

**ORIGINAL**

**Dorothy Menasco**

**From:** Fatool, Vicki [Vicki.Fatool@BellSouth.COM]  
**Sent:** Friday, September 08, 2006 4:03 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 050194-TL BellSouth's Response in Opposition to Petitioner's Motion to Consider Petition of Protest Timely Filed  
**Attachments:** 050194-T.pdf

- A. Vicki Fatool  
 Legal Secretary to James Meza III and Manuel Gurdian  
 BellSouth Telecommunications, Inc.  
 150 South Monroe Street  
 Suite 400  
 Tallahassee, Florida 32301  
 (305) 347-5560  
[vicki.fatool@bellsouth.com](mailto: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 Manuel Gurdian
- D. 9 pages total (including letter, pleading and certificate of service)
- E. BellSouth Telecommunications, Inc.'s Response in Opposition to Petitioner's Motion to Consider Petition of Protest Timely Filed

.pdf version attached

<<050194-T.pdf>>

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9/8/2006

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ORIGINAL

Legal Department

MANUEL A. GURDIAN  
Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

September 8, 2006


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 Response in Opposition to Petitioners' Motion to Consider Petition of Protest Timely Filed, in the captioned docket.

Sincerely,



Manuel A. Gurdian

cc: All Parties of Record  
Jerry D. Hendrix  
E. Earl Edenfield, Jr.  
James Meza III

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**CERTIFICATE OF SERVICE**  
**Docket No. 050194-TL**

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

(\*) Electronic Mail, (\*\*) Fascimile and First Class U. S. Mail this 8<sup>th</sup> day of September,

2006 to the following:

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\_\_\_\_\_  
Manuel A. Gurdian

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint by Florida BellSouth ) Docket No. 050194-TL  
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. )  
\_\_\_\_\_ ) Filed: September 8, 2006

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION  
TO PETITIONERS' MOTION TO CONSIDER PETITION OF  
PROTEST TIMELY FILED**

BellSouth Telecommunications, Inc. ("BellSouth") submits this Response in Opposition to Petitioners' Motion to Consider Petition of Protest Timely Filed ("Motion"). For the following reasons, the Florida Public Service Commission should deny the Motion.

1. On August 8, 2006, the Florida Public Service Commission ("Commission") issued its Proposed Agency Action Order No. PSC-06-0685-PAA-TL ("PAA"). The PAA clearly indicated on page 9 that any protest of the PAA must be received by "close of business on August 29, 2006":

Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 29, 2006.

2. Consistent with the Commission's instructions in the PAA, Rule 28-106.111(2), Florida Administrative Code, further provides that "[u]nless otherwise provided by law, persons seeking a hearing on an agency decision which does or may

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determine their substantial interests shall file a petition for hearing within 21 days of receipt of written notice of the decision.”

3. Rule 28-106.111(4), Florida Administrative Code, also provides that “[a]ny person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters.” (emphasis added).

4. Florida Statutes § 120.569(2)(c), which governs administrative decisions affecting substantial interests, provides, in pertinent part, that “[a] petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed.” (emphasis added).

5. Rule 28-106.104(1), Florida Administrative Code, defines “filing” to mean receipt by the agency clerk during normal business hours. Specifically, Rule 28.106.104(1), Florida Administrative Code, provides that “[i]n construing these rules or any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours.” (emphasis added). Rule 28-106.104(8), Florida Administrative Code, further provides that “[a]ny party who elects to file any document by electronic transmission shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result.”

6. Petitioners allege in their Protest that they “received notice of the Proposed Agency Action, Order No. PSC-06-0685-PAA-TL via the PSC website on August 8, 2006.” The Commission’s website establishes that the Petitioners’ Protest was filed on August 30, 2006. *See* Commission CASR. Further, Petitioners admit in their

Motion that they filed their Petition after the close of business on August 29, 2006. Thus, there is no dispute that the proposed protest is untimely. Instead, the Petitioners main argument as to why the Commission should disregard the PAA, the Commission's rules, legal precedent and Section 120.569 and find that their untimely filing is excused is because of the "the logistical impossibility of synchronizing clocks across the state with those of the Public Service Commission." BellSouth submits that this reason is not sufficient and that, even if it was, the Commission does not have the discretion to consider an untimely filed protest.

7. In *Cann v. Dept. of Children and Family Services*, 813 So.2d 237 (Fla. 2d DCA 2002), the Department of Children and Family Services ("Department") denied the petitioners' renewal of their medical foster home license. On November 7, 2000, the Department sent the petitioners a letter of denial by certified mail and informed them that they could request an administrative hearing with the Department within twenty-one days of their receipt of the letter. The petitioners received the letter on November 8, 2000 and retained counsel as a result. The petitioners' counsel marked November 29, 2000, on his calendar as the due date for the request and prepared the request on November 28, 2000. It was counsel's intent that the request would be mailed that day and arrive at the Department's office the date it was due, November 29, 2000. The request did not arrive at the Department's office until November 30, 2000, which, like the instant case, was untimely. The Department denied the petitioners' request because it was undisputed that the request was untimely and entered a final order.

8. Subsequent to the Department's entry of a final order, the petitioners filed an appeal to the Second District Court of Appeal. In its opinion denying the appeal, the

court rejected the availability of the doctrine of excusable neglect to cure an untimely protest. Specifically, the court noted that Florida Administrative Code Rule 28-106.111(2), (4) required that the petitioners file their request for an administrative hearing in the office of the Department within twenty-one days from the date they received the Department's notice. In addition the court noted that section 120.569(2)(c), Florida Statutes, provides that "[a] petition shall be dismissed if . . . it has been untimely filed" and stated that this "language requiring the dismissal of an untimely request, was added by chapter 98-200, section 4, at 1831, Laws of Florida. We conclude that this amendment overruled *Unimed Laboratory and Rothblatt* to the extent those cases held that an untimely administrative appeal could proceed if the delay was a result of excusable neglect." The court ultimately held that "[b]ecause the Department's rules require the filing of the request for hearing within twenty-one days and section 120.569(2)(c) compels the dismissal of untimely requests, and because equitable tolling provides no exception in this case, we must affirm the Department's order dismissing the [petitioners'] request for hearing as untimely." (emphasis added). Accordingly, under *Cann*, excusable neglect cannot cure an untimely protest of an agency decision. *See also, Patz v. Dept. of Health, Florida Board of Medicine*, 864 So.2d 79 (Fla. 3d DCA 2003).

9. Further, in *Whiting v. Florida Dept. of Law Enforcement*, 849 So.2d 1149 (Fla. 5<sup>th</sup> DCA 2003), the Department of Law Enforcement delivered a notice of final agency action of dismissal on March 21, 2002. The appellant then filed a notice of appeal on April 5, 2002. Pursuant to the statute that the appellant was appealing under, the appellant had 14 calendar days from the date he received notice to file his appeal. The court then determined that the last day to file the appeal was April 4, 2002. The appellant



claimed that he attempted to fax his notice of the appeal on April 4, 2002, but that his attempts were unsuccessful. He then “elected to complete the fax on April 5, 2002 in the morning hours.” In arriving at its decision affirming the dismissal because the appellant’s appeal was untimely, the court noted that “Section 120.569(c)(2) compels dismissal of untimely petitions in administrative hearings concerning substantial rights.”

10. Prior to the *Cann* and *Whiting* decisions, this Commission also denied a Motion to Move Petition out of Time. *See In re: Complaint of GHF Associates against Southern Bell Telephone and Telegraph Company regarding billing for ESSX service*, Docket No. 910486-TL, Order No. 24971, (Issued August 26, 1991). In that proceeding, the proposed agency action required a response by close of business on July 2, 1991. On July 3, 1991, the Commission received the Petitioner’s Petition for Formal Proceeding. On July 15, 1991, the Petitioner filed a Motion to Move Petition out of Time, which the Commission denied. In its decision, the Commission found that Petitioner failed to show any good cause for granting the request for relief and also denied the Petition for Formal Proceeding as being untimely.

11. Pursuant to Rules 28-106.111(2), 28-106.111(4), 28-106.104(1), 28-106.104(8), F.S. § 120.569(2)(c), and the PAA, the undisputed facts establish that Petitioners filed their Protest untimely – after the close of business on August 29, 2006. Petitioners’ anemic excuse for the untimely filing is the “the logistical impossibility of synchronizing clocks across the state with those of the Public Service Commission”. BellSouth submits that this excuse does not constitute excusable neglect, but even if it did, based on *Cann* and *Whiting*, the Commission does not have the discretion to proceed

with an untimely protest. Accordingly, the Commission should deny the instant Motion as the Petition was untimely.

12. In addition and although not expressly pled by the Petitioners, the doctrine of equitable tolling would be inapplicable here, because there has been no allegation that the petitioner "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." *Machules v. Department of Administration*, 523 So.2d 1132, 1134 (Fla. 1988); *see also, Cann*, 813 So. 2d at 239. Instead, Petitioners concede that they received notice of the PAA on August 8, 2006 and were aware of the 21 day deadline but blame the untimely filing on their inability to synchronize clocks. The Commission should find consistent with its prior decision as well as the decisions in *Cann* and *Whiting, supra*, and deny the Motion, find that the Petitioners' protest is untimely, and declare the PAA to be a final order.

WHEREFORE, for the foregoing reasons, BellSouth respectfully requests that the Commission deny Petitioners' Motion to Consider Petition of Protest Timely Filed.

Respectfully submitted this 8th day of September, 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.



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