

**ORIGINAL**

**Timolyn Henry**

**From:** Fatool, Vicki [Vicki.Fatool@BellSouth.COM]  
**Sent:** Tuesday, October 17, 2006 4:24 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 060640-TP BellSouth's Partial Motion to Dismiss and Answer  
**Importance:** High  
**Attachments:** Response.pdf; LEGAL-#653459-v1-060640-TP\_Response\_to\_Bessie\_Russ'\_Evercom\_Complaint.DOC

A. Vickie (Fatool) Woods  
 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. 060640-TP: Petition to investigate, claim for damages, complaint, and

other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation, by Bessie Russ

C. BellSouth Telecommunications, Inc.  
 on behalf of Manuel A. Gurdian

D. 17 pages total (including letter, certificate of service and pleading)  
 15 pages total (word doc.)

E. BellSouth Telecommunications, Inc.'s Partial Motion to Dismiss and Answer

.pdf version attached      word version  
 <<Response.pdf>>      <<LEGAL-#653459-v1-060640-TP\_Response\_to\_Bessie\_Russ'\_Evercom\_Complaint.DOC>>

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Legal Department

Manuel A. Gurdian  
Attorney

BellSouth Telecommunications, Inc.  
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October 17, 2006

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

**Re: Docket No.: 060640-TP  
Petition to investigate, claim for damages, complaint, and  
other statements against respondents Evercom Systems, Inc.  
d/b/a Correctional Billing Services and BellSouth Corporation,  
by Bessie Russ**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Partial Motion to Dismiss and Answer, 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,

  
Manuel A. Gurdian

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

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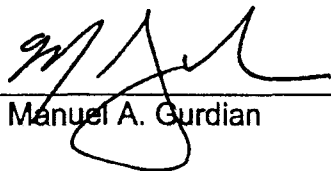
**CERTIFICATE OF SERVICE**  
**Docket No. 060640-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 17th day of October, 2006 to the following:

Felicia West  
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Manuel A. Gurdian

ORIGINAL

FLORIDA PUBLIC SERVICE COMMISSION

Petition to investigate, claim for damages, ) Docket No. 060640-TP  
complaint, and other statements against )  
respondents Evercom Systems, Inc. d/b/a )  
Correctional Billing Services and BellSouth )  
Corporation, by Bessie Russ )  
\_\_\_\_\_ ) October 17, 2006

**BELLSOUTH'S PARTIAL MOTION TO DISMISS AND ANSWER**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Partial Motion to Dismiss and Answer to the "Petition to Investigate, Claim for Damages, Complaint and Other Statements" ("Complaint") filed by Bessie Russ ("Petitioner"). For the reasons set forth below, the Florida Public Service Commission ("Commission") should dismiss certain portions of Petitioner's Complaint. In addition, BellSouth provides its Answer and Affirmative Defenses to the remaining allegations in Petitioner's Complaint.

**INTRODUCTION**

**A. Petitioner's Version of the Facts**

In her Complaint, Petitioner alleges that she uses Correctional Billing Services ("CBS"), a division of Evercom Systems, Inc., to contact a relative who is currently incarcerated. See Complaint at ¶¶ 2 and 4. CBS "provides telecommunications services to correctional inmates so that they may call family and friends." See Complaint at ¶ 3. The Petitioner alleges that she uses BellSouth as her service provider and that her service has been "interrupted without just cause or explanation" by BellSouth's "meddling, interference or doing." See Complaint at ¶¶ 4, 8 and 9. Further, she alleges that "[c]orrectional facilities have discretion over which service provider they will use for inmate telecommunications" and that BellSouth "is not or has not [sic] chosen by this

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institution, to the best of Petitioner's knowledge, and continues to interfere with the CBS service in an effort to force Petitioner to utilize their service." See Complaint at ¶¶ 10 and 11. Petitioner alleges that BellSouth has violated the Federal Trade Commission Act, the Florida Antitrust Act and the Sherman Act. See Complaint at ¶¶ 15 and "Other Statements." Petitioner also alleges that she has suffered damages and has no adequate remedy at law. See Complaint at ¶ 13.

In her Prayer for Relief, Petitioner asks this Commission to, *inter alia*, enter a temporary and permanent injunction enjoining BellSouth "from committing further violations," reimburse Petitioner in the amount of \$500.00 for the cost of preparing the Petition, to have any and all of BellSouth's waivers "given by the Public Service Commission or Federal Communications Commission voided for failure to substantially, completely and in good faith comply with the laws and intentionally causing petitioner distress and costs," for the "incidents described above to forever desists and decease[sic] post haste," and for "service to be re-established so that petitioner may communicate with incarcerated relative."

**B. BellSouth's Version of the Facts<sup>1</sup>**

BellSouth denies that it has interfered with Petitioner's service. Upon information and belief, Sprint Payphone Services, Inc. ("Sprint") is the provider who originates the pay phone service that Petitioner is complaining is being blocked at her residence. BellSouth has not and is not blocking Petitioner's ability to receive collect calls from the correctional facility at issue, because BellSouth only provides billing and collection services on behalf of CBS and does not provide service to the facility in question. Upon

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<sup>1</sup> BellSouth provides this section as information only and is not relying on same in the filing of its Motion to Dismiss.

and information and belief, BellSouth understands that CBS acts as a billing aggregator on behalf of Sprint. Upon information and belief, BellSouth believes that Sprint is the party that had blocked Petitioner's calls. Upon information and belief, BellSouth understands that as of October 12, 2006, Petitioner's ability to receive collect calls from the subject correctional facility has been reestablished.

### **MOTION TO DISMISS**

#### **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. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI, Docket No. 981923-EI, (Issued May 24, 1999)(citing to *Varnes*, 624 So.2d at 350).

#### **B. Federal Trade Commission Act, Sherman Act, and Florida Antitrust Act Claims**

Petitioner alleges that “[t]he acts and practices of Defendants, as herein before alleged, were and are to the injury and prejudice of members of the consuming public and constituted and now constitute unfair methods of competition within the meaning and intent of the Federal Trade Commission Act and the Florida Antitrust Act, §542.19 of the Florida Statutes.” *See* Complaint at ¶ 15. In addition, Petitioner has included in her Petition, an “Other Statements” section which appears to attempt to state a cause of action under the “Florida Antitrust Act of 1980” and “The Sherman Act.”

The PSC does not have jurisdiction over Petitioner's claims that BellSouth violated the Federal Trade Commission Act, the Florida Antitrust Act or the Sherman Antitrust Act. 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. 1<sup>st</sup> DCA 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. 2d DCA 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., In re: Petition by AT&T Communications of the Southern States, Inc. TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries.* Docket No. 010345-TP, PSC-01-2178-FOF-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."); *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) (Commission dismissed 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 or that BellSouth is in violation of the Florida Antitrust Act of 1980. In making these determinations, 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 DCA 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).

Petitioner cannot demonstrate that the Commission has the authority to grant the specific relief the Petitioner requests. Specifically, as can be seen by a cursory review of



Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to determine whether a carrier has violated federal antitrust law or Florida antitrust law.

The Commission addressed a similar situation in *In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information*. Docket No. 030349-TP, Order No. PSC-03-1892-FOF-TP, (Issued December 11, 2003), ("*Sunrise Order*"). In the *Sunrise Order*, the Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created." *See Sunrise Order* at 3 (citations omitted). The Commission further noted, however, it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law. *Id.* at 3-4. Accordingly, in the *Sunrise Order*, the Commission determined that it "cannot provide a remedy (federal or state) for a violation of" federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. *Id.* at 5. *See also, In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC*. Docket No. 031125, Order No. PSC-04-0423-FOF-TP (Issued April 26, 2004) (The Commission "acknowledged that federal courts have found that a state agency is not authorized to take administrative action based solely on federal statutes. *Id.*

at 3 (citing *Curtis v. Taylor*, 648 F.2d 946 (5<sup>th</sup> Cir. 1980)). Since Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five.”)

Here, Petitioner is requesting that the Commission find that BellSouth violated the Florida Antitrust Act as well as federal law. See Complaint at ¶ 15 and at “Other Statements” section. Pursuant to Commission precedent and Florida law, the Commission lacks jurisdiction to make such a finding. Accordingly, BellSouth requests that the Commission dismiss Petitioner’s Complaint to the extent it seeks a finding that BellSouth has violated federal law or the Florida Antitrust Act.

### C. Injunctive Relief

The Petitioner requests in her “Prayer for Relief” for “a temporary and permanent injunction enjoining defendants from committing further violations.” The PSC cannot provide Petitioner’s requested injunctive relief.<sup>2</sup> As stated above, as a creature of statute, the Commission has only those powers granted by the Legislature and has no common law or inherent powers. *Mayo*, 354 So. 2d at 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 that it lacks authority 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

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<sup>2</sup> 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.”).

jurisdiction to issue injunctions . . . .” *Id.* at 9; *see also* Florida Power & Light Company v. Albert Litter Studios, Inc. 896 So.2d 891, 892 n.3 (Fla. 3d DCA 2005) (The PSC “concedes that it lacks the authority to issue injunctive relief.”).

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.

**D. Attorneys’ Fees**

Petitioner requests in her “Prayer for Relief” for “reimbursement in the amount of \$500.00 for the cost in preparing this Petition.” To the extent that Petitioner has requested attorneys’ fees “for the cost in preparing” the Petition, BellSouth requests that this portion of the Complaint be dismissed or stricken.

The PSC has no jurisdiction to award attorney fees as requested in the Petition. *See 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); *In re: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to the Miami-Dade County Ordinance 21-44 and request that Florida Public Service Commission order BellSouth to comply with Section A2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof*. Docket No. 050194-TL, Order No. PSC-05-0762-PCO-TL (Issued July 25, 2005) (“we acknowledge a lack of subject matter jurisdiction to award attorney’s fees.”); *G.E.L. Corp. v. Dep’t of Environ. Protection*, 875 So. 2d 1257, 1263-64 (Fla. 5<sup>th</sup> DCA 2004) (state agencies do not have substantive jurisdiction over legal issues relating to attorney fees authorized by section 120.595, 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 Seminole County*, 599 So. 2d 220 (Fla. 5<sup>th</sup> 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 or contractual basis that authorizes the PSC to award attorney fees. In addition, the Complaint requests relief that the PSC has no authority to provide. Thus, the portion of the Complaint seeking attorney fees should be dismissed.

**E. Request that Waivers given by the PSC or FCC be voided**

Petitioner requests, in her Prayer for Relief, “to have any and all of respondents waivers given by the Public Service Commission or Federal Communications Commission voided for failure to substantially, completely and in good faith comply with the laws and intentionally causing petitioner distress and costs.” Plaintiff’s allegation fails to state a cause of action and must be dismissed. Moreover, BellSouth is unable to fully respond to Petitioner’s allegation because it is “so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading.” *See* Rule 1.140(e) of the Florida Rules of Civil Procedure. Accordingly, based upon the foregoing, BellSouth requests that the Commission enter an order dismissing the allegation or, in the

alternative, requiring Petitioner to provide a more definite statement as to the relief requested pursuant to Rule 1.140(e) of the Florida Rules of Civil Procedure.

**F. Personal Injury Claim**

Petitioner alleges in paragraphs 13 (b) and (c) of the Complaint that “petitioner has incurred lost sleep in a titanic amount and suffered severe emotional distress because of lost telecommunication with such close relative which would not have occurred in the absence of respondents’ actions” and that the “petitioner’s enjoyment of life has been reduced, and the value of the relationship with the close relative abridged.” These alleged damages are clearly tort damages for alleged personal injury and the Commission has previously recognized that it is without jurisdiction to resolve matters in tort. *See In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc. and Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission’s jurisdiction*, Docket No. 951232-TI; Order No. PSC-98-1556-FOF-TI (Issued November 23, 1998) (“we acknowledge that we are without jurisdiction to resolve matters in tort.”).

Moreover, the Commission has recognized that it has no jurisdiction to award monetary damages. *See 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) (“The Commission may not award monetary damages in resolving utility related disputes. *Southern Bell Tel. Co. v. Mobile America Corp, Inc.*, 291 So.2d 199 (Fla. 1974). The Supreme Court of Florida has decreed that ‘Nowhere. . . is the PSC granted authority to enter an award of money damages. . . ; this is a judicial function

within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const.' *Southern Bell* at 202."); *In re: Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01 Filed by BellSouth Telecommunications, Inc., Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003)* ("This Commission lacks any legal authority to award the type of money damages sought by AT&T.")

Pursuant to Commission precedent and Florida law, the Commission lacks the authority to find that Petitioner is entitled to monetary and/or tort damages. Accordingly, BellSouth requests that the Commission dismiss Petitioner's Complaint to the extent it seeks an award of monetary and/or tort damages.

**G. Claim against BellSouth Corporation**

While BellSouth Telecommunications, Inc. is an entity regulated by and under the Commission's jurisdiction, BellSouth Corporation is not. Any allegations against BellSouth Corporation must be dismissed as the Commission does not have jurisdiction over BellSouth Corporation.

**ANSWER**

1. BellSouth admits that Petitioner is a customer of BellSouth. BellSouth is without knowledge as to the remainder of the allegations contained in paragraph 1 and therefore denies same.

2. BellSouth admits that is a wholly owned subsidiary of BellSouth Corporation. BellSouth admits that has numerous contacts in the State of Florida and that it provides telecommunications services. BellSouth denies the remainder of the allegations contained in paragraph 2.

3. BellSouth admits that it does not provide telecommunications services to correctional inmates. BellSouth is without knowledge as to remainder of the allegations contained in paragraph 3 and therefore denies same.

4. BellSouth admits that Petitioner is a customer of BellSouth. BellSouth is without knowledge as to remainder of the allegations contained in paragraph 4 and therefore denies same.

5. The allegations contained in paragraph 5 of the Complaint do not require a response from BellSouth.

6. BellSouth is without knowledge as to the allegations contained in paragraph 6 and therefore denies same.

7. BellSouth denies that it has interrupted the Petitioner's service. BellSouth is without knowledge as to remainder of the allegations contained in paragraph 7 and therefore denies same.

8. BellSouth denies the allegations contained in paragraph 8 of the Complaint. BellSouth specifically denies that it has meddled or interfered with Petitioner's service.

9. BellSouth admits that it offers telecommunications service bundles in conjunction with BellSouth Long Distance, Inc. BellSouth admits that it does not provide telecommunications services to individuals incarcerated in a correctional facility. BellSouth denies the remainder of the allegations contained in paragraph 9.

10. BellSouth is without knowledge as to the allegations contained in paragraph 10 and therefore denies same.

11. BellSouth denies the allegations contained in paragraph 11 of the Complaint. BellSouth specifically denies that it has interfered with CBS' or Petitioner's service.

12. BellSouth denies the allegations contained in paragraph 12 of the Complaint.

13. BellSouth denies the allegations contained in paragraph 13 of the Complaint.

14. BellSouth denies the allegations contained in paragraph 14 of the Complaint.

15. BellSouth denies the allegations contained in paragraph 15 of the Complaint. BellSouth specifically denies that the Commission has jurisdiction to find that BellSouth is in violation of the Federal Trade Commission Act or the Florida Antitrust Act.

16. The allegations contained in paragraph 16 of the Complaint do not require a response from BellSouth.

17. The allegations contained in paragraph 17 of the Complaint do not require a response from BellSouth as Rule 25-4.111 of the Florida Administrative Code speaks for itself.

18. The allegations contained in paragraph 18 of the Complaint do not require a response from BellSouth as Rules 25-4.113 and 25-4.070 of the Florida Administrative Code speak for themselves.



19. BellSouth denies the allegations contained in paragraph 19 of the Complaint. BellSouth specifically denies that it has “cut-off”, discontinued or halted Petitioner’s service.

BellSouth denies each and every allegation in the Complaint not expressly admitted herein, and demands strict proof thereof.

**AFFIRMATIVE DEFENSES**

1. Petitioner’s 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.


3. The Commission lacks subject matter jurisdiction to find that BellSouth is in violation of the Florida Antitrust Act of 1980.

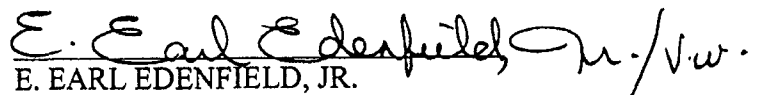
4. Petitioner’s Complaint fails to join an indispensable party to this action, Sprint Payphone Services, Inc.

WHEREFORE, BellSouth respectfully requests the Commission to enter an Order in BellSouth’s favor, deny the Petitioner the relief sought, and grant BellSouth such other relief as the Commission deems just and proper.

Respectfully submitted this 17th day of October, 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.

  
\_\_\_\_\_  
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