

Dorothy Menasco

From: Woods, Vickie [vf1979@att.com]
Sent: Monday, November 03, 2008 4:30 PM
To: Filings@psc.state.fl.us
Subject: 080631-TP AT&T Florida's Partial MTD, Answer and Affirmative Defenses to DSLI's Petition to Intervene, Investigate and Mediate
Attachments: Document.pdf

- A. Vickie Woods
Legal Secretary to E. Earl Edenfield, Jr., Tracy W. Hatch,
and Manuel A. Gurdian,
BellSouth Telecommunications, Inc. d/b/a AT&T Florida
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(305) 347-5560
vf1979@att.com
- B. Re: Docket No. 080631-TP: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.
- C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida

on behalf of Manuel A. Gurdian
- D. 8 pages total (includes letter, certificate of service and pleading)
- E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Partial Motion to Dismiss and Answer and Affirmative Defenses to DSLI's Petition to Intervene, Investigate and Mediate

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11/3/2008

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November 3, 2008

Ms. Ann Cole
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Docket No. 080631-TP: Petition for Commission to intervene,
investigate and mediate dispute between DSL Internet Corporation
d/b/a DSLi and BellSouth Telecommunications, Inc.**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's
Partial Motion to Dismiss and Answer and Affirmative Defenses to DSLI's Petition
to Intervene, Investigate and Mediate, which we ask that you file in the captioned
docket.

Sincerely,

Manuel A. Gurdian

cc: All parties of record
Gregory R. Follensbee
Jerry D. Hendrix
E. Earl Edenfield, Jr.

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CERTIFICATE OF SERVICE
Docket No. 080631-TP

I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail
and First Class U. S. Mail this 3rd day of November, 2008 to the following:

Florida Public Service Commission
Charles Murphy, Staff Counsel
2540 Shumard Oak Boulevard
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Manuel A. Gurdian

FLORIDA PUBLIC SERVICE COMMISSION

Petition for Commission to intervene,) Docket No. 080631-TP
investigate and mediate dispute between)
DSL Internet Corporation d/b/a DSLI and)
BellSouth Telecommunications, Inc.)
_____) November 3, 2008

**AT&T FLORIDA’S PARTIAL MOTION TO DISMISS AND ANSWER AND
AFFIRMATIVE DEFENSES TO DSLI’S PETITION TO
INTERVENE, INVESTIGATE AND MEDIATE**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida (“AT&T Florida”) respectfully submits this Partial Motion to Dismiss and Answer and Affirmative Defenses to DSL Internet Corporation’s (“DSL”) Petition to Intervene, Investigate and Mediate (“Petition”). For the reasons set forth below, the Florida Public Service Commission (“Commission”) should dismiss a certain portion of DSL’s Petition. In addition, AT&T Florida provides its Answer and Affirmative Defenses to the remaining allegations in DSL’s Petition.

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. 1st 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). To sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of

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action for which relief can be granted. *In re: 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*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (Issued April 16, 2007) citing *In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.* 95 FPSC 5:339 (1995); *Varnes*, 624 So.2d at 350.

B. Injunctive Relief

DSL*i* requests in the “CONCLUSIONS” section of its Petition, that the Commission issue “[a]n order which enjoins AT&T (Formerly BellSouth Telecommunications, Inc.) from suspending the services of DSL*i* and thereby keeping the Florida Consumers protected”. The Commission cannot provide DSL*i*’s requested injunctive relief.

As a creature of statute, the Commission has only those powers granted by the Legislature and has no common law or inherent powers. *State v. Mayo*, 354 So. 2d 359, 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). 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).

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 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 Commission “concedes that it lacks the authority to issue injunctive relief.”) and *In re: 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*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (Issued April 16, 2007)(“We find it appropriate to grant BellSouth’s Partial Motion to Dismiss. The Petition/Complaint shall be dismissed in part because we do not have judicial power required to... (b) issue injunctions”).

Because DSLi’s Petition seeks a remedy that the Commission has no authority to provide, the portion of the Petition seeking injunctive relief should be dismissed.

ANSWER

1. AT&T Florida admits that DSLi has a company code of TX609 and is a Competitive Local Exchange Carrier with a certificate to provide telecommunications services within the State of Florida.

2. AT&T Florida admits that DSLi and AT&T Florida executed an Interconnection Agreement and that the Interconnection Agreement speaks for itself.

AT&T Florida denies the remainder of the allegations contained in paragraph 2 of the Petition.

3. AT&T Florida admits that on or about May 28, 2008, AT&T Florida issued DSLi an invoice which contained the amount of \$188,820.59 on account number 305N280044 for true-ups to special access rates dating back to March 10, 2005.

4. AT&T Florida denies the allegations contained in paragraph 4 of the Petition. AT&T Florida specifically denies that DSLi properly submitted to AT&T Florida a "dispute" of the True-ups on or about July 17, 2008.

5. AT&T Florida denies the allegations contained in paragraph 5 of the Petition. AT&T Florida specifically denies that DSLi properly submitted to AT&T Florida a "dispute" of the True-ups on or about September 26, 2008.

6. AT&T Florida admits that on or about September 26, 2008 it denied DSLi's dispute. AT&T Florida denies the remainder of the allegations contained in paragraph 6 of the Petition.

7. AT&T Florida admits that on or about October 7, 2008, AT&T Florida advised DSLi that AT&T Florida would suspend the services it provides to DSLi if payment was not received on October 8, 2008. AT&T Florida denies the remainder of the allegations contained in paragraph 7 of the Petition.

8. AT&T Florida denies the allegations contained in the unnumbered "DISCUSSION" section of the Petition and states that the referenced sections of the Interconnection Agreement speak for themselves. AT&T Florida further specifically denies that it is "not allowed to back bill the true-ups to March 10, 2005."

9. AT&T Florida denies the allegations contained in the unnumbered "CONCLUSIONS" section of the Petition and states that the referenced sections of the Interconnection Agreement speak for themselves. AT&T Florida specifically denies that DSLi is entitled to the relief requested in the Petition.

AT&T Florida denies each and every allegation in the Petition not expressly admitted herein, and demands strict proof thereof.

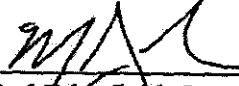
AFFIRMATIVE DEFENSES

1. DSLi's Petition fails to state a cause of action upon which relief can be granted.
2. The Commission lacks the authority to issue an injunction as requested by DSLi.

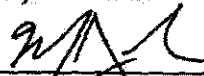
WHEREFORE, AT&T Florida respectfully requests the Commission to enter an Order in AT&T Florida's favor, deny the Petitioner the relief sought, and grant AT&T Florida such other relief as the Commission deems just and proper.

Respectfully submitted this 3rd day of November, 2008.

AT&T FLORIDA



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