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Sent: Wednesday, October 18, 2006 3:04 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Slaughter, Brenda; Carver, J; Meza, James; Nancy Sims; Holland, Robyn P; Randa, Johna A
Subject: Florida Docket No. 060650-TL
Importance: High
Attachments: bellsouthmotion.pdf

ORIGINAL

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- B. Docket No. 060650-TL: In Re: Joint Petition against BellSouth, Embarq and Verizon for billing charges not authorized by law and request for refunds or credits to consumers.
- C. BellSouth Telecommunications, Inc.
 on behalf of J. Phillip Carver
- D. 10 pages total in PDF format
- E. BellSouth's Motion to Dismiss the Joint Petition Against BellSouth for Billing Charges
 Unauthorized by the Telecommunications Consumer Protection Act and Request for Refunds

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ORIGINAL

October 18, 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. 060650-TL
In Re: Joint Petition against BellSouth, Embarq and Verizon for
billing charges not authorized by law and request for refunds or
credits to consumers

Dear Ms. Bayó:

Enclosed is BellSouth's Motion to Dismiss the Joint Petition Against BellSouth for Billing Charges Unauthorized by the Telecommunications Consumer Protection Act and Request for Refunds, 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,



J. Phillip Carver

Enclosure

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

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CERTIFICATE OF SERVICE
Docket No. 060650-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 18th day of October, 2006 to the following:

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J. Phillip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition against BellSouth,)
Embarq and Verizon for billing charges)
Not authorized by law and request for)
Refunds or credits to consumers)

Docket No. 060650-TL

Filed: October 18, 2006

**BELLSOUTH'S MOTION TO DISMISS THE JOINT
PETITION AGAINST BELLSOUTH FOR BILLING CHARGES
UNAUTHORIZED BY THE TELECOMMUNICATIONS CONSUMER
PROTECTION ACT AND REQUEST FOR REFUNDS**

BellSouth Telecommunications, Inc. ("BellSouth") hereby files, pursuant to Rule 25-22.037, Florida Administrative Code and Rule 1.140 Fla. R. Civ. Pro., its Motion to Dismiss the above-referenced Joint Petition, and states as grounds in support thereof the following:

1. On September 28, 2006, the Office of Public Counsel ("OPC") and the Attorney General ("AG") filed a Joint Petition against BellSouth, Embarq and Verizon alleging that these three companies "have included and continue to include in the telephone bills of Florida consumers charges that are not permitted by the Telecommunications Consumer Protection Act, Section 364.601 et. seq." (Petition, p. 1). The Petition further states that the charges in question relate to "Internet services" (Id., p. 3). BellSouth hereby moves to dismiss the Petition with Prejudice because (1) the Commission lacks subject matter jurisdiction over the Internet services referenced in the Petition; (2) the Petition fails to state a claim upon which relief may be granted.

2. The Petition is premised entirely upon an alleged violation of the Telecommunications Consumers Protection Act (Sections 364.601 – 604, Florida Statutes) ("The Act"). The Petitioners allege that BellSouth has violated the statutory

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provisions of the Act regarding billing practices. A review of the statutory provisions and the allegations of the Petition, however, make clear that the allegations against BellSouth, if proven, would not establish a violation of the Act. Further, the allegations of the Petition, if proven, would conclusively demonstrate that the Act does not apply. Accordingly, the Petition should be dismissed with prejudice.

3. The allegations of the Petition that relate to BellSouth can be summarized as follows: Email Discount Network LLC (EDN) “purports to provide Internet services such as email accounts to thousands of Florida consumers.” (Petition, p. 3). EDN allegedly charges customers for services that they have not ordered and do not want. These charges are submitted to a billing aggregator, who, in turn, submits them to BellSouth. BellSouth performs the billing function for EDN without performing a pre-billing verification to ensure that the charges are authorized. (Id.).

4. Obviously, the Commission cannot rule in a matter unless it has jurisdiction over the parties and over the subject matter. Lack of subject matter jurisdiction is properly raised by a motion to dismiss. Schmauss v. Snoll, 245 So 2d 112 (Fla. 1971). In the instant case, the Petition should be dismissed because the Commission lacks subject matter jurisdiction over Internet services. Again, Petitioners claim that BellSouth has conducted third party billing for a company that provides Internet services. The FCC has consistently held that Internet services are interstate services.¹ Since Internet services are interstate in nature, they are not within the jurisdiction of this Commission. Moreover, this Commission has specifically acknowledged “that the ISP

¹ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) for a thorough discussion of the FCC’s conclusion that ISP traffic is jurisdictionally interstate.

Remand Order does classify ISP-bound traffic as interstate and, therefore, under the jurisdiction of the FCC.”² The fact that these services are not under the subject matter jurisdiction of this Commission mandates dismissal of the Petition.

5. Moreover, even if these Internet services were within the Commission’s jurisdiction, the Petition should, nevertheless, be dismissed because it not only fails to state a claim upon which relief can be granted, it contains allegations that, if proven, would affirmatively establish that the Consumer Protection Act does not apply. Under the long standing rule in Florida, a motion to dismiss tests the sufficiency of the Complaint (or in this case, the Petition). Dismissal is appropriate if the allegations of the Complaint fail to state a cause of action. Temples v. Florida Industrial Construction Co., Inc., 310 So 2d 326 (Fla. 2d DCA 1975). That is, if the allegations, if proven, would not entitle the Petitioner to prevail on its claim, then dismissal is proper.³ Judged against this standard, the Petition should be dismissed with prejudice.

6. The Petition alleges that BellSouth provides third-party billing for internet services charged to consumers by EDN. The only allegation in the Petition of active misconduct is that EDN charges customers for services that they do not order. The Petition alleges no active misconduct by BellSouth, but claims that it does not take affirmative action to go behind the billing information provided to it by EDN and undertake an independent process to verify that the billing information that EDN submits to BellSouth is accurate (Petition, p. 3). However, there is nothing in the Act to require BellSouth to take such action.

² *Order Approving Stipulation*, Docket No. 00075-TP (Phase I), Order No. PSC-02-0634-AS-TP, issued May 7, 2002, p. 2.

³ See also, Jackson Grain Company v. Kemp, 177 So 2d 513, 515 (Fla 2d DCA) 1965, in which the Court noted that dismissal is also proper when the pleading discloses some fact that “will necessarily defeat the claim.”

7. The Act is composed of four Sections, a title (§364.601), definitions (§364.602), the “methodology for changing telecommunications providers” (§364.603), and a section that relates to billing practices (§364.604). Since the Petition is based entirely upon allegations of improper billing, it is clear that § 364.604 is the section most pertinent to the claim. A review of § 364.604 reveals it to be structured in a fairly typical manner. It defines certain actions that must be taken by a billing party such as BellSouth (e.g., identifying on the bill the name and toll free number of the originating party), and it prohibits certain actions by a billing party (e.g., disconnecting a customer’s lifeline service when basic local exchange services have been paid for). There is absolutely nothing in Section 364.604 (or anywhere else in 364.601 – 364.604) to require a billing party to verify the information provided to it by an originating party prior to performing the billing function. Given this, the facts alleged in the Petition, if proven, would still not constitute a violation by BellSouth of the Act, which means that dismissal is warranted.

8. The weakness of the Petitioners’ claim is highlighted by the fact that they cite to no provision of the Act that would require BellSouth to conduct pre-billing verification. Instead, Petitioners contend that BellSouth has violated the statute by billing without statutory authorization. The language of the statute, however, does not support this contention.

9. Section 364.604 applies to both the “billing party” and the “originating party.” The term “originating party” is defined as the party that provides or bills for a “telecommunications service or information service.” (§ 364.02(4)). Further, the term “information service” is defined expressly to exclude Internet services. § 364.02(5). Thus, the plain meaning of §§ 364.02 and 364.04 is that the requirements of 364.604

apply only when the service that is being billed is a telecommunications or information service. The statute does not apply when the service being billed is an “Internet service.” Accordingly, even if “Internet services” were within the Commission’s jurisdiction, the statute upon which the Petitioners rely exclusively does not apply.

10. Petitioners attempt to avoid the plain meaning of the statute by making the argument that since § 364.604 is inapplicable to Internet services on its face, this must mean that billing for internet services is prohibited. In this regard, Petitioners allege the following:

Under Sections 364.602(4) and (5), Florida Statutes, an Internet service such as EDN is not an “information service” that is entitled to bill as an “originating party” under the Florida Telecommunications Consumer Protection Act. BellSouth, Embarq and Verizon have failed, and continue to fail, to ensure that charges appearing on their telephone bills are authorized by the Telecommunications Consumer Protection Act.

(Petition, p. 4).

Thus, Petitioners argue that the Act should be read to mean either that (1) billing for all services other than telecommunications and information services is unauthorized; or (2) since § 364.604 clearly does not contain a requirement that the billing party perform a pre-billing verification for information and telecommunications services, this process is required when billing is performed for any other type of service. Neither of these readings of §§ 364.02 and 364.04 is supported by the statute’s plain language.

11. The rules that apply to statutory interpretation are well-settled and fairly straightforward. When construing a statute, it must be assumed that the legislature intended the words used in the statute to have the meaning that is plain and obvious. Leisure Resorts Inc. v. Rooney, 654 So 2d 911 (Fla. 1995). When the meaning of the statutory language is clear, there is nothing to do other than to read the language and

apply it. Holly vs. Auld, 450 So 2d 217 (Fla. 1984). Generally, a statute should not be read in a way that adds to its express terms any additional requirements or limitations (Id.). The literal language of the statute must control unless a literal reading would lead to “an unreasonable or ridiculous conclusion.” Id., at 219.

12. The Petitioners’ arguments are not consistent with these principles because they attempt to create a meaning that does not arise from the literal language of the statute, and offer a statutory interpretation that leads to an “unreasonable and ridiculous conclusion.” As previously stated, the plain and simple language of § 364.604 requires some actions by billing parties and prohibits others. These prohibitions and requirements apply only to the billing of information and telecommunications services (as these terms are defined in § 364.602). There is absolutely nothing on the face of the statute to prompt the conclusion that the legislature intended § 364.604 to function as a prohibition against billing for any services other than services defined by the Act as telecommunications and information services. Moreover, if this were the legislature’s intent, then it would have been simple enough for the statute to say as much. In the absence of language to create such a prohibition, it is unreasonable to assume that this is what the legislature intended. It is equally unreasonable to assume that the legislature intended to create a pre-billing verification requirement for services other than telecommunications and information services, then chose to express this intention by way of complete silence on the subject.

13. Finally, the problem with the Petitioners’ statutory interpretation is illustrated by the fact that their request for relief and their theory of statutory interpretation cannot be aligned. The only purported “misdeed” the petitioners allege that

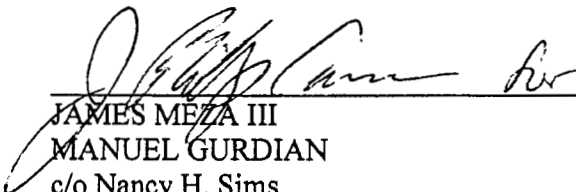
BellSouth has committed is the failure to obtain a verification of the billing information provided to it by EDN (even though the Act does not contain such a requirement). By way of remedy, Petitioners request that the Commission order BellSouth to refund money that has been billed to date and to institute a pre-billing verification process in the future. However, under the Petitioners' legal theory, BellSouth's violation of the statute resides in the fact that BellSouth is not "authorized" by §§ 364.01-.04 to bill for Internet services. Obviously, if BellSouth instituted a pre-billing verification process, this would not change the fact that the services being billed are Internet services. For this reason, under Petitioners' theory, BellSouth would still be violating the Statute, regardless of whether or not it verifies the charges before billing the services.

14. Thus, there is a complete disconnect between Petitioners' theory of how BellSouth violated the statute and what they ask the Commission to do to remedy this alleged violation. In effect, the Petitioners are alleging that BellSouth has violated the statute by providing unauthorized billing services, while implicitly asserting that a continued violation would be acceptable if the Commission were to impose upon BellSouth the duty to conduct pre-billing verification, i.e., a duty that is not required by the language of the statute.

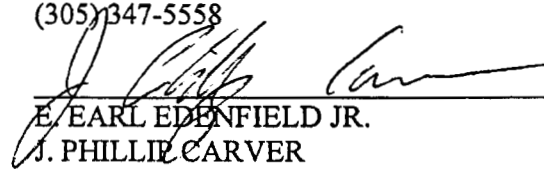
WHEREFORE, for the foregoing reasons, BellSouth respectfully requests the entry of an Order dismissing the subject Petition with prejudice.

Respectfully submitted, this 18th day of October 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.



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