

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: SEPTEMBER 19, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (DODSON) *AD* *ZK*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BUYS, *DRB*
McDONALD) *On* *AD*

RE: DOCKET NO. 020595-TL - COMPLAINT OF J. CHRISTOPHER ROBBINS AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR VIOLATION OF RULE 25-4.073(1)(C), F.A.C., ANSWERING TIME

AGENDA: 10/01/02 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION TO DISMISS - ORAL ARGUMENT NOT REQUESTED; HOWEVER, ORAL ARGUMENT MAY BE ENTERTAINED AT THE COMMISSION'S DISCRETION UPON REQUEST OF A PARTY

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

CASE BACKGROUND

On June 26, 2002, J. Christopher Robbins filed a complaint against BellSouth Telecommuncations, 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, 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

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review BellSouth's response times to see if they were in compliance with the rule. On August 25, 2002, the OPC advised staff that they had reviewed BellSouth's response times, had found BellSouth substantially in compliance with both repair and business office measurements, and had so informed Mr. Robbins. The OPC further informed Mr. Robbins (correspondence provided as Attachment A) that the OPC "would have no basis for filing a complaint against BellSouth for willful failure to comply with the answertime rules based on the current performance of the company." This is staff's recommendation on the Motion to Dismiss.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01(4), 364.025, 364.03, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should grant BellSouth's Motion to Dismiss. The Petitioner has failed to state a cause of action upon which relief can be granted. (DODSON, BUYS, McDONALD)

STAFF ANALYSIS:

Petitioner - The Complaint

In the complaint, the Petitioner 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.

BellSouth's Motion to Dismiss

BellSouth states that Mr. Robbin's complaint should be dismissed for lack of standing, lack of subject matter jurisdiction, and for failure to state a cause of action.

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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. 1977).

Further, BellSouth points out that the only injuries alleged by Mr. Robbins are pecuniary in nature. (Petitioner's Complaint at p. 2). 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 adds, 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.

Analysis

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.

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However, Mr. Robbins has failed to show any specific instances of BellSouth's violation of this rule. Further, Mr. Robbins will not divulge the telephone number or numbers from which the calls originated, so staff has been unable to aid him in documenting express violations. Staff agrees with BellSouth that the Commission has settled 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, staff's 2001 Service Evaluation for BellSouth reports results that indicate BellSouth has complied with the Answer Time rules from the time of the order until this date.

Staff does not agree with BellSouth's argument that Mr. Robbin's 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. Robbin has still failed to cite any instances of BellSouth's violation of the rule. Therefore, staff believes that the Petitioner has failed to state a cause of action for which relief can be granted.

Even if Mr. Robbin's 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 believe Mr. Robbins lacks standing.

Mr. Robbins also requests that the Commission 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

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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, staff believes that it would be appropriate for the Commission to grant BellSouth's Motion to Dismiss.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: If the Commission approves staff's recommendation on Issue 1, this docket should be closed, since no further action would be required. If the Commission denies staff's recommendation on Issue 1, this docket should remain open pending further proceedings. (DODSON)

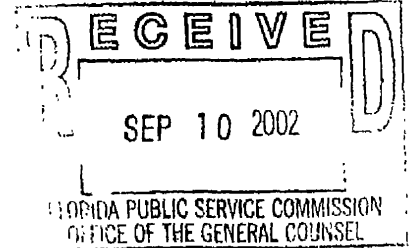
STAFF ANALYSIS: If the Commission approves staff's recommendation on Issue 1, this docket should be closed, since no further action would be required. If the Commission denies staff's recommendation on Issue 1, this docket should remain open pending further proceedings.



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September 9, 2002

J. Christopher Robbins, J.D.
P.O. Box 248392
Coral Gables, FL 33134

Dear Mr. Robbins:

As we discussed in our recent meeting with the Florida PSC Staff, I have investigated the current service performance of BellSouth as it relates to Answertime rules and possible violations of the PSC Rules.

In order to provide you with some background, I have attached a copy of my testimony in Docket No. 991378-TL that was settled in 2001 by a stipulation between the Public Counsel and BellSouth and approved by the FPSC. This testimony included the specific rules in question, the rule violations by the company over a four year period, and conclusions and recommendations for penalties. BellSouth violated the Business Office Answertime rule 47 of the 48 months in question. BellSouth missed the Repair Service Answertime mark in 46 of the 48 months in question. My testimony concluded that the violations were, therefore, willful and recommended financial penalties because of the willful violations. In order to prove that the violations were willful, the burden of proof fell on the Office of Public Counsel and the Commission Staff to demonstrate that the violations were intentional. I would add that this is not a simple burden to prove.

I have reviewed BellSouth's most recent performance, and the answertime performance has improved significantly since our settlement. I have attached copies of two recent audits that reflected satisfactory answertime results for both Repair and Business Office Answertime. While the audits involved specific local exchanges in Florida, it would be easy to conclude that the results are reflective of overall Florida service, since both Repair and Business Office inward calls are switched to the most readily available call center in the state.

While BellSouth's most recent internal reports do not show 100% compliance with the answertime rules, I would conclude that the company is substantially in compliance with both Repair and Business Office measurements.

Finally, I have asked the PSC to conduct a file search of its complaints due to Answertime that have been received during the past 12 months. The files show only one complaint against BellSouth, and further investigation revealed that the company responsible was Sprint, not BellSouth.

In view of the above, as I discussed with you by telephone, our office would have no basis for filing a complaint against BellSouth for willful failure to comply with the answertime rules based on the current performance by the company.

This does not mean that you are not free to pursue your complaints against the company. But, frankly, it is my advice to you that you would have a difficult and time-consuming job ahead of you with, in my opinion, a very low possibility of victory.

I also asked BellSouth to determine whether there were different numbers used for DSL answering, as opposed to the regular Business Office and Repair numbers. It would appear that DSL customers have two separate numbers that can be used. Regular Repair and Business Office numbers are available to DSL customers, as well as the special numbers that are available to DSL customers alone. If you called the DSL number, those calls are received in Atlanta and are not measured by the PSC for rule compliance.

I hope this information will be of help to you.

Sincerely,



R. Earl Poucher
Senior Legislative Analyst
Office of Public Counsel

CC: Nancy Sims, BellSouth
Linda Dodson, PSC
Charlie Beck, OPC