

ORIGINAL

Legal Department

E. EARL EDENFIELD, JR.
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0763

June 20, 2003

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

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Re: 030349-TP (Supra \$75 Cash Back Promotion)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss and Answer to Supra's Amended Complaint, which we ask that you file in the 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 shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield, Jr.

E. Earl Edenfield, Jr.

(EA)

Enclosures

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

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**CERTIFICATE OF SERVICE
DOCKET NO. 030349-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 20th day of June, 2003 to the following:

Linda Dodson
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6216
ldodson@psc.state.fl.us

Adenet Medacier, Esq.
Jorge L. Cruz-Bustillo, Esq,
Legal Department
Supra Telecommunications and
Information Systems, Inc.
2620 S.W. 27th Avenue
Miami, Florida 33133
Tel. No. (305) 476-4240
Fax. No. (305) 443-9516
amedacier@stis.com
jorge.cruz-bustillo@stis.com

E. Earl Edenfield, Jr.
E. Earl Edenfield, Jr. (KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Supra) Docket No. 030349-TP
Telecommunications and Information)
Systems, Inc. Regarding BellSouth's)
Use of Carrier to Carrier Information) Filed: June 20, 2003

**BELLSOUTH'S PARTIAL MOTION TO DISMISS AND
ANSWER TO SUPRA'S AMENDED COMPLAINT**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Partial Motion to Dismiss and Answer to the Amended Complaint filed by Supra Telecommunications and Information Systems, Inc. ("Supra").¹ For the reasons set forth below, the Florida Public Service Commission ("Commission") should dismiss Supra's request that the Commission find that BellSouth has violated federal law. In addition, BellSouth provides its Answer and affirmative defenses to the remaining allegations in Supra's Amended Complaint.

PROCEDURAL BACKGROUND

On April 14, 2003, Supra filed its original Complaint, wherein it alleged that BellSouth's \$75 Cash Back Promotion Tariff violated Florida law and that BellSouth was using "wholesale" information in violation of federal law. On May 8, 2003, BellSouth filed its response to the Complaint.

On June 6, 2003, the parties and Staff participated in an issue identification meeting. The parties could not agree on issues because Supra's Complaint did not mirror Supra's proposed issues. Specifically, with its issue list,

¹ In drafting this Motion to Dismiss and Answer, BellSouth utilized the revised caption articulated by Staff in its June 16, 2003 internal memorandum. BellSouth objects to the caption as written because it presumes that BellSouth is in fact using "carrier to carrier information." BellSouth suggests that the caption read as follows: "In re: Complaint of Supra Telecommunications and Information Systems, Inc. regarding BellSouth's *alleged* use of carrier to carrier information."

Supra abandoned all counts of the Complaint that referenced or addressed BellSouth's \$75 Cash Back Promotion and only advanced the single count of the Complaint relating to BellSouth's purported improper use of "wholesale information" for marketing purposes. However, Supra's proposed issues were more encompassing than the allegations in Supra's complaint, as Supra's proposed issues raised violations of Florida law and Commission policy whereas the Complaint was limited solely to violations of federal law.

In order to facilitate a resolution of the issue, BellSouth suggested at the issue identification meeting that Supra amend its Complaint to assert violations of state and federal law so that the proposed issues in concept mirrored the allegations in the Complaint. Supra refused to take such action at that time. Because there was no agreement on the issues, on June 6, 2003, Staff informed the parties via a memorandum that the Prehearing Officer ordered the parties to submit briefs in support of their proposed issues by June 12, 2003.

On June 9, 2003, Supra filed a motion for leave to file an Amended Complaint, and on the morning of June 11, 2003, BellSouth informed the parties that it did not object to Supra's request for leave. On June 11-12, 2003, the parties engaged in good-faith negotiations regarding a stipulated issue list. On June 12, 2003, the parties informed Staff that they had reached agreement on the issues to be addressed in this proceeding.

MOTION TO DISMISS

While the parties have agreed to the issues Supra's Amended Complaint raises, the parties do not agree that the Commission has the jurisdiction to

resolve Supra's contention that BellSouth has violated 47 U.S.C. § 222(b). Specifically, Supra requests that the Commission address "BellSouth's illegal use of wholesale information in its marketing practices in violation of 47 U.S.C. § 222 . . ." and that the Commission fine and/or revoke BellSouth's certificate for its "violations of 47 U.S.C. § 222(b)." Section 222(b) of the Telecommunications Act of 1996 provides:

CONFIDENTIALITY OF CARRIER INFORMATION --
A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

See 47 U.S.C. 222. As established below, the Commission does not have subject matter jurisdiction to determine if BellSouth is in violation of 47 U.S.C. § 222(b).

A. Standard for Motion to Dismiss.

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. 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 complaint to be true. 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). In determining the sufficiency of a complaint, the Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Applying these principles to the case at hand

mandates that the Commission dismiss Supra's request that the Commission interpret, and find that BellSouth is in violation of federal law.

B. The Commission Does Not Have Subject Matter Jurisdiction Over Alleged Violations of Federal Law.

In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. See, e.g., Order Granting Motion to Dismiss (PSC-01-2178-FOF-TP) in Docket No. 010345-TP (Nov. 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for monetary damages, an

assertion of tortious liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.”).

The Commission, therefore, must determine whether the Legislature has granted it any authority to find that BellSouth is in violation of federal law. In making that determination, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See City of Cape Coral v. GAC Util., Inc., 281 So. 2d 493, 496 (Fla. 1973). Instead, “[t]he Commission has only those powers granted by statute expressly or by necessary implication.” See Deltona Corp. v. Mayo, 342 So. 2d 510, 512 n.4 (Fla. 1977); accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach, 659 So.2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has “only such power as expressly or by necessary implication is granted by legislative enactment” and that “as a creature of statute,” an agency “has no common law jurisdiction or inherent power . . .”).

Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N. R. Co., 49 So. 39 (Fla. 1909). Finally, “any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977). As explained below, *Supra* cannot demonstrate that the Commission has the authority to grant the relief *Supra* requests.

As can be seen by a cursory review of Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to regulate, interpret, or enforce federal law regarding a carrier's use of "wholesale information" for marketing purposes. Moreover, while the Commission has authority under the Act in Section 252 arbitration proceedings to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and the FCC regulations prescribed pursuant to Section 251, the Act does not grant the Commission with any authority to resolve and enforce purported violations of Section 222(b) of the Act. See e.g., 47 U.S.C. § 251;

Undoubtedly, Supra will argue that the Commission's recent decision in Order No. PSC-03-0578-FOF-TP ("AT&T Slamming Order") in Docket No. 030200-TP denying Supra's Motion to Dismiss AT&T's slamming complaint is dispositive of the issue. In that decision, Supra attempted to argue that the Commission did not have jurisdiction to "enforce an FCC statute." See Supra's Motion to Dismiss at 27. The Commission rejected Supra's argument and determined that "under Section 364.01, Florida Statutes, we have jurisdiction to review conduct that is alleged to violate an FCC rule if such violation could be deemed anticompetitive behavior under Florida law." See Order No. PSC-03-0578-FOF-TP.

However, the AT&T Slamming Order is factually inapposite to the instant matter because AT&T never requested that the Commission find that Supra

actually violated Section 222(b) of the Act. Rather, AT&T limited its request for relief to purported violations of Florida law. See AT&T Complaint at 11-13. Regarding Section 222(b), AT&T simply pointed out in its Petition that Supra's marketing of "its long distance services in the Disconnect letter is prohibited by 47 U.S.C. § 222(b)" See AT&T's Petition at ¶ 20.

BellSouth does not dispute the Commission's rationale in the AT&T Slamming Order – that it has the authority to review conduct that violates federal law if that conduct can also be deemed to be anticompetitive behavior under Florida law. But, such a finding does not translate into a determination that the Commission has subject matter jurisdiction to find that BellSouth has actually violated federal law. Accordingly, for the reasons set forth above, the Commission should dismiss Supra's Amended Complaint to the extent it alleges and requests that BellSouth is in violation of 47 U.S.C. § 222(b).

ANSWER

1. BellSouth admits the allegations of Paragraph 1 of the Amended Complaint.

2. Supra's Amended Complaint did not include a Paragraph 2 of the Amended Complaint.

3. BellSouth admits the allegations of Paragraph 3 of the Amended Complaint.

4. BellSouth admits the allegations of Paragraph 4 of the Amended Complaint.

5. BellSouth denies the allegations of Paragraph 5 of the Amended Complaint, except to admit that (1) the Commission Staff issued a recommendation in Docket No. 020119, which speaks for itself and is the best evidence of its terms and conditions; and (2) the Commission approved the Staff recommendation at the May 20, 2003 Agenda Conference.

6. BellSouth denies the allegations of Paragraph 6 of the Amended Complaint, except to admit that the Commission issued Order No. 03-0578-FOF-TP, which speaks for itself and is the best evidence of its terms and conditions and that Florida Statutes contain Section 364.01(4)(g), which speaks for itself and is the best evidence of its terms and conditions.

7. BellSouth denies the allegations of Paragraph 7 of the Amended Complaint, except to admit that the Commission issued Order No. 03-0578-FOF-TP, which speaks for itself and is the best evidence of its terms and conditions.

8. BellSouth denies the allegations of Paragraph 8 of the Amended Complaint.

9. BellSouth denies the allegations of Paragraph 9 of the Amended Complaint, except to admit that (1) the Commission addressed Docket No. 020119-TP at its May 20, 2003 Agenda Conference; and (2) the Commission issued Order No. PSC-02-0875-PAA-TP, which speaks for itself and is the best evidence of its terms and conditions.

10. BellSouth denies the allegations of Paragraph 10 of the Amended Complaint.

11. BellSouth is unable to admit or deny the allegations of Paragraph 11 of the Amended Complaint and thus denies the allegations because Supra does not reference or identify the admission in question.

12. BellSouth denies the allegations of Paragraph 12 of the Amended Complaint, except to admit that Ms. Cox submitted testimony in the Florida 271 proceeding, some of which was subsequently stricken from the docket. That testimony speaks for itself and is the best evidence of its terms and conditions.

13. BellSouth denies the allegations of Paragraph 13 of the Amended Complaint, except to admit that Ms. Cox submitted testimony in the Florida 271 proceeding, some of which was subsequently stricken from the docket. That testimony speaks for itself and is the best evidence of its terms and conditions.

14. BellSouth denies the allegations of Paragraph 14 of the Amended Complaint, except to admit that the Operation Sunrise documents Supra attached to its Complaint speak for themselves and are the best evidence of their terms and conditions.

15. BellSouth denies the allegations of Paragraph 15 of the Amended Complaint, except to admit that the Operation Sunrise documents Supra attached to its Complaint speak for themselves and are the best evidence of their terms and conditions.

16. BellSouth denies the allegations of Paragraph 16 of the Amended Complaint.

17. BellSouth denies the allegations of Paragraph 17 of the Amended Complaint, except to admit that the Operation Sunrise documents Supra

attached to its Complaint speak for themselves and are the best evidence of their terms and conditions.

18. BellSouth denies the allegations of Paragraph 18 of the Amended Complaint, except to admit that the Operation Sunrise documents Supra attached to its Complaint speak for themselves and are the best evidence of their terms and conditions.

19. BellSouth denies the allegations of Paragraph 19 of the Amended Complaint, except to admit that the Operation Sunrise documents Supra attached to its Complaint speak for themselves and are the best evidence of their terms and conditions.

20. BellSouth denies the allegations of Paragraph 20 of the Amended Complaint.

21. Supra's Amended Complaint does not contain Paragraphs 21-39.

22. BellSouth denies the allegations of Paragraph 40 of the Amended Complaint.

23. BellSouth denies the allegations of Paragraph 41 of the Amended Complaint.

24. BellSouth denies that Supra is entitled to any of the relief sought in the "wherefore" clause of Supra's Amended Complaint.

25. Any allegation not expressly admitted herein, is denied.

AFFIRMATIVE DEFENSES


1. Supra's Amended Complaint fails to state a cause of action upon which relief can be granted.

2. The Commission lacks subject matter jurisdiction to find that BellSouth is in violation of federal law.


WHEREFORE, BellSouth requests that the Commission dismiss Supra's Amended Complaint to the extent it seeks a determination that BellSouth has violated federal law and enter judgment in BellSouth's favor on all other counts.

Respectfully submitted this 20th day of June 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE (UA)
JAMES MEZA III
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558



R. DOUGLAS LACKEY (UA)
E. EARL EDENFIELD, JR.
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0763

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