

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Dispute between Dade) DOCKET NO. 931033-TL
County Aviation department and) ORDER NO. PSC-94-1285-FOF-TL
BELLSOUTH TELECOMMUNICATIONS,) ISSUED: October 17, 1994
INC. d/b/a SOUTHERN BELL)
TELEPHONE AND TELEGRAPH COMPANY)
related to telephone serving)
arrangements at airports in Dade)
County.)
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

I. BACKGROUND

On February 1, 1994, the Commission issued Proposed Agency Action Order PSC-94-0123-FOF-TL Regarding Access to Facilities at Airports. The Order was issued as a result of failed attempts to settle a dispute that has continued for several years between the Dade County Aviation Department (DCAD) and Bellsouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell or Company). On February 17, 1994, DCAD filed a Petition on Proposed Agency Action and Request for Formal Hearing. On March 11, 1994, Southern Bell filed a Motion to Dismiss DCAD's Petition. DCAD filed a response to the Motion to Dismiss on March 22, 1994.

II. MOTION TO DISMISS

Order PSC-94-0123-FOF-TL addressed the location of Southern Bell's network point of demarcation on DCAD airport complexes, the extent to which DCAD must provide cable support structures for Southern Bell to reach its airport tenant customers, whether Southern Bell shall be responsible for the cost of additional

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support structures, and whether Southern Bell should be required to use DCAD installed cable to provide service at the airport. Also, whether DCAD should be able to dictate where Southern Bell's demarcation point should be in future installations.

DCAD timely filed a Petition on Proposed Agency Action and Request for Formal Hearing in response to the Commission's Order, stating that its substantial interests will be affected by the actions proposed in the Order.

Southern Bell filed a Motion to Dismiss arguing that the Petition should be dismissed because it fails to set forth an adequate basis to obtain a formal hearing. (emphasis supplied) Specifically, the Company argued that the Petition fails to set forth adequately any genuine disputed issues of material fact and that it fails to set forth the relief requested and the basis for the relief in accordance with Rule 25-22.036(7)(a)4 and 5, Florida Administrative Code.

Upon consideration, we find that DCAD's Petition should not be dismissed. First, although DCAD characterized its Petition as a request for a formal hearing, it appears, from the pleading as a whole, that DCAD did not intend to limit its request to a formal proceeding. Rule 25-22.029(4) provides that one whose substantial interests may or will be affected by the Commission's proposed action may file for a section 120.57 hearing. The DCAD Petition stated "...that its substantial interests will be affected by the Commission's Proposed Agency Action and, therefore, respectfully requests that it be granted a hearing pursuant to Section 120.57, Florida statutes, to review that proposed action."

Since the Petition is not limited to a request for a formal hearing, the fact that there may not be any genuine disputed issues of material fact does not eliminate DCAD's right to a hearing.

The court in Village Saloon, Inc. v. Division of Alcoholic Beverages, Department of Business Regulation, 463 So.2d 278 (Fla. 1st DCA 1984) found failure to state disputed issues of material fact would not eliminate the right to a hearing. The court observed:

"Fundamental to due process is the right to a fair hearing. The provisions of section 120.57 implement that right through the mechanism of formal proceedings or informal proceedings. Section 120.57(1) governs formal proceedings and necessarily requires the holding of a hearing. Informal proceedings under section 120.57(2), on the other hand, may proceed with or without a hearing... While a party has the absolute right to a formal hearing under section 120.57(1) when material

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facts are in dispute, the absence of disputed issues of material fact, which authorizes informal proceedings under section 120.57(2) does not, ipso facto, eliminate the right to a hearing..."

The second reason we find that DCAD's Petition should not be dismissed is that it substantially satisfies the requirements of Rule 25-22.036(7)(a)4 and 5. The Petition sets out the Rules and Statutes DCAD believes entitles it to relief and requests a hearing.

Southern Bell also requested in the alternative that if the Commission grants DCAD a hearing, that it grant an informal hearing pursuant to Section 120.57(2), Florida Statutes, rather than formal hearing. The Company asserted that the Commission should strike any other issues that do not raise disputed issues of material fact or are not otherwise appropriate to be resolved in an evidentiary hearing.

It is premature to make a determination about whether DCAD is entitled to a formal or informal hearing. Notwithstanding the issues raised in DCAD's Petition, there may be disputed issues of material fact that would require a formal hearing. This should not be decided until after there is an Issue Identification Workshop. If, at that time, it is determined that there are no disputed issues of material fact, then the hearing should be conducted informally pursuant to 120.57(2), Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bellsouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company's Motion to Dismiss Dade County Aviation Department's Petition on Proposed Agency Action Order PSC-94-0123-FOF-TL, is hereby denied.

By ORDER of the Florida Public Service Commission, this 17th day of October, 1994.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
TWH

by: Kay Flynn
Chief, Bureau of Records,

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 Records and Reporting 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 or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.