorized to pay the '911' fee imposed by counties for '911' emergency telephone services provided to state agencies as such fee is in the nature of a tax from which the state and its agencies are immune in the absence of an express legislative waiver of such immunity." AT&T further states that "[w]hile the Opinion does not discuss the TASA Surcharge, the TASA Surcharge is similar to the 911 fee in that it is imposed pursuant to Florida law and is a fixed monthly charge to be collected from telecommunications company customers."

AT&T asserts that it advised Commission staff on December 7, 2005, that it would no longer bill 911 fee or the TASA surcharge to the access lines of the counties (such as lines used

at county administrative offices and other county departments) in its service territory because counties, as political subdivisions of the State, may be considered immune from the fee.[3]

According to AT&T, on December 4, 2006, the Commission staff advised AT&T that it disagreed with the Sheriff's Office's position and requested AT&T to immediately re-implement the collection of the 911 fees and TASA surcharges from county agencies and that it back-bill for any amounts that would have been collected had it not discontinued collection. The company states that Commission staff indicated that AT&T did not follow the prescribed statutory procedure for dealing with objections to the 911 fee, and that the proper course of action would have been to continue to collect the fee and report to the county that one of its agencies was refusing to pay the 911 fee that the county itself had chosen to impose.

Furthermore, AT&T asserts that Commission staff stated that any refusal to pay the TASA surcharges should be handled under the same procedures used by the Commission to handle billing disputes. Moreover, AT&T states that Commission staff informed the company that if a county agency were to refuse to pay the TASA surcharge for any reason, AT&T must continue billing the surcharge and report the billing dispute to the Commission.

AT&T further states that it contacted the 911 Coordinator for Orange County on December 18, 2006, inquiring as to whether it continued to object to paying the 911 fee and TASA surcharge.[4] On or about January 11, 2007, the 911 Coordinator for Orange County confirmed that Orange County continues to object to payment of the 911 fee and TASA surcharge. AT&T also asserts that it attempted to contact the Orange County Attorney's Office, but has not, to date, received a communication from that office indicating that it has changed its position.

AT&T's Request

In its Petition, AT&T requests that the Commission issue a declaratory statement as to the following questions:

1) whether the Sheriff's Office is correct that AT&T should not bill and collect the 911 fee and TASA surcharge from Florida counties and their agencies or subdivisions;

2) whether it is appropriate for counties to be billed and/or back-billed the 911 fee and TASA surcharge;

3) whether AT&T is required to include on the list sent to the counties quarterly, any county, county agency, or county subdivision that refuses to pay the 911 fee; and

4) whether AT&T is required to report to the Commission that a county or county agency refuses to pay the TASA surcharge.

[3] As a result of AT&T's belief that the TASA surcharge is similar to the 911 fee, AT&T unilaterally discontinued its billing and collecting of the TASA surcharge.

[4] Staff notes that the Sheriff's Office originally objected to the 911 fee, not the TASA surcharge.

Analysis and Recommendation

Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Furthermore, Rule 28-105.001, F.A.C., states that "[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority." Rule 28-105.001, F.A.C., further states, however, that a declaratory statement is not a means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.

The purpose of a declaratory statement is to allow the petitioner to select a proper course of action in advance. *Gopman v. Department of Education*, 908 So. 2d 118 (Fla. 1st DCA 2005). The facts, as set out in AT&T's Petition, show that AT&T discontinued billing and collecting the 911 fee and the TASA surcharge over a year prior to seeking a declaratory statement. Declaratory statements, however, are not available when seeking approval of acts which have already occurred. *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration*, 2007 Fla. App. LEXIS 6480 (Fla. 1st DCA 2007); *see also Novick v. Department of Health*, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002)(stating that a petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied).

According to AT&T's Petition, it unilaterally decided not to impose either the 911 fee or the TASA surcharge on the Sheriff's Office, as well as other county agencies within its service territory. Prior to taking any action, AT&T did not seek a declaratory statement from the Commission. Rather, AT&T took it upon itself to not impose the fees and surcharges based on objections and doubts raised in a billing dispute with one of its customers. AT&T is now asking the Commission to determine whether conduct it has been engaging in for over a year or more is appropriate. Therefore, staff recommends that the Commission deny AT&T's request for a declaratory statement because it is not the proper vehicle for approving conduct that has already occurred.

In further support of staff's recommendation, a declaratory statement is an inappropriate means to determine the correctness or incorrectness of a third party's actions or, in this case, inaction. AT&T has asked this Commission to determine whether the Sheriff's Office is correct

in its belief that AT&T should not bill and collect the TASA surcharge from Florida counties and their agencies or subdivisions. Underlying AT&T's request for a declaratory statement is a billing dispute between itself and the Sheriff's Office. Staff believes that this matter would be more appropriately handled in the context of an enforcement proceeding in which Commission staff would have an opportunity to gather information.

Conclusion

Based upon the foregoing reasons, staff recommends that the Commission deny AT&T's Petition because, pursuant to Section 120.565, Florida Statutes, and Rule 28-105.001, Florida Administrative Code, as well as relevant case law, a declaratory statement is not the appropriate means for approving conduct that has already occurred or for determining conduct of third parties.

Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, the docket should be closed. (Scott)

Staff Analysis: A declaratory statement is issued as a final order and the docket may be closed after the deadline for filing an appeal has passed.