

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint by BellSouth Telecommunications,)	
Inc. against VarTec Telecom, Inc. d/b/a VarTec)	
Telecom and Clear Choice Communications)	Docket No. 011374-TP
regarding practices in the reporting of percent)	
interstate usage for compensation for)	Filed: March 29, 2002
jurisdictional access services.)	
_____)	

VARTEC'S MOTION TO DISMISS COMPLAINT

Comes now, VarTec Telecom Inc. d/b/a VarTec Telecom and Clear Choice Communications ("VarTec") and respectfully requests the Florida Public Service Commission ("Commission" or PSC") to dismiss the Complaint filed in this docket by BellSouth Telecommunications, Inc. ("BellSouth"). For cause, VarTec shows as follows:

I.

BELLSOUTH'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

1. In its Complaint, BellSouth makes the following allegations:

- a) That BellSouth is a local exchange telecommunications company that provides exchange access to VarTec, an interexchange company. BellSouth Complaint, paragraphs 1-4.
- b) That VarTec misreported its terminating percentage of interstate usage ("TPIU"), which is used to calculate the number of minutes of terminating access provided to VarTec by BellSouth. BellSouth Complaint, paragraph 11.
- c) That this alleged underreporting resulted in BellSouth underbilling (and VarTec underpaying) intrastate terminating access charges for the period between 1994 and 2000. BellSouth Complaint, paragraph 12.
- d) That BellSouth made demand upon VarTec, which VarTec has refused to pay. BellSouth Complaint paragraph 13.

DOCUMENTAL MESSAGES
03626 MAR 29 8
FPSC-COMM. SECTION CLERK

2. Based on the above allegations, BellSouth asks the Commission to order VarTec to pay “all sums due and owing to BellSouth” as well as applicable late payment charges.¹ Complaint, paragraph 14. Thus, the only dispute between the parties relates to the amount of money, if any, owed by VarTec to BellSouth for a prior period of time. BellSouth’s Complaint is a suit for monetary damages, and the relief requested is beyond the Commission’s jurisdiction to award. BellSouth’s Complaint therefore fails to state a cause of action upon which the Commission can grant relief, and must be dismissed. VarTec respectfully moves for an order dismissing BellSouth’s Complaint.

The Commission has no statutory authority to award monetary damages.

3. The Commission’s jurisdiction over telecommunications issues is broad, but it is not unlimited. The Florida Supreme Court has determined that suits for monetary damages are beyond the Commission’s jurisdiction. Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc., 291 So.2d 199 (Fla. 1974). In that case, a plaintiff brought suit in circuit court, seeking damages because its local telecommunications provider had failed to comply with the statutory standards for provision of telephone service found in Section 364.03, Florida Statutes. The circuit court dismissed the complaint on the grounds that the Commission enjoyed exclusive jurisdiction over the issues found in Chapter 364, Florida Statutes. The district court of appeals reversed the decision, stating that “the PSC does not have authority to award damages for past failures to meet service standards.” Mobile America at 201.

4. The Florida Supreme Court upheld the district court of appeals’ decision, explaining that while the trial court’s erroneous conclusion may have been “understandable”,

¹ From a review of paragraph 10 of the Complaint, it appears that BellSouth bases its demand for damages on its own assumptions and projections rather than evidence of the actual number of minutes of intrastate calls terminated by BellSouth between 1994 to 2000.

given the language in § 364.01(2) that broadly grants the Commission exclusive jurisdiction over regulation of telecommunications companies, the award of damages is reserved to the courts by the Florida Constitution:

Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V., §5(b), Fla. Const.

Mobile America at 202. Thus, the Florida Supreme Court recognized that the Commission's authority is limited not only by statute², but by the terms of the Florida Constitution.

VarTec is entitled to a jury trial, which is beyond the Commission's jurisdiction to provide.

5. Although the Florida Supreme Court in Mobile America relied upon Article V, §5 (b) of the Florida Constitution in determining that the award of monetary damages is beyond the Commission's jurisdiction, Article 1, §22 of the Florida Constitution mandates the same result on independent grounds. Article 1, §22 secures the right to a jury trial in all cases in which the parties were entitled to a jury trial under the common law. BellSouth's complaint amounts to nothing more than a traditional action for payment for services rendered, a type of suit that existed and was recognized at common law at the time Florida adopted its Constitution, and to which the right to a jury trial accordingly applied.³ Article 1, §22 thus provides VarTec with a

² Although VarTec reserves the right to respond to any specific statutory argument raised by BellSouth, it is noted that VarTec is the sole provider of interexchange services in this relationship (BellSouth Complaint, paragraphs 1-4) and thus Section 364.07, Florida Statutes, is inapplicable.

³ Suits by common carriers seeking payment, like other actions for the value of services rendered, were considered "assumpsit" actions under the common law. Barnard v. Wheeler, 24 Maine 412, 420-21, 1843 Me. Lexis 88 (1843); see also, Hurt v. Atlanta, B. & A. R., 84 So. 631, 632 (Ala. App. 1919); Chicago, B & O. R.R. v. Berry's Sons, 86 Pa. Super. 1, 1, 1925 Pa. Super. Lexis 40 (1925). Jury trials were afforded. See, e.g., Central R. Co. V. H. H. Lineaweaver Co., 27 F.2d 25 (3rd Cir. 1928); St. Louis S.R.R. Co. v. Arkadelphia Milling Co., 180 S.W. 200 (Ark. 1915).

right to a jury trial in this case. This right applies notwithstanding BellSouth's decision to file its collection action with the Commission rather than in Circuit Court. See Broward v. La Rosa, 505 So. 2d 422, 424 (Fla. 1987). As the Commission cannot provide a jury trial, the action must be dismissed, and VarTec respectfully so moves.

The Commission has no general authority to adjudicate BellSouth's claim for damages.

6. BellSouth has not alleged any violation of statute, rule or order, nor has BellSouth identified any statutory basis for its pleading. It thus appears that BellSouth relies upon some inherent power of the Commission to adjudicate a debt between telecommunications providers, and to order its payment. The Legislature has never granted the Commission such broad, general authority, and none exists.

7. The Florida Public Service Commission, like other administrative agencies, is a creation of statute, with the ability to exercise only limited powers:

[The] Commission's powers, duties and authority are those and only those that are expressly or impliedly by statute of the State. [citations omitted] Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof.... *The Legislature of Florida has never conferred upon the Public Service Commission any general authority to regulate public utilities.*

City of Cape Coral v. GAC Utilities, Inc. and the Florida Public Service Commission, 281 So.2d 493 at 496 (Fla. 1973), emphasis added. Accord, Teleco Communications Co. v. Clark, 695 So. 2d 304, 307 (Fla. 1977) (Commission has no jurisdiction over claim by telecommunications provider for amounts allegedly due). Clearly, BellSouth cannot rely upon any general or inherent authority for the relief requested in its Complaint.

8. This Commission has openly acknowledged the limits of its jurisdiction in connection with claims for monetary damages. Order No. PSC-99-1054-FOF-EI, Order No.

PSC-95-1153-FOF-TI. In fact, the Commission has taken great care to avoid entertaining issues that appear to trespass this boundary, stating clearly and repeatedly that it lacks jurisdiction to award monetary damages. Order No. PSC-96-1321-FOF-TP, Order No. PSC-96-1579-FOF-TP, Order No. PSC-97-0122-FOF-TP, Order No. PSC-99-1309-PHO-FOF-TP, Order No. PSC-00-0185-PCO-TP, Order No. PSC-00-0285-PCO-TP.

9. BellSouth, too, has freely acknowledged the Commission's inability to award damages. In fact, BellSouth recently has used this argument defensively to pre-empt other telecommunications companies from seeking damages against BellSouth. See, for example, Order No. PSC- 99-1565-PHO-TP, which reflects BellSouth's argument against the award of monetary damages for its alleged breach of an interconnection agreement:

Finally, even if Access One were able to prevail on any issue that it has raised in this matter, its demand for damages [from BellSouth] must be dismissed. The Commission lacks the authority to award damages. Accordingly, any relief to which Access One were able to prove itself entitled must be limited to nonmonetary, injunctive remedies.

Order No. PSC- 99-1565-PHO-TP, pages 8, 17 (bracketed material added).

10. BellSouth has requested *only* monetary damages in its Complaint.⁴ Not only has BellSouth failed to request injunctive relief, it has failed even to allege any facts for which injunctive relief could possibly be appropriate. BellSouth seeks payment only for occurrences in a prior, completed period of time (1994 - 2000, see BellSouth Complaint paragraphs 11, 12, 14). There are no allegations of continuing activity that could give rise to any injunctive relief that may be within the Commission's jurisdiction. Because the Commission lacks jurisdiction to

⁴ Although BellSouth's Complaint also includes a request "for all other relief deemed appropriate under the law" (BellSouth Complaint, paragraph 14(3)), this ancillary request is insufficient to stand on its own once the requests for payment of monetary damages are dismissed.

award the only relief sought by BellSouth, the Complaint must be dismissed, as VarTec respectfully requests.

Legal standard for Motions to Dismiss for failure to state a cause of action upon which relief can be granted.

11. The function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The appropriate standard is whether, taking all allegations in the petition as true, and without considering any affirmative defenses or evidence likely to be raised by the parties, the petition states a cause of action upon which relief can be granted. Id. BellSouth's Complaint fails to pass this test. Even assuming that all facts alleged in BellSouth's Complaint are true, BellSouth's Complaint amounts to nothing more than a suit for payment for services rendered, and requests relief which is beyond the Commission's jurisdiction to grant.

II.

BELLSOUTH'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO MEET THE REQUIREMENTS OF RULE 25-22.036, FLORIDA ADMINISTRATIVE CODE

12. BellSouth's Complaint states that it is brought "pursuant to Florida Administrative Code Rules 25-22.036(2), 25-22.036(3)(b), and 28-106.201 and Florida Statutes Chapters 350 and 364." There is no other legal authority cited in the Complaint.

13. Rule 25-22.036 Florida Administrative Code, Initiation of Formal Proceedings, specifies the purpose of a formal complaint:

A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

Rule 25-22.036(2), Florida Administrative Code (emphasis added). A review of BellSouth's Complaint reveals that BellSouth never alleges any action or omission complained of is in violation of a statute enforced by the Commission, or of any Commission rule or order. Instead, BellSouth is attempting to use the complaint process to collect an alleged debt in a manner that bypasses the normal Circuit Court forum and the right to a jury trial that any citizen has when sued for such a debt. Debt collection is not properly the subject of a complaint under Rule 25-22.036(b), and the Complaint therefore should be dismissed.

14. BellSouth similarly fails to meet the pleading requirements of Rule 25-22.036(3)(b), Florida Administrative Code, which requires that the complaining party specify the particular rule, order or statute that triggers the Commission's jurisdiction:

Each complaint, in addition to the requirements of paragraph (a) above shall also contain:

1. The rule, order, or statute that has been violated[.]

This pleading rule serves to put the Defendant on notice of the allegations against it so that it can prepare a defense showing that it has not violated the specific rule, order or statute cited.

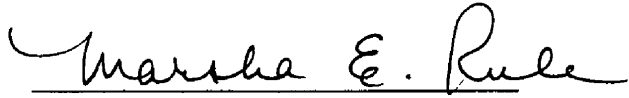
BellSouth having failed to comply with this rule, VarTec is placed in the untenable position of having to guess the legal basis for the filing of the Complaint with the Commission.

15. As stated above, the only legal authorities cited anywhere in BellSouth's Complaint are (1) Rules 25-22.036(2), 25-22.036(3)(b), and 28-106.20, Florida Administrative Code, which are the pleading requirements BellSouth has failed to comply with, and (2) Florida Statutes Chapters 350 and 364. The citation to the entirety of Chapters 350 and 364, Florida Statutes, is unexplained, but it does not appear that BellSouth is accusing VarTec of violating each and every statute included in both of these chapters. There is no other legal citation anywhere else in the Complaint and thus the pleading provides no notice to the Commission or

VarTec of what statute, rule or order may have been violated. It is simply unreasonable to require either the Commission or VarTec to review each and every statute under the Commission's jurisdiction and pre-emptively analyze how each one does or does not apply to the facts alleged by BellSouth. This should be no more acceptable to the Commission than it is to VarTec, and BellSouth's Complaint should be dismissed, or in the alternative, stricken.

WHEREFORE, VarTec respectfully requests this Commission to dismiss BellSouth's Complaint.

Respectfully submitted this 29th day of March, 2002.



Kenneth A. Hoffman, Esquire
Martin P. McDonnell, Esquire
Marsha E. Rule, Esquire
RUTLEDGE, ECENIA, PURNELL &
HOFFMAN PA
P.O. Box 551
Tallahassee, FL 32302
(850) 681-6788 (Telephone)
(850) 681-6515 (Telephone)

and

James U. Troup
James H. Lister
MCGUIRE WOODS LLP
1050 Connecticut Avenue, Suite 1200
Washington, D.C. 200-5317
(202) 857-1700 (Telephone)
(202) 857-1737 (Telecopier)

Attorneys for VarTec Telecom, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2002, a copy of the foregoing Motion to Dismiss Complaint was furnished by United States Mail to the following:

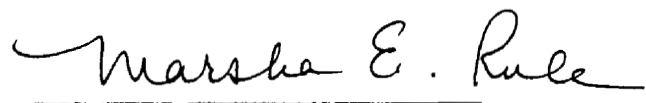
Nancy B. White, Esq.
James B. Meza
c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301

R. Douglas Lackey
675 West Peachtree Street, Suite 4300
Atlanta, Georgia

Wayne T. McGaw
365 Canal Street, Room 3060
New Orleans, LA 70130

Edward H. Bergin
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre, LLP
201 St. Charles Avenue, 49th Floor
New Orleans, LA 70170-5100

Jason Fudge, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850



MARSHA E. RULE, ESQ.