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Public Service Commission

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DATE: June 23, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Scott, Fordham) *KS PK*
Division of Competitive Markets & Enforcement (Simmons) *SAS*

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.

AGENDA: 07/05/05 – Regular Agenda – Parties May Participate – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Bradley

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050194.RCM.DOC

DOCUMENT NUMBER-DATE

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Case Background

On March 23, 2005, a Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief (“Complaint”) was filed by Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, as well as all other BellSouth customers who have paid the Miami-Dade County Ordinance #83-3 (“Manhole Ordinance”) fee, (collectively as the “Petitioners”).¹ The Complaint alleges that BellSouth has violated the terms of Section A.2.4.6 of its General Subscriber Service Tariff (“Tariff”). The Complaint requests that the Florida Public Service Commission (the “Commission”) enforce the Tariff, and order BellSouth to comply with its Tariff and to refund all fees collected in violation of the terms of the Tariff.² Complaint at pg. 1.

On April 18, 2005, BellSouth filed its Motion to Dismiss (“Motion”) the Complaint on the following four bases: (1) the individual customers lack standing to initiate a proceeding, (2) there is no statutory authority for the Commission to hear a class action suit, (3) the Commission has no authority to grant injunctive relief, and (4) the Commission has no authority to award attorney’s fees. Motion at pg. 1. If its Motion to Dismiss is not granted, BellSouth alternatively 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, Florida Administrative Code (F.A.C.). Id. at pg. 9. BellSouth contemporaneously filed a Request for Oral Argument.

On April 28, 2005, the Petitioners filed their Response to BellSouth’s Motion to Dismiss (“Response”) in which they request that the Motion be denied. Alternatively, the Petitioners suggest that the Commission enter an order acknowledging that the matters in the Complaint are and were properly before the Circuit Court. Response, FN 2. In its Response, the Petitioners reiterate their contention that they have specifically alleged an injury in fact and are part of a putative class, uniformly affected by BellSouth’s non-compliance with the Tariff. Id. at pg. 6.

¹ Prior to filing the Complaint, the Petitioners served as representatives of a class of BellSouth customers in a class action suit before Judge Henry Harnage in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the same matters brought by the Complaint. See Hightshoe, et al. v. BellSouth Telecommunications, Inc., Case No. 03-26623-CA11. Judge Harnage dismissed the Petitioners’ class action suit for failure to exhaust administrative remedies.

² BellSouth General Subscriber Service Tariff, Section A.2.4.6 states:

When the Company [BellSouth] by virtue of its compliance with a municipal or county ordinance, incurs significant costs that would not otherwise normally be incurred, all such costs shall be billed, insofar as practical, pro rata, per exchange access line, to those subscribers receiving exchange service within the municipality or county as part of the price for exchange service.

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.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth's Request for Oral Argument?

RECOMMENDATION: Yes. (SCOTT, FORDHAM)

STAFF ANALYSIS: Staff believes that oral argument would assist the Commission in evaluating BellSouth's Motion to Dismiss and the threshold jurisdictional issues stemming from the Complaint.

ISSUE 2: Should the Commission grant BellSouth's Motion to Dismiss?

RECOMMENDATION: The Commission should grant in part and deny in part BellSouth's Motion to Dismiss. Staff believes that the Petitioners have standing to bring the subject matter of the Complaint before the Commission, and to seek a refund for all affected customers of any charges collected in violation of the Tariff. However, staff believes that the other relief requested by the Petitioners, i.e. the injunctive relief and attorney's fees, is not within the Commission's jurisdiction. Furthermore, staff believes that BellSouth's alternative request to refer the Complaint to the Division of Regulatory Compliance and Consumer Assistance for consideration pursuant to Rule 25-22.032, Florida Administrative Code (F.A.C.), is inappropriate in this instance.

STAFF ANALYSIS:

I. Standard of Review

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. Id. In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

In reviewing a motion to dismiss, the Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be

granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

II. Arguments

A. Complaint of Florida BellSouth Customers

In its Complaint, the Petitioners allege that BellSouth has violated the terms of Section A.2.4.6 of the Tariff and should be ordered by the Commission to comply with the Tariff. Complaint at pg. 1. Additionally, they request that the Commission order BellSouth to refund all fees it has collected for costs associated with the implementation of the Manhole Ordinance, or, in the alternative, refund the difference between fees collected and the amount permitted under the Tariff. Id. at ¶2. The Petitioners interpret the Tariff to allow BellSouth to pass on to customers the costs it incurred in complying with the Manhole Ordinance, but to also require BellSouth to perform semi-annual audits and reconcile the imposed fees. Id. at ¶19.

The Petitioners allege that BellSouth has not been in compliance with its Tariff since 1983, because it has not conducted semi-annual audits to determine the actual costs associated with compliance with the Manhole Ordinance and has not attempted to reconcile the actual costs with the fees imposed. Id. at ¶21. The Petitioners further allege that BellSouth has overcharged and continues to overcharge its Miami-Dade customers in violation of the Tariff. Id. at ¶25.

The Petitioners state that because the charges were uniformly applied, class-wide relief is appropriate. Id. at ¶26. The Petitioners request injunctive relief requiring BellSouth to comply with the Tariff by conducting semi-annual audits. Id. at ¶27. Additionally, the Petitioners seek a refund of all fees collected in violation of the Tariff, or, in the alternative, a refund of the difference between the amounts charged by BellSouth and the actual costs incurred, plus interest. Id. at ¶28. Furthermore, the Petitioners request that the Commission enjoin BellSouth from charging the fee until a semi-annual adjustment is conducted. Id. at ¶29. The Petitioners also request that the Commission award attorney's fees and costs, as well as any penalties it deems necessary. Id. at ¶¶30 and 31.

B. BellSouth's Motion to Dismiss

BellSouth contends that although the Complaint states the fee is \$0.11, it fails to allege that the amount of the fee is inappropriate. Motion at pg. 2. First, BellSouth contends that the Petitioners, i.e. the named BellSouth customers, have failed to meet the requirements for standing to bring the Complaint. Id. at pg. 3. BellSouth argues that being a BellSouth customer and previously serving as a representative of a class of customers in a class action suit are not enough to meet the standing requirements. Id. More specifically, BellSouth contends that the customers fail to meet the "substantial interests" test, which requires a showing of: (1) an immediate injury in fact, and (2) that the injury suffered is of the type the proceeding is tailored to remedy. Id. at pg. 4. BellSouth argues that the Petitioners fail to demonstrate a sufficient nexus between the customers' substantial interests and the imposition of the Manhole Ordinance fee and, therefore argues the injury is speculative and does not satisfy the standing test as set

forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981). Id. at pg. 4 and 5.

BellSouth and the Petitioners have contrary interpretations of the Tariff in that BellSouth contends that refunds are not required. Id. at pg. 5. BellSouth further contends that the Tariff provides for it to review the charges after each six-month period and make adjustments, if necessary. Id. BellSouth contends that the word “reconcile” as used in the Tariff does not mean “refund” or “audit” as suggested by the Petitioners. Id.

BellSouth further contends that the Commission “does not have the authority to hear class action suits.” Id. at pg. 6. To support its argument, BellSouth cites Medley Investors, Ltd. v. Lewis, 465 So.2d 1305 (Fla. 1st DCA 1985), in which the Court ruled “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.” Medley at 1307. Furthermore, BellSouth contends that there is no statutory basis, either procedurally or substantively, authorizing the Commission to hear class action suits or to grant class relief. Motion at pg. 6. BellSouth also contends that there is no statutory basis for the Commission to grant injunctive relief or attorney’s fees. Id. at pg. 7 and 8.

If its Motion to Dismiss is not granted, BellSouth alternatively 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, Florida Administrative Code (F.A.C.). Id. at pg. 9 and 10.

C. Response to BellSouth’s Motion to Dismiss

In the Petitioners’ Response to BellSouth’s Motion to Dismiss (Response), they request that the Commission deny the Motion on the basis that “BellSouth’s arguments are both legally and factually flawed.” Response at pg. 3. In the alternative, the Petitioners suggest that the Commission enter an order acknowledging that the matters in the Complaint are and were properly before the Circuit Court. Response, FN 2.

The Petitioners argue that they satisfy the standing requirements as set forth in the Agrico case. The Petitioners contend that they have standing as they are BellSouth customers, who were charged and paid the Manhole Ordinance fee. Response at pg. 4. Furthermore, the Petitioners argue that as a result of BellSouth’s non-compliance with the Tariff, they have been overcharged. Id. The Petitioners are claiming that the overcharges are the injury that they have suffered and are continuing to suffer. Id. In addition, the Petitioners argue that BellSouth’s non-compliance with the Tariff and resulting overcharges to its affected customers requires a refund. Id. at pg. 5. The Petitioners also reiterate their earlier allegation that all Miami-Dade customers were similarly affected since the Manhole Ordinance fee was applied uniformly. Id. at pg. 7. The Petitioners further argue that requiring each customer, who paid the fee, to file a complaint would be inefficient. Id. at pg. 8.

III. Discussion

Upon consideration, staff recommends that BellSouth's Motion be granted in part and denied in part. While the Petitioners have stated a cause of action upon which relief can be granted, they have requested certain relief, i.e. injunctive relief and attorney's fees, that may not be granted by the Commission. BellSouth's Motion should therefore, be granted with respect to the requests for injunctive relief and attorney's fees and denied with respect to the issue of standing.

Staff believes that BellSouth's alternative request to refer the Complaint to the Division of Regulatory Compliance and Consumer Assistance for consideration pursuant to Rule 25-22.032, F.A.C., is inappropriate in this instance. Rule 25-22.032, F.A.C., does not contemplate resolving formal complaints that have already been filed.

Staff further believes that the parties' arguments with regard to the proper interpretation of the Tariff are more appropriate in the context of a Motion for Summary Final Order. Therefore, staff is not addressing the Tariff language since such an analysis would amount to an evaluation of the merits of the case.

Standing

In order to demonstrate standing, an individual "must show 1) that he will suffer 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 a type or nature which the proceeding is designed to protect." Agrico at 482. The Petitioners allege that they have been BellSouth customers since 1997. Complaint, ¶ 5. If the Petitioners and other BellSouth customers who have paid the fee have indeed been overcharged in violation of the Tariff, then they have suffered an injury and continue to incur that injury. Therefore, staff believes that the facts alleged by the Petitioners are sufficient to show an injury in fact. The next question is whether the injury is of the type which can be properly addressed by the Commission. Generally, if the Petitioners have been overcharged the fees in violation of BellSouth's Tariff, then the resulting injury would be appropriately addressed in this forum. Thus, staff believes that the Petitioners have met the two-prong test for standing to bring the Complaint. Nevertheless, as discussed below, the Commission lacks jurisdiction to grant the injunctive relief or to award attorney's fees.

Class Standing

BellSouth cites the ruling in Medley for the proposition that there is "no authority for a class action in an administrative proceeding." Motion at pg. 6. BellSouth further contends that "Chapter 364 nor any other statutes governing the Commission authorize the PSC to entertain class actions." Id. The Petitioners argue, however, that the Manhole Ordinance fee has been applied uniformly to all of BellSouth's Miami-Dade customers. Response at pg. 6. The Petitioners further argue that "[w]hen a publicly regulated utility company acts in a manner that uniformly affects a class of its customers, the expected and ordinary method of addressing the conduct of the public utility is through the class-action vehicle." Id. at 7.

Although traditional notions of class standing do not apply in Commission proceedings, the Commission has the authority to enforce the Tariff and determine the appropriate disposition of any overcharges, including the authority to order a refund to all affected customers, if appropriate. See, Richter v. Florida Power Corporation, 366 So.2d 798, 801 (Fla. 2d DCA 1979). A “class action” is a creature of civil law; thus, the term does not apply in the administrative law context. The body of customers charged pursuant to a tariff is affected by any alleged misapplication of the tariff, and the Commission has clear authority to remedy such alleged injuries. Therefore, staff believes that the Petitioners have sufficiently alleged standing simply by stating that they are charged pursuant to the Tariff, and that the Tariff has been misapplied.

Injunctive Relief and Attorney’s fees

In its Motion, BellSouth cites to 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 in which the Commission acknowledged its lack of subject matter jurisdiction to issue injunctions. Motion at pg. 7; See also Southern Bell Telephone and Telegraph Company v. Mobile America Corp., 291 So.2d 199 (Fla. 1974). Based on the Commission’s own acknowledgment in the previously cited dockets, staff strongly believes that the Commission lacks authority to address the Petitioners’ request for injunctive relief to prevent BellSouth from imposing the Manhole Ordinance fee. Similarly, the Commission lacks subject matter jurisdiction to award attorney’s fees. BellSouth cites case law to that effect and a Commission Order dismissing a petition requesting attorney’s fees for lack of subject matter jurisdiction. Motion at pg. 8.

CONCLUSION

The Commission should grant in part and deny in part BellSouth's Motion to Dismiss the Petitioners' Complaint. While staff believes that the Petitioners have standing to bring the subject matter of the Complaint before the Commission, and to seek a refund of any charges collected in violation of the Tariff, the types of ancillary relief, i.e. the injunctive relief and attorney's fees, requested by the Petitioners are not within the Commission's jurisdiction.

Furthermore, staff believes that BellSouth's alternative request to refer the Complaint to the Division of Regulatory Compliance and Consumer Assistance for consideration pursuant to Rule 25-22.032, Florida Administrative Code (F.A.C.), is inappropriate in this instance. Rule 25-22.032, F.A.C., does not contemplate resolving formal complaints that have already been filed.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 2, this docket should remain open pending further proceedings. **(SCOTT, FORDHAM)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 2, this docket should remain open pending further proceedings.