

ORIGINAL

Matilda Sanders

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Monday, April 18, 2005 3:19 PM
To: Filings@psc.state.fl.us
Subject: 050194-TL BellSouth Telecommunications Inc.'s Motion to Dismiss
Importance: High
Attachments: MTD.pdf; LEGAL-#581912-v1-Motion_to_Dismiss_-_Manhole_Ordinance__PSC_Complaint.DOC

- A. Vicki Fatool
Legal Secretary to Nancy B. White
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vicki.fatool@bellsouth.com

B. Docket No. 050194-TL: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

C. BellSouth Telecommunications, Inc.
on behalf of Nancy B. White

D. 12 pages total (including letter, pleading and certificate of service)

E. BellSouth Telecommunications, Inc.'s Motion to Dismiss

.pdf version attached word version
<<MTD.pdf>> <<LEGAL-#581912-v1-Motion_to_Dismiss_-_Manhole_Ordinance__PSC_Complaint.DOC>>

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DOCUMENT NUMBER-DATE
03746 APR 18 05
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Legal Department

NANCY B. WHITE
General Counsel - FL

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

April 18, 2005

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

Re: Docket No. 050194-TL: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Dismiss, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


Nancy B. White

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

DOCUMENT NUMBER-DATE

03746 APR 18 05

FPSC-COMMISSIONER OF CPK

CERTIFICATE OF SERVICE
Docket No. 050194-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

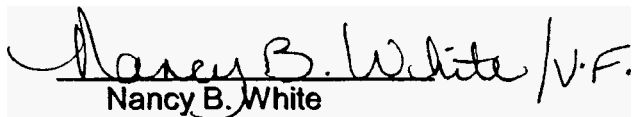
(*) Federal Express and First Class U. S. Mail this 18th day of April, 2005 to the following:

Lee Fordham
Kira Scott
Staff Counsels
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
cfordham@psc.state.fl.us
kscott@psc.state.fl.us

Justin G. Witkin, Esq.
Joshua Jones, Esq. (*)
Aylstock, Witkin & Passer, P.L.C.
55 Baybridge Drive
P.O. Box 1147 32562-1147
Gulf Breeze, FL 32561
Tel. No. (850) 916-7450

Lance Harke, P.A.
Howard Bushman, Esq.
Harke & Clasby LLP
155 South Miami Avenue
Suite 600
Miami, FL 33130

Tod Arnovitz, Esq.
Barbara Perez, Esq.
Museum Tower, Suite 2700
150 West Flagler Street
Miami, Florida 33130


Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Florida BellSouth)
customers who paid fees to BellSouth)
Telecommunications, Inc. related to)
Miami-Dade County Ordinance Section)
21-44 ("Manhole Ordinance") and)
request that Florida Public Service)
Commission order BellSouth to comply)
with Section A.2.4.6 of General)
Subscriber Service Tariff and refund all)
fees collected in violation thereof.)

Docket No. 050194-TL

Filed: April 18, 2005

MOTION TO DISMISS

Pursuant to Rule 28-106.204(2), Uniform Rules of Procedure, BellSouth Telecommunications, Inc. ("BellSouth") files this Motion to Dismiss the "Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief" ("Complaint"). The Complaint should be dismissed because (1) the individual customers identified in paragraph 5 of the Complaint have not demonstrated standing to initiate a proceeding, (2) class standing is not authorized under the Florida Administrative Procedure Act ("APA") or any statute governing the Public Service Commission ("PSC" or "Commission"), (3) the Commission has no authority to grant injunctive relief, and (4) the Commission has no authority to award attorney fees.

Background

The Complaint asserts that BellSouth has violated Part A2.4.6 of BellSouth's General Subscriber Services Tariff, which allows BellSouth to pass on charges to subscribers in connection with costs BellSouth incurs in complying with a Miami-Dade

County ordinance dictating safety measures around manholes (“Manhole Ordinance”). See Complaint, ¶¶ 16-21.

Although the Complaint alleges that a \$0.11 per line monthly “Manhole Fee” has been charged by BellSouth since 1983 to Miami-Dade County customers pursuant to the Tariff, the Complaint does not allege that the amount of the fee is inappropriate.¹ Complaint, ¶ 20. Indeed, the Complaint acknowledges that the Tariff allowed BellSouth to pass on costs it incurred in complying with the Manhole Ordinance. Complaint, ¶ 19. Rather, the Complaint alleges that BellSouth has failed to comply with its Tariff because it has not conducted semi-annual audits to determine its actual costs of compliance with the Manhole Ordinance and reconcile them with fees imposed. See Complaint, ¶ 21, which states:

Since 1983, BellSouth has failed to comply with its Tariff in that it has not conducted semi-annual audits to determine its actual costs of compliance with the Manhole Ordinance[,] nor has it taken steps to reconcile its actual costs of compliance with fees it has imposed on its customers.

(Emphasis supplied).²

The Complaint requests that the Commission (1) order BellSouth to refund all manhole charges it has collected “and/or” refund the difference between the amount charged by BellSouth and the amount permitted under Part A2.4.6 of the Tariff, plus interest, (2) enjoin BellSouth from charging the fee until the alleged violations of Part

¹ Although the Complaint references a \$0.11 per line monthly charge, the current charge is \$.08, not \$.11.

² Although Complainants make one bald allegation in Paragraph 25 of the Complaint that “[a]s a result of BellSouth’s non-compliance with the Tariff, it has overcharged, and currently overcharges customers for the Manhole Fee in violation of the Tariff,” the thrust of the entire Complaint is that BellSouth’s only alleged error is in failing to reconcile estimated charges to customers with actual costs incurred. The Complaint includes no allegations that the actual charge to subscribers should have been less than the amount that was charged.

A2.4.6 are corrected and issue an injunction requiring BellSouth to comply with Part A2.4.6, (3) impose additional appropriate penalties, and (4) award the customers attorneys' fees and costs of the action that is the subject of the Complaint. Complaint, ¶¶ 27-31.

Named Party Standing

The Complaint is purportedly brought "on behalf of the petitioners identified below and all other Bellsouth customers who paid the "Cost of Dade County Manhole Ordinance #83-3" fee." Complaint, ¶ 3. Paragraph 5 of the Complaint identifies three individuals and one corporation ("Complainants"). The Complaint alleges that these Complainants "have been customers of BellSouth since at least 1997 and continue to be customers during this complaint." The only other alleged basis for standing of these Complainants is that they "have previously served as representatives of a class of customers in a class action suit."³

To participate as a party in proceeding pursuant to the APA, individuals and entities must demonstrate that their "substantial interests" will be affected by the proceeding. See, e.g., §§ 120.569, 120.52(2), Fla. Stat. Rr. 28-106.201, 25-22.036(2), Fla. Admin. Code;⁴ *Agrico Chem. Co. v. Dep't of Environ. Reg.*, 406 So. 2d 478 (Fla. 2d

³ As Appendix D of the Complaint illustrates, that purported class action was dismissed based on the doctrine of primary jurisdiction. No determination was made as to the adequacy of the class representatives. The Third District Court of Appeal recently made clear in *Florida Power & Light Company v. Albert Litter Studios*, 2005 WL 475441 (Fla. 3d DCA March 2, 2005), that the PSC has exclusive jurisdiction to adjudicate disputes and challenges to a public utility's rates and charges. 2005 WL 475441 at *3.

⁴ The Complaint purportedly was instituted pursuant to Rules 25-22.036(2) and 25-22.032, Florida Administrative Code. Complaint, p. 1. Rule 25-22.036(2) provides that "[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 . . ." (Emphasis supplied). A Complaint filed pursuant to Rule 25-22.036(2) constitutes the initiation of a formal administrative proceeding conducted pursuant to the APA.

DCA 1981). To demonstrate standing under the “substantial interests” test, individuals must show that they will suffer an injury in fact that is of sufficient immediacy to entitle them to a hearing and that the injury suffered is of a type that the proceeding is designed to protect. *Id.* at 482. The first aspect of the test relates to the degree of injury, and the second part deals with the nature of the injury. *Id.*; see also *Ameristeel v. Clark*, 691 So. 2d 473, 477 (Fla. 1997) (citing the *Agrico* standing test).

Nothing in the Complaint demonstrates that the substantial interests of the Complainants have been or will be affected by what Complaint refers to as the “Cost of Dade County Manhole Ordinance #83-3” fee. Complaint, ¶ 3. The Complaint does not even allege that these Complainants paid the fee or that they live in Miami-Dade County, where the fee is imposed. Nor does the Complaint allege that the fee allegedly imposed on these Complainants represented more than BellSouth’s actual costs of complying with the Manhole Ordinance.

Because the Complaint does not allege that the Complainants paid more than they should have in fees – or even that they paid the fees at all – the Complaint does not satisfy the first prong of the *Agrico* standing test, which requires a demonstration of “injury in fact which is of sufficient immediacy” to entitle a person to a hearing. 406 So. 2d at 482. Courts have held that the first prong of the *Agrico* test is not satisfied based on stated concerns that are speculative or conjectural. See *International Jai-Alai Players Ass’n v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990); *Village Park Mobile Home Ass’n, Inc. v. State, Dep’t of Bus. Reg.*, 506 So.

Rule 25-22.032, on the other hand, establishes an alternate means of resolving complaints through the PSC’s Division of Regulatory Compliance and Consumer Assistance. From the face of the Complaint, it is unclear which procedure Complainants propose to invoke.

2d 426, 434 (Fla. 1st DCA 1987) (speculations on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process).

The relief that Complainants seek also is speculative in that it is not contemplated by the BellSouth Tariff. In Paragraph 24 of the Complaint, the Complainants state that BellSouth “failed to return any excess amounts collected back to its consumers,” and in Paragraph 28, the Complainants seek a “refund of all fees collected in violation of the Tariff.” The Tariff does not require refunds. It provides:

An estimated monthly amount of such costs shall be billed to the affected subscribers each month and an adjustment to reconcile these estimates to the actual costs incurred for the six month periods ending June 30 and December 31 of each year shall be applied.

See Exhibit A to Complaint. The Tariff contemplates that BellSouth will review the estimated charges after each six-month period and make adjustments, if warranted, on a going-forward basis. “Reconcile” does not mean “refund.” Further, “reconcile” does not mean “audit,” as Complainants suggest. Complaint, ¶¶ 19, 21.

Complainants include no allegations that they paid the fee or, even if they did, that they paid more than BellSouth’s actual costs of compliance with the Miami-Dade Manhole Ordinance. Any stated concerns that the Complainants overpaid are purely speculative and conjectural and do not constitute “injury in fact.” In addition, the Complainants do not have standing to seek relief not contemplated by the Tariff, i.e., a “refund” of monies that Complainants speculate they may have overpaid. Because the named Complainants in Paragraph 5 do not have standing, the Complaint should be dismissed.

Class Standing

The Complaint is also purportedly brought “on behalf of . . . all other BellSouth customers who paid the ‘Cost of Dade County Manhole Ordinance #83-3’ fee.” Complaint, ¶ 3. The Complaint states that the “class of customers” seek refunds and an injunction, *id.*, and that “class-wide relief” is appropriate because the fee was allegedly applied uniformly to all Miami-Dade County customers. Complaint, ¶ 26.

The PSC does not have authority to hear class action suits. See *Medley Investors, Ltd. v. Lewis*, 465 So. 2d 1305, 1307 (Fla. 1st DCA 1985) (no authority for a class action in an administrative proceeding). The court in *Medley* noted that the APA provides no authority for class action suits and that the Florida Legislature has not applied Florida Rule of Civil Procedure 1.220, providing for class action civil suits, to administrative hearings. *Id.*

Moreover, nothing in Chapter 364 nor any other statutes governing the Commission authorize the PSC to entertain class actions. Proceedings before the Commission are governed by the APA, the Uniform Rules of Procedure enacted pursuant to Section 120.54(5), Florida Statutes, and the Commission’s procedural rules in Chapter 25-22, Florida Administrative Code. Nothing in any of these procedural statutes and rules authorize class action suits in an administrative proceeding or provide for class relief. The PSC is a creature of the Legislature, and its authority – including its jurisdiction – is derived solely from the Legislature. *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 2005 WL 475441 *3 (Fla. 3d DCA March 2, 2005).

Because nothing in the Commission’s substantive statutes and nothing in the procedural statutes governing Commission proceedings authorize class actions, such

proceedings are improper at the Commission. Therefore, the portions of the Complaint seeking standing on behalf of a class and class relief should be dismissed.

Injunctive Relief

The Complaint asks that the Commission issue “an injunction that requires BellSouth to comply with Section A.2.4.6 of the Tariff.” See Complaint, ¶ 3; see also Complaint, ¶ 27 (“Customers request that an injunction be entered requiring BellSouth to comply with the Tariff by conducting the semi-annual adjustments to the Manhole Fee.”), ¶ 29 (“Customers request that BellSouth be enjoined from charging the Manhole Fee until it conducts proper semi-annual adjustments as required by the Tariff.”).

For the same reason that the PSC cannot entertain class actions, it cannot provide injunctive relief. As a creature of statute, the Commission has only those powers granted by the Legislature and has no common law or inherent powers. *State, Department of Transportation v. Mayo*, 354 So. 2d 359, 360 (Fla. 1977) (“[T]he Public Service Commission was created and exists through legislative enactment. Being a statutory creature, its powers and duties are only those conferred expressly or impliedly by statute.”); *City of Cape Coral v. GAC Utility*, 281 So. 2d 493 (Fla. 1973) (same). The Commission has acknowledged its inability to issue injunctions in *In re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210 (February 21, 1994), where it stated: “We agree that this Commission does not have subject matter jurisdiction to

issue injunctions” *Id.* at 9; see also *Albert Litter*, 475441 *4 n.3 (The PSC “concedes that it lacks the authority to issue injunctive relief.”).⁵

Because the Complaint seeks a remedy that the Commission has no authority to provide, the portions of the Complaint seeking injunctive relief should be dismissed.

Attorney Fees

The Complaint states that “[c]ustomers have been forced to hire attorneys to prosecute this action and ask that they be awarded attorney fees and the costs of this action.” Complaint, ¶ 30.

The PSC has no jurisdiction to award attorney fees as requested in this Complaint. *E.g., In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) (dismissing petition requesting attorney fees for lack of subject matter jurisdiction); *G.E.L. Corp. v. Dep’t of Environ. Protection*, 875 So. 2d 1257, 1263-64 (Fla. 5th DCA 2004) (state agencies do not have substantive jurisdiction over legal issues relating to attorney fees authorized by section 120.595, Florida Statutes); *Friends of Nassau County, Inc. v. Nassau County*, 752 So. 2d 42, 43 n.1 (Fla. 1st DCA 2000) (Only an Administrative Law Judge, as opposed to an agency, may award attorney fees pursuant to section 120.569(2)(c), Florida Statutes).

State agencies, including the PSC, follow the “American rule” that is applied in judicial proceedings, which holds that attorney fees may be awarded by a court only when authorized by statute or agreement of the parties. *Werthman v. School Board of*

⁵ The Commission’s statutory authority concerning injunctions is limited to seeking injunctive relief in the circuit court. See § 364.015, Fla. Stat. (“The commission is authorized to seek relief in circuit court including temporary or permanent injunctions, restraining order, or any other appropriate order.”).

Seminole County, 599 So. 2d 220 (Fla. 5th DCA 1992); *In re: Application for a Rate Increase in Marion County by Sunshine Utilities of Central Florida, Inc.*, Docket No. 900386-WU, Order No. PSC-94-0738-FOF-WU (June 15, 1994) (“In terms of utility regulation, any authority to award attorney fees must come from the statute creating the utility regulatory body.”)

The Complaint cites no statute that authorizes the PSC to award attorney fees. None of the statutes listed in the first paragraph of the Complaint authorize the Commission to award attorney fees, nor do the attorney fee provisions of the APA. See *G.E.L. Corp.; Nassau County*; see also § 120.595(1) (authorizing awards in 120.57(1) proceedings only by an administrative law judge); § 57.105(5) (authorizing an administrative law judge to award attorney fees in administrative proceedings); § 57.111, Fla. Stat. (authorizing an administrative law judge to award attorney fees in certain administrative proceedings).

Because the Complaint requests relief that the PSC has no authority to provide, the portion of the Complaint seeking attorney fees should be dismissed.

Conclusion

For the reasons expressed, BellSouth respectfully requests that the Complaint be dismissed.⁶ In the alternative, if the Commission does not grant this Motion to Dismiss, BellSouth requests that the Commission refer the Complaint to the Commission's Division of Regulatory Compliance and Consumer Assistance for consideration pursuant to Rule 25-22.032. Both Rule 25-22.032 and Rule 25-22.036(2) were cited as

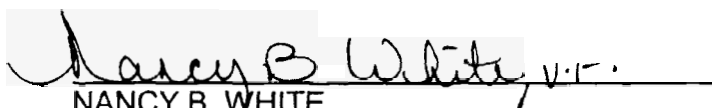
⁶ If the Commission denies this Motion, BellSouth reserves the right to file an Answer to the Complaint as permitted by Rule 28-104.203, Florida Administrative Code.

authority for the Complaint, and if the Complaint is to be considered, the Commission's preferred means of doing so is Rule 25-22.032, which provides:

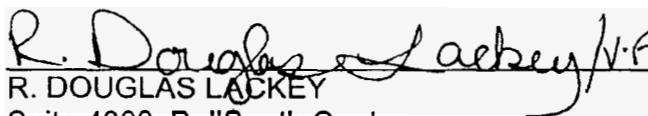
It is the Commission's intent that disputes between regulated companies and their customers be resolved as quickly, effectively, and inexpensively as possible. This rule establishes informal customer complaint procedures that are designed to address disputes, subject to the Commission's jurisdiction, that occur between regulated companies and individual customers. It provides for an expedited process for customer complaints that can be resolved quickly by the customer and the company. It also provides a process for informal Commission staff resolution of complaints that cannot be resolved by the company and the customer.

Respectfully submitted this 18th day of April, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE
SHARON R. LIEBMAN
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
(305) 347-5558



R. DOUGLAS LACKEY
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0747

581912