

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of J.
Christopher Robbins against
BellSouth Telecommunications,
Inc. for violation of Rule 25-
4.073(1)(c), F.A.C., Answering
Time.

DOCKET NO. 020595-TL
ORDER NO. PSC-02-1344-FOF-TL
ISSUED: October 3, 2002

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

I. BACKGROUND

On June 26, 2002, J. Christopher Robbins (Petitioner) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for violation of Rule 25-4.073(1)(c), Florida Administrative Code, Answering Time. Mr. Robbins alleges that 90 percent of all calls directed to intercept, directory assistance and repair services and 80 percent of all calls to business offices are not answered within the 30-second response time required by the rule. In his petition, Mr. Robbins seeks administrative action and monetary damages. On July 15, 2002, BellSouth filed a Motion to Dismiss the complaint. The Petitioner did not file a response to the motion.

On July 25, 2002, our staff held an informal meeting with Mr. Robbins, BellSouth, and the Office of Public Counsel (OPC) in an attempt to resolve this matter. A resolution was not forthcoming, but representatives of the OPC advised Mr. Robbins that they would review BellSouth's response times to see if they were in compliance with the rule. On September 9, 2002, the OPC advised Mr. Robbins

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that they had reviewed BellSouth's response times and had found BellSouth substantially in compliance with both repair and business office measurements. The OPC further informed Mr. Robbins that the OPC "would have no basis for filing a complaint against BellSouth for willful failure to comply with the answer time rules based on the current performance of the company."

In his complaint, Mr. Robbins alleges that BellSouth is not meeting the requirements of Rule 25-4.073(1)(c), Florida Administrative Code, Answering Time. Petitioner requests that the Commission initiate show cause proceedings against BellSouth, conduct an investigation and publish its findings, permit Mr. Robbins to conduct discovery, and award compensatory damages to all of BellSouth's Florida customers.

II. MOTION TO DISMISS

In its Motion to Dismiss, BellSouth states that Mr. Robbins' complaint should be dismissed for lack of standing, lack of subject matter jurisdiction, and failure to state a cause of action.

BellSouth argues that Mr. Robbins lacks standing to file a complaint on behalf of either himself or the residents of Florida. BellSouth maintains that Mr. Robbins does not meet the standards set forth in Agrico Chemical Co. v. DER, 406 So.2d 478, 482 (Fla. 2nd DCA 1981), which states that to have standing, a person must demonstrate that (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes hearing, and (2) his substantial injury is of a type or nature which the proceeding is designed to protect. Id. To meet these standards, BellSouth states, a person must show that he has suffered an injury in fact as a result of the action complained of, which entitles him to a hearing, and the person must show that his injury is within the "zone of interest" that the rule is designed to protect. See Ameristeel Corp. v. Clark, 691 So.2d 473, 477 (Fla. 1997).

Further, BellSouth points out that the only injuries alleged by Mr. Robbins are pecuniary in nature. According to BellSouth, this Commission does not have jurisdiction to award monetary damages in resolving utility-related disputes. See Southern Bell

Telephone Co. v. Mobile America Corp., Inc., 291 So. 2d 199, 202 (Fla. 1974).

In addition, BellSouth declares that this Commission settled all claims with regard to BellSouth's alleged violation of the Answer Time rules for 2000 and 2001 in Docket No. 010097-TL, by Order No. PSC-02-0197-PAA-TL, issued on February 13, 2002. Therefore, according to BellSouth, any violations of Rule 25-4.073, Florida Administrative Code, that Mr. Robbins may allege that occurred during 2000 and 2001 are barred by that settlement and should be dismissed.

Moreover, BellSouth adds, Mr. Robbins has failed to state a cause of action upon which relief can be granted because Mr. Robbins relied on Subsection (1)(c) of Rule 25-4.073. Since BellSouth uses a menu-driven automated, interactive answering system, the subsection of the rule that applies to them, contends BellSouth, is Subsection (1)(d). Therefore, BellSouth holds that Mr. Robbins' complaint fails because it is based on invalid grounds.

Even if the correct rule had been applied, BellSouth states, the complaint would still fail to state a cause of action because BellSouth is currently meeting the requirements of Rule 25-4.073(1)(d) and met the requirements in 2001. As evidence for this claim, BellSouth points to this Commission's 2001 Service Evaluation for BellSouth's answer times which specifically recognizes BellSouth's passing scores.

Lastly, BellSouth takes issue that Mr. Robbins can represent the citizens of Florida. BellSouth declares that Mr. Robbins cites no authority indicating that he is authorized or qualified to do so. BellSouth states that there is no jurisdiction or procedure at this Commission for hearing class action cases. BellSouth contends that it is the obligation of the Commission and the OPC to represent the citizens of Florida.

III. DECISION

We are vested with jurisdiction in this matter pursuant to Sections 364.01(4), 364.025, 364.03, Florida Statutes.

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 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.

As mentioned above, Mr. Robbins alleges that BellSouth is not meeting the requirements of Rule 25-4.073(1)(c), Florida Administrative Code, Answering Time, which states:

At least ninety (90%) percent of all calls directed to intercept, directory assistance and repair services and eighty (80%) percent of all the calls to the business offices shall be answered within thirty (30) seconds after the last digit is dialed.

However, Mr. Robbins has failed to show any specific instance of BellSouth's violation of this rule. Further, Mr. Robbins will not divulge the telephone number or numbers from which the calls originated, so our staff has been unable to aid him in documenting express violations. We agree with BellSouth that we approved a settlement of all claims with BellSouth for alleged violations of the Answer Time rules occurring in 2000 and 2001, by Order No. PSC-02-0197-PAA-TL, issued February 13, 2002, in Docket No. 010097-TL. In addition, BellSouth's 2001 Service Evaluation indicates BellSouth has complied with the Answer Time rules from the time of the order until this date.

We do not agree with BellSouth's argument that Mr. Robbins' misstatement of the rule would, of itself, constitute grounds for dismissal. It would seem unfair to deny Mr. Robbins access to an administrative forum, simply because he did not know that BellSouth uses a menu-driven, interactive answering system. However, even if

the correct rule was applied in this instance, Mr. Robbins has still failed to cite any instances of BellSouth's violation of the rule. Therefore, we find the Petitioner has failed to state a cause of action for which relief can be granted.

Even if Mr. Robbins' complaint had stated a cause of action for which relief could be granted, Mr. Robbins lacks standing under the Agrico test. The first prong of the test, the "immediacy" requirement, has been held to preclude participation based on stated concerns that are speculative or conjectural. See International Jai-Alai Players Assoc. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, at 1225, 1226 (Fla. 3rd DCA 1990), and Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process). The injuries Mr. Robbins claims of BellSouth appear speculative at best because we are unable to determine their nature. Since both prongs of the Agrico test must be met (see, Ameristeel Corp. v. Clark, 691 So. 2d at 477), we find that Mr. Robbins lacks standing.

Mr. Robbins also requests that we award compensatory damages to all BellSouth customers. It is not within this agency's jurisdiction to do so. See Southern Bell Telephone Co. v. Mobile America Corp., Inc., 291 So. 2d 199, 202 (Fla. 1974) (award of money damages for past failures to provide telephone service meeting the statutory standards is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, 5(b), Fla. Const.).

For the foregoing reasons, we find that BellSouth's Motion to Dismiss is granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. Motion to Dismiss the complaint of J. Christopher Robbins is granted. It is further

ORDERED that this docket shall be closed.

ORDER NO. PSC-02-1344-FOF-TL
DOCKET NO. 020595-TL
PAGE 6

By ORDER of the Florida Public Service Commission this 3rd day
of October, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

LHD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak

ORDER NO. PSC-02-1344-FOF-TL
DOCKET NO. 020595-TL
PAGE 7

Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.