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ORIGINAL

July 2, 2002

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COMMISSION
CLERK

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 020493-TP - Complaint Regarding Regulatory Assessment Fees Paid By Supra

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth's Opposition to Supra's Motion to Dismiss, which we ask that you file in the above-captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties of record as shown on the certificate of service.

Sincerely,

James Meza III (LA)

James Meza III

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

DOCUMENT NUMBER-DATE
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CERTIFICATE OF SERVICE
Docket No. 020493-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 2nd day of July, 2002 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Complaint of BellSouth Telecommunications, Inc., regarding the Regulatory Assessment Fees Paid by Supra Telecommunications and Information Systems, Inc., for the years 2000 and 2001.	)))))))	Docket No. 020493-TP Filed: July 2, 2002

OPPOSITION TO SUPRA'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth"), respectfully submits this Opposition to Supra Telecommunications and Information Systems, Inc.'s ("Supra") Motion to Dismiss BellSouth's Complaint ("Motion").

INTRODUCTION

On June 6, 2002, BellSouth filed a Complaint with the Florida Public Service Commission ("Commission") because of Supra's violation of Section 364.336, Florida Statutes and Rule 25-4.0161, Florida Administrative Code, relating to Supra's regulatory assessment fee ("RAF") payments. The basis of BellSouth's claim is simple. Section 364.336 and Rule 25-4.0161, require telecommunications companies to pay RAFs based on their gross operating revenue, minus any amounts **paid** to another carrier for use of that carrier's telecommunications network. In its RAF forms, from which Supra calculated its RAF payments to the Commission, Supra stated that it paid BellSouth $1,032,596.00 in 2000 and $23,552,861.00 in 2001. However, BellSouth has presented evidence, including Supra's own admissions in other proceedings, that Supra had not paid BellSouth any money in 2000 and did not pay BellSouth

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$23,552,861.00 in 2001. Based on these misrepresentations, Supra paid less RAFs to the Commission than other carriers, including BellSouth, who calculated and paid RAFs based on the express wording of Section 364.336 and the Commission's rule.

Supra filed its Motion to Dismiss on June 20, 2002[1], wherein it requested that the Commission dismiss BellSouth's Complaint for two reasons: (1) Supra claimed that BellSouth's utilization of the Commission's complaint procedures was improper because BellSouth was not challenging and the Commission had not issued a preliminary agency action ("PAA"); and (2) BellSouth did not have standing to raise the Complaint. Interestingly, Supra did not challenge any of the allegations raised by BellSouth in the Complaint, including the fact that (1) Supra had not paid BellSouth any money for services received in 2000 and did not pay BellSouth $23,552,861.00 in 2001; and (2) the plain wording of Section 364.336 and Rule 25-4.0161 requires that any deduction be based on amounts actually **paid** to other carriers.

The Commission should deny Supra's Motion and should allow this matter to proceed to hearing because, as will be established below, the Commission's rules authorize BellSouth's filing of the Complaint and because BellSouth has standing to raise the issues in the Complaint.

[1]Supra served BellSouth via U.S. mail. Thus, pursuant to Rules 28-106.103 and 28-106.204, Florida Administrative Code, BellSouth response is due in 12 days or by July 2, 2002.

LAW AND ARGUMENT

I. Standard for Motion to Dismiss

A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the petition to be true and determine whether the petition states a cause of action upon which relief may be granted. Heekin v. Florida Power & Light Co., Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 *2 (citing to Varnes, 624 So. 2d at 350). All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id. Further, in order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. Id. Applying this standard to the case at hand, it is clear that Supra's Motion to Dismiss must be denied.

II. BellSouth Has the Procedural Right to Bring the Complaint

Supra argues that BellSouth's Complaint should be dismissed because the Commission rules purportedly do not authorize the filing of a complaint absent the issuance of a PAA.[2] Under Supra's warped interpretation of the Commission's rules, a party can file a complaint and request a formal hearing, "only after the person has received notice of the [Commission's] proposed agency action." Motion at 1-7. Supra argues that because the Commission has

[2]Supra does not challenge BellSouth's compliance with the pleading requirements set forth in the applicable rules, just that BellSouth cannot institute a complaint proceeding based on the rules.

not issued a PAA, BellSouth has no procedural right under Rules 28-106.201 and 25-22.036 to bring the Complaint. Id.

In support of this erroneous argument, Supra provides a long-winded and irrelevant analysis of the "Specific Authority" and "Law Implemented" sections that follow the applicable Commission rules. Additionally, Supra cites to Rule 25-22.029, which specifically addresses a party's right to protest a PAA and request a Section 120.569 and 120.57 hearing under the Administrative Procedure Act ("APA). Id. Supra concludes by stating that, based on the above authority, "ss. 120.569 and 120.57, F.S. require that the Commission first have taken some proposed agency action . . . Rule 25-22.036, F.A.C., [cannot] be cited as a basis for filing its complaint against Supra – in the absence of a Commission order reflecting some proposed agency action." Motion at 7. The Commission should reject this argument for the following reasons.

First, Supra's argument conveniently ignores the express language of Rule 25-22.036, which expressly provides BellSouth with the right to file a complaint against Supra.[3] This rule provides in pertinent part:

> (2) Complaints. 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

[3] BellSouth filed the Complaint primarily pursuant to Rule 25-22.036(2), Florida Administrative Code. BellSouth included the reference to Rule 28-106.201, Florida Administrative Code, in an abundance of caution. The fact that Rule 28-106.201 refers to PAA challenges does not nullify BellSouth's independent right to initiate a complaint proceeding under Rule 25-22.036 even in the absence of a Commission issued PAA. Indeed, the Commission has already determined that "formal evidentiary hearings (or hearings involving disputed issues of material fact) pending before the Public Service Commission are not governed solely by Chapter 28-106. Thus, Chapter 28-106 must be read in conjunction with the remaining portions of Chapter 25-22 and the Commission's statutory obligations. One of the provisions retained by the Commission is Rule 25-22.036 . . . ." In re: Peninsular Florida, Order No. PSC-99-1716-PCU-EU, 1999 WL 742820 *3.

> violation of a statue enforced by the Commission, or
> of any Commission rule or order.

Rule 25-22.036(2), Florida Administrative Code. Contrary to Supra's argument, there is no requirement in Rule 25-22.036 that a complaint can be initiated only after the issuance of a PAA. In fact, the rule provides just the opposite, authorizing a party to file a complaint to complain of an act that violates a "statute enforced by the Commission" or "any Commission rule or order", irrespective of the issuance of a PAA.

BellSouth's Complaint complies with Rule 25-22.036. Specifically, BellSouth brought the Complaint to address Supra's violation of Section 364.336, which is a statute enforced by the Commission and Rule 25-4.0161, which is a Commission rule. Thus, Supra's argument is facially deficient and must be rejected. Simply put, notwithstanding Supra's twisted and convoluted argument, the Commission's rules do not limit a party's right to bring a complaint proceeding to the challenge or after the issuance of a PAA.

Second, Commission precedent establishes that a party can initiate a complaint proceeding even in the absence of a PAA. For instance, in In re: Petition of Metropolitan Fiber Systems of Florida, Inc., Order No. 96-1321-FOF-TP, 1996 WL 669854 *2, the Commission determined that a party can use Rule 25-22.036 to address violations of an arbitrated agreement. "If a party to an arbitrated agreement believes the other party is not performing its duties under the agreement, it has remedies under state law. A party may file an appropriate petition or complaint under Rule 25-22.036, Florida Administrative Code."

Significantly, the Commission, in interpreting Rule 25-22.036, did not tie a party's right to initiate a complaint proceeding to the issuance of a PAA.

Similarly, in In re: Peninsular Florida, Order No. 99-1716-PCO-EU, 1999 WL 742820 *3, the Commission held, that under 25-22.036(3), the Commission may, on its own motion, issue an order or notice initiating a complaint proceeding. Again, the Commission, in interpreting Rule 25-22.036, did not limit this sua sponte right to initiate a complaint proceeding to only when the Commission issues a PAA.

Indeed, research has revealed numerous occasions where parties instituted a Rule 25-22.036 complaint proceeding even in the absence of the issuance of a PAA. See e.g., Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited Relief, Docket No. 020578-TP (filing complaint against BellSouth pursuant to Rules 25-22.036(2) 28-106.201); Petition for Structural Separation of BellSouth Telecommunications, Inc., Docket No. 010345-TP (requesting that the Commission structurally separate BellSouth); D.R. Horton Custom Homes, Inc. v. Southlake Utilities, Inc., Docket No. 980992-WS, Order No. PSC-00-1518-SC-WS, 2000 WL 1298798 *2 (filing of a complaint against the utility pursuant to Rule 25-22.036). Accordingly, Supra's argument is directly contrary to Commission precedent and the practice of parties before the Commission.

Third, in addition to ignoring the express wording of Rule 25-22.036, Supra's argument misinterprets the applicable Commission rules and the APA. At its essence, Supra argues that, pursuant to Rule 25-22.029, complaint

proceedings can only be instituted after the issuance of a PAA. Motion at 4. Rule 25-22.029 governs a party's ability to protest a PAA and to request a Section 120.569 or 120.57 hearing under the APA. Supra's erroneous argument appears to be that, because Rule 25-22.029 allows a party to protest a PAA and request a formal hearing, all party initiated proceedings, including complaint proceedings, must be predicated on the issuance of a PAA.

This analysis is simply incorrect. While Rule 25-22.029 does allow a party to protest a PAA, such a right does not translate into a requirement that all formal hearings under the APA must be based on the issuance of a PAA. Rather, it simply means that, in addition to the right to institute a complaint proceeding based on a regulated company's violation of a Commission statute, rule, or order pursuant to Rule 25-22.036, a party can challenge a PAA and request a formal hearing under the APA. Stated another way, the right to initiate a complaint proceeding and the right to protest a PAA are not mutually exclusive – each right exists independent of the other. Indeed, nothing in Sections 120.569 or 12.57, which governs formal hearings under the APA, predicates an administrative hearing on the issuance of a PAA. See Section 120.569, Florida Statutes ("The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency. . . .").

Fourth, there is no question that the Commission's has the authority to address the issues raised in BellSouth's Complaint. It is well settled that the Commission has the "authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly." Florida

Public Serv. Comm'n v. Bryson, 569 SO. 2d 1253, 1255 (Fla. 1990). In addition, under Section 364.285, Florida Statutes, the Commission has the authority to fine telecommunications company up to $25,000 for each violation of any rule or order of the commission or any provision of Chapter 364, Florida Statutes. Moreover, the Commission has the authority to ensure "the fair treatment of all telecommunications providers in the telecommunications marketplace." Section 364.337(5); see also, 364.01(g), Florida Statutes (stating that the Commission has the authority "to ensure that all providers of telecommunications services are treated fairly . . "). BellSouth's Complaint invokes all of the above-cited authority as it requests that the Commission determine that Supra has violated Florida statutes and Commission rules by making misrepresentations on its RAF forms and by paying less RAFs than the law requires.

In sum, the Commission should reject Supra's argument because it ignores the express wording of the Commission's rules. These rules permit BellSouth to initiate a complaint proceeding against Supra for violating Chapter 364 and the Commission's rules and orders. Further, adoption of Supra's argument would lead to the absurd conclusion that a party has no right to initiate a Rule 25-22.036 proceeding absent the issuance of a PAA, which is in direct conflict with Commission precedent and the practice of all parties before the Commission. For all of these reasons, the Commission should deny Supra's Motion to Dismiss.

III. BellSouth Has Standing to Bring the Complaint

Next, Supra argues that the Commission should dismiss BellSouth's Complaint because BellSouth lacks standing. "Standing under chapter 120, Florida Statutes . . . is established by statute." Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992). Standing under the APA is conferred on persons whose substantial interest will be affected agency action. Id.; see also, Section 120.569(1) ("The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency . . . ."); Rule 25-22.036(2) (a complaint is appropriate "when a person complains of an act or omission . . . which affects the complainant's substantial interest . . . ."). A party seeking to show a substantial interest must demonstrate that (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing; and (2) that his substantial injury is of the type or nature which the proceeding is designed to protect. Friends of the Everglades, Inc., 595 So. 2d at 189. BellSouth satisfies both elements stated above and thus has standing to bring the instant Complaint.

A. BellSouth Has Sustained Injury in Fact

The first prong of the test, the "immediacy" requirement, requires a party seeking a Section 120.57 hearing to establish that it has or will sustain an injury in fact. The focus in this requirement is the degree of the injury. See Agrico Chem. Co. v. Department of Environ. Reg., 406 So. 2d 478, 482 (Fla. 1st DCA 1981). Concerns that are speculative or conjectural will not satisfy this

requirement. See Argico Chem. Co. v. Department of Environ. Reg., 406 So. 2d 478, 482 (Fla. 1st DCA 1981); International Jai-Alai Players Assoc. v. Florida Pari-Mutual Comm'n, 561 So. 2d 1224, 1226 (Fla. 3rd DCA 1990). However, Florida courts have determined that economic injury is sufficient to establish standing.[4]

For instance, in Florida State Univ. v. Dann, 400 So. 2d 1304, 1304 (Fla. 1st DCA 1981), faculty members of Florida State University ("University") challenged the University's establishment of procedures for the award of merit salaries and other pay increases as an invalid rule. The court determined that the faculty members had standing to raise the challenge because the "procedures were likely to have a continuing impact on determination of their annual salaries." Id. Similarly, in Florida Medical Center v. Department of Health & Rehab. Serv., 484 So. 2d 1292, 1294-95 (Fla. 1st DCA 1986), the court determined that a hospital had standing to challenge the Department of Health and Rehabilitative Services' award of certificates of need to competing facilities because the award would affect the hospital's economic interest.

BellSouth's stated injury is that BellSouth has and will suffer actual economic harm as a result of Supra's violation of Florida statutes and Commission rules in misreporting information on its RAF forms, which results in Supra paying less RAFs. Specifically, BellSouth's actual injury is that, in complying with the express wording of the applicable statute and rules and in by

[4]The court in Agrico illustrated the rule that "in licensing or permitting proceedings a claim of standing by third parties based solely upon economic interest is not sufficient unless the permitting or licensing statute itself contemplates consideration of such interests." Florida Medical Center v. Department of Health & Rehab. Serv., 484 So. 2d 1292, 1294-95 (Fla 1st DCA

timely paying undisputed amounts, BellSouth has paid more RAFs than it would have had it followed Supra's practice of disputing all amounts owed and deducting from its RAF calculation the amount of wholesale services received and disputed instead of the actual amount paid for these services. As a result, BellSouth's economic injury is neither speculative nor conjectural as it is based on the fact that Supra is paying less RAFs than BellSouth and other carriers regulated by the Commission and thus is receiving an unwarranted and improper financial advantage. Further, as long as Supra is allowed to continue to calculate RAFs in such a manner, BellSouth's injury will continue. Accordingly, as with the faculty members in Florida State Univ. v. Dann and the competing hospital in Florida Medical Center, BellSouth has standing to raise the issues in its Complaint.

In addition, BellSouth has sustained a definite economic injury in that, contrary to Supra's representations to the Commission, Supra has never paid BellSouth the money that Supra reported in its RAF forms. As a result of this nonpayment, BellSouth has sustained actual financial injury. The Commission should not allow Supra to financially benefit from its misrepresentations to Commission.

Moreover, BellSouth has/will sustain an injury in fact because, as a result of Supra's practice of misreporting information, Supra pays less RAFs than what is required by statute and Commission rules, thereby affecting the Commission's ability to regulate BellSouth and the other carries' within the Commission's

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1986). The instant Complaint is neither a licensing or permitting procedure and thus the Agrico rule is inapplicable.

jurisdiction.[5] See Section 350.113(2), Florida Statutes (providing that all fees collected by the Commission will be used to operate the Commission). There is no question that with more financial resources the Commission will be better able to regulate the industry. Indeed, with carriers like Supra who consistently abuse the regulatory process, Florida statutes, and Commission rules in order to gain unwarranted and improper financial gains, the Commission needs as much funding as possible to adequately police all companies and to ensure "that all providers of telecommunications services are treated fairly . . ." See Section 364.01(g), Florida Statutes.

For all of these reasons, BellSouth has and will sustain a concrete and definite injury as a result of Supra misreporting information on its RAF forms relating to amounts Supra purportedly paid to BellSouth. Accordingly, BellSouth has standing to raise the issues in its Complaint.

B. The Applicable Statutes and Rules Are Designed to Protect BellSouth's Injuries

The second prong of the test, the "zone of interest" requirement, deals with the nature of the injury. Agrico, 406 So. 2d at 482. This requirement limits standing to those persons that the Legislature intended to be protected by the administrative proceeding. The statutes in question define the scope or nature of the proceeding and thus govern the analysis. Friends of the Everglades, Inc.,

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[5][4] In fact, to ensure that the Commission receives all fees that it is entitled to under the law, the Commission audits RAF forms. See In re: Level 3 Communications, Order No. 01-1662-DS-TX, 2001 WL 1039966 *1 (stating that the Commission audited Level 3's RAF forms). The fact that the Commission audits RAF forms and pursues any unpaid amounts establishes that proper payment of RAFs is essential to the survival of the Commission.

595 So. 2d at 189. As with the first requirement, BellSouth satisfies this requirement as well.

BellSouth is in the "zone of interest" because it is a telecommunications company that pays RAFs to the Commission pursuant to Section 364.336 and because it is a company that is regulated by the Commission. Any interpretation of Section 364.336 will have a substantial affect on BellSouth's reporting and payment of RAFs and the Commission's ability to regulate telecommunications companies.

Moreover, Section 364.336, Florida Statutes, requires that the Commission, in analyzing the propriety of RAF forms submitted, address all amounts paid by that company to other telecommunications companies for the use of other carrier networks. As evidenced by Supra's RAF forms, true and accurate information as to the actual amounts paid to other telecommunications companies can only be determined by reviewing the records of both the party submitting the RAF form and the party who provides the services. Without both sets of information, the Commission could not adequately determine the veracity of any representations made in RAF forms.

Consequently, the Legislature contemplated that any proceeding involving the proper calculation of RAFs would necessarily involve both the party who submitted the RAF forms and all wholesale providers identified in the forms. Indeed, any investigation into Supra's improper payment of RAFs would require BellSouth's participation, given that BellSouth is the wholesale provider in question and is the only party that can rebut the representations Supra made in

its RAF forms. Accordingly, Supra has provided BellSouth with standing by making false representations as to what Supra has actually **paid** BellSouth for services received.

Further, all interested parties have a right to participate in any RAF proceeding because the Commission has a legislative mandate under Section 364.01(g) to treat all telecommunications companies fairly. See also, Section 364.337(5), Florida Statutes (stating that the Commission, specifically with ALECs, must ensure "the fair treatment of all telecommunications providers in the telecommunications marketplace.").[6] As stated above, the current situation is unfair because Supra is currently is receiving an improper and unwarranted financial benefit as a result of its RAF reporting practice that BellSouth does not currently receive because it follows the express wording of the applicable statues and rules. Both BellSouth's and Supra's practices cannot be correct.

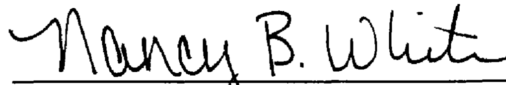
Accordingly, BellSouth is in the "zone of interest" contemplated by Section 364.336 because BellSouth's calculation of its own RAFs will be affected by the Commission's decision in this docket. Indeed, if the Commission, rather than BellSouth, had initiated the proceeding, BellSouth could have intervened pursuant to Rule 25-22.039, Florida Administrative Code. Moreover, the Commission has, on innumerable occasions, fined and/or cancelled the certificate of companies for not properly filing RAFs in accordance with Florida law. This situation is no different.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission deny Supra's Motion to Dismiss.

Respectfully submitted this 2nd day of July 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



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PC Docs 453092.v1

6[5] Supra spends three pages of its Motion to attempt to argue that Section 364.337 does not apply to BellSouth's claims. Supra's Motion is entirely silent in the applicability of Section 364.01 to BellSouth's claims.