BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against Miami-Dade County for alleged operation of a telecommunications company in violation of Florida statutes and Commission rules.	DOCKET NO. 050257-TL ORDER NO. PSC-05-0847-FOF-TL ISSUED: August 19, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

I. Case Background

On April 13, 2005, BellSouth Telecommunications, Inc. (BellSouth) filed its Complaint regarding the operation of a telecommunications company in violation of applicable Florida Statutes and Commission rules against Miami-Dade County (County). The County filed its Answer on May 24, 2005. On June 2, 2005, the County filed its Motion to Dismiss. On June 9, 2005, BellSouth filed a Motion for Extension of Time. By Order No. PSC-05-0653-PCO-TL, issued June 16, 2005, BellSouth was granted until June 20, 2005 to respond. On June 17, 2005, BellSouth filed its Response to Miami-Dade County's Motion to Dismiss.

The rule at issue in this docket is Rule 25-24.580, Florida Administrative Code[1], which provides that:

> Airports shall be exempt from other STS rules due to the necessity to ensure the safe and efficient transportation of passengers and freight through the airport facility. The airport shall obtain a certificate as a shared tenant service provider before it provides shared local services to facilities such as hotels, shopping malls and industrial parks. However, if the airport partitions its trunks, it shall be exempt from other STS rules for service provided only to the airport facility.

[1] This rule codified our decision in *In re: Investigation into Appropriate Rates and Conditions of Service for Shared Local Exchange Telephone Service*, Docket No. 860455-TL, Order No. 17111, issued January 15, 1987 (STS Order). We held in the STS Order that airports shall be exempt from the commercial STS rules and permitted to continue to share local exchange service for services related to the safe and efficient transportation of passengers and freight through the airport campus.

In its complaint, BellSouth contends that the County is providing shared local tenant services to commercial airport tenants in violation of Rule 25-24.580, Florida Administrative Code, by failing to obtain a shared tenant services (STS) certificate.

This proceeding is the result of a concurrent proceeding before the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Case no. 02-288688 CA 03. In that proceeding, BellSouth has alleged that the County is operating a telecommunications company, based on the County's acquisition of telecommunications facilities and operations at Miami International Airport (MIA) in violation of the Miami-Dade County Home Rule Charter and in violation of Florida Statutes, by not obtaining a certificate of convenience and necessity to provide STS from this Commission.

II. Position of the Parties

County

In its Motion, the County contends BellSouth's Complaint is based on an interpretation of the STS Order that is wholly inconsistent with the terms of that decision and our stated rational. The County argues that the only thing that has materially changed since issuance of the STS Order is that the management of airports, particularly the paramount need to assure security, has increased exponentially in complexity since September 11, 2001. The County opines that BellSouth's attempt to redefine the scope of the STS airport exemption eighteen years later should be promptly dismissed without further waste of County and our resources.

The County asserts that in 1987 after protracted proceedings in which detailed testimony was received and opposing positions considered, we issued the STS Order adopting rules governing the provision of STS. The County contends that during the consideration of appropriate rules for commercial STS providers and other types of sharing arrangements, we heard considerable testimony regarding the shared airport systems that the Greater Orlando Aviation Authority (GOAA) and the County had established to accommodate the special and unique circumstances of airports. The County asserts that GOAA and the County's systems, unlike commercial STS operations, are operated by governmental authorities for the convenience of the traveling public and have unique and critical communications needs such as the ability of airport tenants to quickly communicate with one another for security reasons. The County asserts that as a result of the special airport circumstances, the STS Order exempted airports from the commercial STS rules and permitted airports such as MIA to continue to share local exchange service for airport purposes (i.e., service related to the safe and efficient transportation of passengers and freight through the airport campus) without the requirement of certification or other restrictions applicable to commercial STS providers, such as prohibitions on inter-tenant calling, and single building and local trunk sharing limitations.

The County argues further that BellSouth lacks standing to bring its complaint pursuant to our rules. The County contends that in Florida a party has the burden to prove standing by demonstrating that it has a substantial interest in the outcome of the proceeding. Specifically, the County contends that a party must demonstrate that: (1) it will suffer injury that is substantial and immediate, not merely speculative or conjectural; and (2) the injury is of a type that the

proceeding is designed to protect. The County opines that BellSouth's assertion that it has an interest in competitive providers complying with our applicable requirements is not sufficient to demonstrate that it will suffer any injury, either immediate or speculative. The County argues further that the fact that it allows BellSouth to fully and freely provide services to MIA tenants directly and purchases[2] the trunks used to serve the shared airport system from BellSouth is further proof that BellSouth has not been injured.

The County asserts that even if we were to find that BellSouth had standing to bring its complaint, BellSouth's claim that the County was required to apply for and obtain a certificate to provide shared airport services: (1) to restaurants, retail shops or other commercial entities located in the MIA terminals to serve the traveling public; (2) for the hotel to receive non-shared, partitioned service; and (3) before the County commenced operation of the shared airport system is incorrect. The County argues that the STS Order clearly provides that when an airport operates shared airport telecommunications for the purpose of the safe and efficient transportation of passengers and freight through the airport campus, the airport is exempt from certification because there is no competition with nor duplication of local exchange service by the LEC. The County asserts that the airport provides concessions in its terminals for the convenience and comfort to travelers passing through the airport and that this purpose is wholly consistent with the STS Order and Rule 25-24.580, Florida Administrative Code. The County argues further that the hotel at MIA is served on a fully partitioned basis and is not a part of the shared airport system consistent with the requirement in Rule 25-24.580, Florida Administrative Code, that "if the airport partitions its trunks, it shall be exempt from other STS rules for service provided only to the airport facility."

Consequently, the County argues that BellSouth's complaint is based on a misinterpretation of the STS Order and Rule 25-24.580, Florida Administrative Code, and therefore, should be dismissed.

BellSouth

In its Response, BellSouth asserts that the County's Motion to Dismiss is procedurally defective, because it fails to meet the legal standard for a Motion to Dismiss and is also untimely. BellSouth asserts that the County's Motion is not focused on the four corners of the Complaint and inappropriately relies on evidence in the form of testimony and affidavits attached to its Motion to support dismissal. BellSouth argues further that the County's Motion, filed on June 1, 2005[3], is untimely pursuant to Rule 28-106.204(2), Florida Administrative Code, which requires motions to dismiss to be filed no later than twenty (20) days after service of the petition on a party.

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[2] The County states in its Motion that that the Miami-Dade Aviation Department, which manages and operates MIA for the County, pays BellSouth over $630,000 annually for local service, trunks and other equipment, services and access necessary for MDAD to provide shared services.

[3] In its Response, BellSouth stated the Motion was filed June 1, 2005, however, our records indicate the Motion was filed on June 2, 2005.

BellSouth argues it has stated a cause of action in its complaint. BellSouth asserts that if the allegations in its complaint are taken as factually correct, the County is blatantly and intentionally violating Florida law and our rules, and as a result, its behavior is both anticompetitive and discriminatory. Specifically, BellSouth argues that its Complaint shows that the County is operating as a STS provider without the necessary certificate by providing services to facilities such as hotels, shopping malls, and industrial parks and by not partitioning its trunks with respect to services to restaurants, retail shops or other commercial entities. BellSouth asserts further that the County is a competitor and it is using its provision of telecommunications services to generate revenues and profits for the County and not the safe and efficient transport of passengers and freight through the airport facility. BellSouth contends that taking these facts as correct, it has clearly alleged a valid cause of action against the County and therefore, the Complaint cannot be dismissed.

In response to the County's assertion that BellSouth lacks standing to bring the Complaint, BellSouth cites Section 120.569, Florida Statutes, which states that any substantially affected person may or request a hearing. *Citing* Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement trust Fund, 595, So. 2d 186, 189 (Fla 1st DCA 1992), BellSouth clarifies that a party has a substantial interest if: (1) it will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing or intervene in proceedings already pending; and (2) his substantial injury is the type or nature which the proceeding is designed to protect. BellSouth contends it has satisfied both of these requirements. As to the first prong of the test, BellSouth asserts that it has an economic interest in the even-handed regulation of telecommunications companies with which it competes. BellSouth clarifies further that applying rules of regulation to one provider while failing to enforce the rules of regulation to a competitor affects the economic interests of Bellsouth and its ability to compete. Addressing the second prong of the standing test, the zone of interest requirement, BellSouth asserts it is in the zone of interest because it is a telecommunications company whose operations are regulated, in part, by this Commission. BellSouth further contends that it is required to be certificated by this Commission, to provide access to basic services, and to provide access to 911 and that any interpretation of state law by this Commission on the issue of how a competitor is regulated has a substantial affect on BellSouth's ability to compete. For these reasons, BellSouth asserts it has standing to bring its Complaint.

Additionally, BellSouth asserts that the County's Motion is essentially a Motion for Summary Final Order. Citing Combs v. City of Naples, 834 So. 2d 194, 198 (Fla. 2nd DCA 2002), BellSouth clarifies that it is well settled that a motion to dismiss is not a substitute for a motion for summary judgment and consequently, we are without discretion to treat the County's Motion as one for summary final order.

BellSouth asserts that if we treat the County's Motion as one for summary final order, there are clearly disputed issues of material fact and under Florida law, the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and every possible inference must be drawn in favor of the party against whom a summary judgment is sought. BellSouth points out that during its lawsuit in Circuit Court, it conducted extensive written discovery and completed several depositions of the County's

designated and authorized representatives. BellSouth contends that the information discovered through these proceedings spawned the need to file its Complaint with this Commission. Attached to BellSouth's Response is the deposition testimony of County representatives that BellSouth asserts, contrary to the County's position, confirm that the County is seeking to make a profit from its telecommunications business and that the County intends to compete with other telecommunications companies.

Finally, BellSouth argues the County's contention that it has consistently complied with our regulations and applicable statutory requirements is erroneous. BellSouth's Composite Exhibit 1 attached to its Response points out that our staff in late 2001 and again in 2003 informed the County that it was their opinion that the County should obtain a certificate to provide STS to airport tenants when it acquired the airport telecommunications facilities from NextiraOne LLC in February, 2002.

III. Analysis

Standard of Review

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. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

Additionally, Rule 28-106.204(2), Florida Administrative Code, requires that motions to dismiss a petition shall be filed no later than 20 days after service of the petition on the party.

Discussion

First, we find that BellSouth does have standing to bring this action before this Commission. It is not challenged by the County that BellSouth has an economic interest in providing telecommunications services to commercial vendors within MIA. Furthermore, as a certificated telecommunications company competing for business within MIA, BellSouth has an interest in how we interpret and apply Rule 25-24.580, Florida Administrative Code, in this instance. Accordingly, we find that BellSouth's Complaint alleges an actual injury of sufficient immediacy which the proceeding was designed to protect.[4]

[4] See Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981)

We find further that BellSouth has stated a cause of action in its complaint for which relief can be granted. Taking all the allegations as true and viewed in the light most favorable to BellSouth, a valid question is raised as to whether or not the County's provisioning of shared tenant services to commercial vendors at MIA is exempt from our STS rules pursuant to Rule 25-24.580, Florida Administrative Code.

Additionally, we find that the County failed to file its Motion within the 20 days required pursuant to Rule 28-106.204(2), Florida Administrative Code. The County was served with BellSouth's Complaint on May 2, 2005. A timely Motion to Dismiss would need to have been filed by May 23. The County filed its Motion on June 2, 2005. Consequently, the Motion to Dismiss shall be denied because it was not timely filed.

The County raises legitimate concerns that after lengthy proceedings in the Circuit Court, an additional proceeding may place a significant strain on the County's resources. However, as a result of the Circuit Court proceeding, there may not remain significant disputed issues of material fact. Rather, this proceeding may be appropriately conducted pursuant to Section 120.57(2), Florida Administrative Code, which would require the parties only address the unresolved legal issues. Our staff will work with the parties to determine if a Section 120.57(2) hearing is appropriate.

For the reasons set forth above, we find that BellSouth has stated a cause of action for which relief may be granted and the County's Motion was not timely filed. Therefore, the County's Motion to Dismiss shall be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Miami-Dade County's Motion to Dismiss is hereby denied. It is further

ORDERED that this docket shall remain open and our staff shall work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer.

By ORDER of the Florida Public Service Commission this 19th day of August, 2005.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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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 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.