

ORIGINAL

Matilda Sanders

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Monday, September 11, 2006 3:54 PM
To: Filings@psc.state.fl.us
Subject: 050194-TL BellSouth's Response in Opposition to Protest
Importance: High
Attachments: 050194.pdf

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A. Vicki Fatool
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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. 8 pages total (including letter, pleading and certificate of service)

E. BellSouth Telecommunications, Inc.'s Response in Opposition to Protest
 .pdf version attached

<<050194.pdf>>

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9/11/2006

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Attorney

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ORIGINAL

September 11, 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 Protest, which we ask that you file 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 11th 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.)	
<hr/>		Filed: September 11, 2006

BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE IN OPPOSITION TO PROTEST

BellSouth Telecommunications, Inc. ("BellSouth") submits this Response in Opposition ("Response")¹ to the Petition of Protest to Proposed Agency Action ("Protest") filed by Karla Hightshoe, Timothy McCall, Manuel Garcia and Best Investment Realty, Inc. ("Petitioners"). For the following reasons, the Florida Public Service Commission ("Commission") should summarily dismiss and refuse to consider the untimely Protest.

ARGUMENT

A. The Protest Is Untimely

1. Petitioners untimely filed their Petition of Protest to Proposed Agency Action ("Petition") after close of business on August 29, 2006.
2. On or about September 1, 2006, Petitioners filed a Motion to Consider Petition of Protest Timely Filed.

¹ While BellSouth does not believe it is required to file the instant Response because the underlying Protest was untimely and thus not a properly filed Protest under Commission Rules, BellSouth files this Response in an abundance of caution and only in the event that the Commission is inclined to deviate from Commission Rules, the Commission's Order, Florida statutes, and Florida case law and grant Petitioners' Motion to Consider Petition of Protest Timely Filed.

DOCUMENT NUMBER-DATE

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3. On or about September 8, 2006, BellSouth filed its Response in Opposition to Petitioners Motion to Consider Petition of Protest Timely Filed, wherein BellSouth sets forth the reasons why Commission rules, the Commission's Orders, Florida statutes, and Florida case law all require the Commission to dismiss and refuse to consider the Petitioners' untimely protest. BellSouth expressly incorporates said arguments into the instant Response, and the Commission should reject the Protest for this reason alone.

B. The Petitioners Lack Standing

To protest a proposed agency action, a party must provide "an explanation of how the petitioner's substantial interests will be affected by the agency determination." Florida Administrative Code 28-106.201(2)(b). If a party lacks substantial interests and thus standing, then the Commission must reject the purported protest. See Order No. PSC-06-0033-FOF-TP at 1-2, 10, *In re Joint Application for Approval of Transfer of Control of Sprint-Florida*, Docket No. 050551-TP (Fla. PSC Jan. 10, 2006).

Under a long line of Commission decisions, the proper test to determine "substantial interest" is that announced in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. Dist. Ct. App. 1981). Under *Agrico*, a party has a substantial interest in the outcome of an administrative proceeding if: (1) the party will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing,² and (2) the substantial injury is of a type or nature that the proceeding is designed to protect. See 406 So. 2d at 482. "The first aspect of this test deals with the degree of injury. The second deals with the nature of the injury." *Id.*; see also *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997).

² Section 120.57, Florida Statutes, prescribes procedures for the conduct of administrative hearings.

The Protesting Parties bear the burden of demonstrating that they meet *both* prongs and therefore have standing in this proceeding. *See, e.g.*, Order No. PSC-05-0382-FOF-TP at 6, *In re MCG Capital Group*, Docket No. 050111-TP (Apr. 12, 2005); Order No. PSC-00-0421-PAA-TP at 6. If the Protesting Parties fail to make *either* showing under the *Agrico* test, their petitions must fail. *See* Order No. PSC-00-0421-PAA-TP at 7.

Petitioners fail to adequately allege standing to file their Petition for a Section 120.569 or 120.57 hearing. Specifically, Petitioners have failed to demonstrate that they will suffer any injury at all (let alone of sufficient immediacy), because they fail to allege that they are or have ever been BellSouth customers who paid the fee in question. The Petition simply alleges that the Petitioners are either “A Miami-Dade County resident” or “A Miami-Dade County Business” and that they bring the Protest “on behalf of all BellSouth Customers.” These allegations are insufficient to prove direct and immediate injury.

C. Commission Is Not Authorized to Entertain Class Actions

While the Petition does allege that the Petitioners bring the instant Protest on behalf of all BellSouth Customers who paid the Miami-Dade County Ordinance Fee, the Commission 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. *See Id.*

Moreover, nothing in Chapter 364 nor any other statutes governing the Commission authorize it to entertain class actions.³ 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. And, importantly, any claim of standing by the Petitioners must be based on their *own* interests, not on their assertions about the interests of Florida consumers. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (“In the ordinary course, a litigant must assert his or her own legal rights or interests, and cannot rest a claim to relief on the legal rights or interests . . . of third parties.”) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); Order No. PSC-96-0768-PCO-WU, *In re Application for a Limited Proceeding To Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company*, Docket No. 960192-WU (Fla. PSC June 14, 1996) (denying a town intervention because it had no standing to represent the interests of consumers who are residents and taxpayers). Therefore, for this additional reason, the Petition should be dismissed.⁴

D. The Petition Fails To Comply With Rule 28-106.201(2)

Pursuant to Rule 28-106.201(2)(b) and (f), Florida Administrative Code, the Petition shall contain the “name, address, and telephone number of the petitioner” and

³ 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.*, 896 So.2d 891 (Fla. 3d DCA 2005).

⁴ BellSouth reasserts this argument, previously raised in its April 18, 2005 Motion to Dismiss, that the Commission does not have jurisdiction to hear class actions, as Petitioners fail to allege in the Petition that they are or have ever been BellSouth customers who paid the fee in question

must include a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action. Rule 28-106.201(4) provides that "[a] petition shall be dismissed if it is not in substantial compliance with subsection (2) of this rule or it has been untimely filed." The Petition does not include a citation or mention of any rule or statute that the petitioners contend require reversal or modification of the Commission's Proposed Agency Action. Moreover, the Petition does not contain the addresses and telephone numbers of the Petitioners. Accordingly, because the Petition fails to substantially comply with the provisions of Rule 28-106.201, Florida Administrative Code, it must be dismissed.

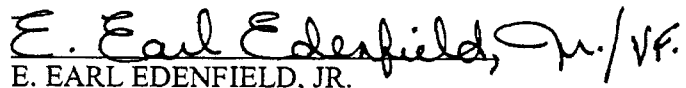
WHEREFORE, based upon the foregoing, BellSouth respectfully requests that the Commission enter an Order denying the Protest filed by Karla Hightshoe, Timothy McCall, Manuel Garcia and Best Investment Realty, Inc.

Respectfully submitted this 11th day of September, 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.



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