**Dorothy Menasco**

**From:** Woods, Vickie [vf1979@att.com]

**Sent:** Monday, March 16, 2009 4:31 PM

**To:** Filings@psc.state.fl.us

**Subject:** 090084-TP AT&T Florida's Motion to Dismiss and Response to Public Counsel and Attorney General's Joint Petition

**Attachments:** Document.pdf; LEGAL-#730600-v1-090084_Motion_to_Dismiss_and_Response_to_Joint_Petition.DOC

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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B. **Docket No. 090084-TP**
Joint Petition of Public Counsel and Attorney General for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunication Companies, Verizon, Embarq, AT&T, et al.

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

D. 17 pages total in PDF format (includes letter, certificate, and pleading)
15 pages total in .word format (includes pleading)

E. Motion to Dismiss and Response to Public Counsel and Attorney General's Joint Petition

.pdf .word

<<Document.pdf>> <<LEGAL-#730600-v1-090084_Motion_to_Dismiss_and_Response_to_Joint_Petition.DOC>>

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March 16, 2009

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

**Re: Docket No. 090084-TP**
**Joint Petition of Public Counsel and Attorney General for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunication Companies, Verizon, Embarq, AT&T, et al.**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss and Response to Public Counsel and Attorney General's Joint Petition, 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,

Manuel A. Gurdian

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

**CERTIFICATE OF SERVICE**
**Docket No. 090084-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 16th day of March, 2009 to the following:

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Manuel A. Gurdian

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In re: Joint Petition of Public Counsel and Attorney General for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunications Companies Verizon, Embarq, AT&T, et al. | ) ) ) ) ) | Docket No. 090084-TP<br><br><br><br>Filed: March 16, 2009 |

**AT&T FLORIDA'S MOTION TO DISMISS AND RESPONSE TO PUBLIC COUNSEL AND ATTORNEY GENERAL'S JOINT PETITION**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida"), hereby files its Motion to Dismiss and Response to the Joint Petition for Declaratory Statement and for Order Limiting Third Party Billing by Florida Telecommunications Companies Verizon, Embarq, AT&T, et al. ("Joint Petition") filed by Public Counsel and Attorney General, and states as grounds in support thereof the following:

## I. INTRODUCTION

1. Public Counsel and Attorney General seek a declaration by the Commission that the Telecommunications Consumer Protection Act, Sections 364.601-364.604 ("the Act"), Florida Statutes, requires telecommunications companies in Florida, including AT&T Florida, to only provide third party billing services for "telecommunications services" and "information services" as those terms are defined by the Act. Joint Petition at p. 9. In addition, the Joint Petition requests that the Commission enter an order "prohibiting telecommunications companies subject to its jurisdiction from charging consumer telephone bills and performing third party billing services for entities providing services other than those authorized by the Act, and subjecting any telecommunications companies that fail to conform to said order to the disciplinary actions that are appropriate under the circumstances." *Id.* Public Counsel and Attorney General are trying to use the declaratory judgment statute and rule as a vehicle to enjoin the rights of other parties; a use

which is expressly prohibited by the rule itself. For this reason, and others as discussed below, the Joint Petition should be summarily dismissed.

2. If, despite the deficiencies of the Petition, the Commission decides to rule on the Joint Petition, then the relief Public Counsel and Attorney General seek should be denied.

## II. 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).

### B. Joint Petition is an Improper Request for Declaratory Statement

Relevant to any request for declaratory judgment are Florida Statutes and Commission Rules. Specifically, Florida Statutes Section 120.565 governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's set of circumstances.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Also applicable is Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, which provides:

> [a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

As noted above, Public Counsel and Attorney General request that the Commission issue a Declaratory Statement finding that, pursuant to the Act, telecommunications companies may provide third party billing services only for "telecommunications services" and "information services" as those terms are used and defined within the Act, and in doing so must conform to the full requirements of the Act. Joint Petition at p. 9. Public Counsel and Attorney General also request "the Commission to implement its interpretation of the Act by issuing an order prohibiting telecommunications companies subject to its jurisdiction from charging consumer telephone bills and performing third party billing services for entities providing services other than those authorized by the Act, and subjecting any telecommunications companies that fail to conform to said order to the disciplinary actions that are appropriate under the circumstances." *Id.*

Rule 28-105.001, Florida Administrative Code, expressly provides that a "declaratory statement is not the appropriate means for determining the conduct of another person." (emphasis added). Public Counsel and Attorney General's requests, as set forth above, do not conform to Rule 28-105.001, Florida Administrative Code, in that they are asking the Commission to declare that telecommunications companies in Florida are not entitled to take certain actions.

The Commission rejected a similar request for declaratory relief in the matter styled *In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building ("Maxihut") located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department*, Docket No. 060049-TL, Order No. PSC-06-0306-DS-TL (Issued April 19, 2006). In that case, Broward County filed a request for a declaration that BellSouth was not "entitled, by virtue of any provision of its Tariff, or by any statute, rule, or order of the Commission," to require various payments, use Broward County Property for certain purposes or to abrogate the terms of a lease. *Id.*, p. 6. The Commission rejected this portion of Broward County's Petition and stated the following:

> Rule 28-105.001, Florida Administrative Code, specifically states that a 'declaratory statement is not the appropriate means for determining the conduct of another person.' Broward County's request, as set forth in Points A through D above, does not conform to Rule 28-105.001, Florida Administrative Code, in that it is asking us to state that BellSouth is not entitled to take certain actions.

*Id.*

In addition, the Commission rejected a similar request for declaratory relief in *In re: Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications Inc.*, Docket No. 080089-TP, Order No. PSC-08-0374-DS-TP (Issued June 4, 2008). In that case, Intrado Communications filed a request for a declaration, *inter alia*, that ILECs could not impose certain charges on Intrado and on PSAPs. *Id.* at p. 15. The Commission rejected Intrado's request and stated:

> In the Petition at issue here, Intrado asks us to determine the conduct of ILECs and certain PSAPs in addition to its own interests, which is prohibited by Rule 28-105.001, F.A.C."

*Id.*

Because Public Counsel and Attorney General's Joint Petition is composed entirely of the same type of improper requests as the Commission rejected in the above cited proceedings, it too should be dismissed.

Moreover, Florida law provides that "[a]n administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons." *Tampa Electric Company v. Florida Dept. of Community Affairs*, 654 So. 2d 998, 999 (Fla. 1st DCA 1995) citing *Regal Kitchens, Inc. v. Florida Dept. of Revenue*, 641 So. 2d 158, 162 (Fla. 1st DCA 1994). The Joint Petition attempts to have the Commission "adopt a broad agency policy" that no telecommunications carrier is permitted to bill for any service other than "telecommunications" or "information" services, and provide a statutory interpretation that applies to an "entire class of persons" (i.e. telecommunications carriers). This is an improper request for a declaratory statement under Florida law and it should be dismissed.

## III. RESPONSE

Adoption of the Petitioner's position will lead to consequences far beyond those intended by the Petitioners and far beyond the realm of sensible policy as it will preclude telecommunications companies in Florida from billing for a number of services that have long been billed through telecommunications' bills and that the Petitioners have not alleged to have caused problems, e.g. internet services, yellow pages, alarm and security

monitoring, etc. Moreover, prohibiting the placement of such services on telecommunications company bills will raise telecommunications companies' costs of doing business and harm consumers who enjoy the convenience of paying for services through their telecommunications providers' bills and, in some cases, who lack other means of payment. If the Commission decides to entertain Public Counsel and Attorney General's request, the Petition should be denied for the reasons discussed below.

**A. AT&T Florida's Third Party Billing Business**

AT&T provides a variety of services to Florida residents, many of whom enjoy the convenience of having a single bill for multiple services. For example, customers can enjoy the simplicity of paying their video or satellite television charges, internet access, mobile phone charges, and long distance charges all through a single AT&T bill. Many Florida residents also enjoy the convenience of having other types of charges[1] (examples include non-AT&T internet access service, e-mail, voice mail, web hosting and design, alarm protection, computer technical support, off-site computer data storage and directory listing services) appear on a single bill. With stringent consumer protections in place, AT&T accommodates these customers and provides them with a single, simplified billing solution.

AT&T's third party customers include third-party billing aggregators, also known as clearinghouses, which assign each of their clients a customer identification code known in the industry as a "Sub-CIC." Clearinghouses collect billing information from the Sub-CICs and send the information in the proper electronic format to the local exchange carrier ("LEC") for inclusion on the customer's telephone bill. Clearinghouses enter into billing

[1] AT&T Florida also bills for businesses that provide hospital telephone services, allowing patients to bill their phone service to their home telephone bill while hospitalized.

services agreements with LECs that provide for inclusion of Sub-CIC charges on telephone bills. Those agreements require clearinghouses to take specified actions to protect consumers from erroneous or fraudulent billing. Currently, AT&T Florida has arrangements with 11 third-party billing aggregators. Through these aggregators, AT&T Florida processes more than 1 million clearinghouse bills per month in Florida. These bills include charges for traditional telecommunications services (1+, collect and calling card services) and charges for miscellaneous services.

AT&T Florida's third-party billing services provide important benefits for Florida consumers.[2] Many Sub-CICs offer telephone billing options with no credit check or requirement that the customer present a credit card or other payment instrument to purchase service. Many Florida residents are low-income families and being able to pay for services through a telephone bill can be an important option if they do not have a bank account, credit card, or other credit-based payment mechanism. By using their telephone bill, customers that lack – or simply choose not to use – personal credit instruments may still obtain Internet access, e-mail accounts and private voice mail services, which expands the universe of Internet users beyond those with formal credit accounts. Another advantage of third-party billing service is that consumers benefit from consolidated billing of telecommunications and other communications-related services on a single bill, and including competitive services in a consolidated bill fosters competition by lowering providers' costs and enabling them to offer their services at lower prices to consumers. As a result, consumers clearly benefit from telephone companies offering telephone bill-based

[2] The Commission's Rules prohibit the discontinuance of local telephone services for non-payment of non-regulated services, so consumers who utilize these third-party services do not put their access to telephone service at risk by incurring third-party charges on their telephone bills. Fl. Admin. Code § 25-4.113(4)(e).

billing to other service providers wishing to offer their services in a competitive marketplace.

### B. AT&T Florida's Consumer Safeguards Adequately Protect Its Customers

The vast majority of clearinghouses and Sub-CICs conduct their business properly. However, in order to protect its customers from unauthorized third-party billing, AT&T Florida takes a number of steps to prevent Sub-CICs from submitting erroneous charges.

First, AT&T Florida offers customers the opportunity to place a block on their line which restricts third parties from putting charges on a customer's phone bill. AT&T Florida provides this block at no charge to all customers who request it. AT&T Florida also offers this block to customers who have called the business office to complain about cramming. Moreover, AT&T Florida notifies customers of this option in an annual bill message. Bill block information is also provided in AT&T's directory (paper and online versions).

Second, third-party charges are clearly identified in a separate section of the bill. In this section, the name and telephone number of the Sub-CIC submitting the charge, the amount of the charge, and the name of the service are provided.

Third, AT&T Florida's billing services agreements with clearinghouses require them to obtain end user authorization that comply with AT&T Florida's policies. These policies include requirements that persons placing third-party charges on a telephone bill must be at least 18 years old and authorized to put the charges on the bill. The required authorization must take the form of a recording of the verbal Third Party Verification (when telemarketers are used), a letter of authorization or an internet authorization/identification. AT&T Florida has also implemented the FCC's Anti-

Cramming guidelines, continues to reinforce its efforts by adding more stringent performance requirements and has dedicated resources focused on quality billing for its end-users at all levels. In addition, AT&T Florida's agreements with aggregators, require clearinghouses and Sub-CICs, upon request from AT&T Florida, to provide proof of an end-user's authorization for a charge. Under the terms of AT&T Florida's agreements, the end-user authorization must include the following: 1) the date the end-user authorization was received; 2) the end-user's name and telephone number; 3) questions and answers regarding the end-user's age to ensure authorization was not received from a minor; 4) reasonable determination that the person ordering the service has the authority to do so; 5) explanation of the service offering and all applicable rates and charges; 6) explanation as to how the end-user may cancel the service; and 7) the service name that will be used to market, sell and, when applicable, bill the service to end-users, and information related to whom the end-user should call for inquiries, including the applicable toll-free number. Moreover, when an end-user's authorization is obtained through a website, in addition to the above, the Sub-CIC must use an authorization and authentication procedure such as date of birth or the last digits of the end-user's social security number.

Fourth, AT&T Florida's billing services agreements with clearinghouses require them to submit only valid Sub-CIC charges that comply with AT&T Florida's policies. Clearinghouses are required to screen billing files submitted to AT&T Florida to ensure that they are accurate. Invalid charges can subject clearinghouses to a range of actions including financial penalties or termination of their relationship with AT&T Florida. Moreover, AT&T Florida has the right to terminate any clearinghouse or Sub-CIC that,

among other things, has generated an excessive number of complaints or is the subject of a state or federal agency investigation alleging cramming or other fraudulent activity.

Fifth, AT&T Florida investigates each new Sub-CIC for which it bills. For example, AT&T Florida checks for any links to Sub-CICs that have previously been terminated or that have been required to take corrective actions. AT&T Florida also researches the products and services offered by the Sub-CIC and reviews the Sub-CIC's sales and marketing procedures to ensure (among other things) that they require customer authorization to bill charges to their telephone number and to confirm that the purchaser is at least 18 years old.

Sixth, AT&T Florida monitors the type, number and percentage of cramming complaints each month by clearinghouse. AT&T Florida also monitors the type and number of cramming complaints received each month by Sub-CIC. AT&T Florida will aggressively act against any Sub-CIC that may exceed thresholds.

### C. Commission Does Not Have Jurisdiction Over Services Placed on Customers' Bills Other Than "Telecommunications Services" and "Information Services".

Petitioners cannot demonstrate that the Commission has the authority to regulate any services placed on customers' bills other than "telecommunications or information services" as provided for in the Act.

Under Florida law, 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. 1st 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).

The Commission, therefore, must determine whether the Legislature has granted it any authority over services billed by AT&T Florida other than for "telecommunications or information services". In making this determination, 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 statue," 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). The Commission has previously recognized the limited nature of its jurisdiction. *See In re: Petition for declaratory statement that NPCR, Inc. d/b/a Nextel Partners, commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."; In re: Petition for*

*declaratory statement that ALLTEL Communications, Inc., commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."* Docket Nos. 030346-TP and 030413-TP; Order No. PSC-03-1063-DS-TP; *In re: Complaint Against Florida Power & Light Company Regarding Placement of Power Poles and Transmission Lines,* Docket No. 010908-EI, Order No. PSC-02-0788-PAA-EI, (Issued June 10, 2002); *In re: Complaint and Petition by Lee County Electric Cooperative, Inc. for an Investigation of the Rate Structure of Seminole Electric Cooperative, Inc.,* Docket No. 981827-EC, Order No. PSC-01-0217-FOF-EC, (Issued January 23, 2001) (recognizing that any doubt as to the Commission's jurisdiction must be resolved against an exercise of jurisdiction).

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 Joint Petition is based entirely upon allegations of improper billing, Section 364.604 is the section most pertinent to the Commission's determination. Section 364.604 defines certain actions that must be taken by a billing party such as AT&T Florida (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). 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." Florida Statutes § 364.602(4). "Billing party" is defined as "any telecommunications company that bills an end user

consumer on its own behalf or on behalf of an originating party." Florida Statutes § 364.602(1). Further, the term "information service" is defined as "telephone calls made to 900 or 976 type services" and expressly excludes "Internet services". Florida Statutes § 364.602(5). The statute does not apply when the service being billed is any other "service" other than a "telecommunications or information" service.[3] Moreover, there is no statutory language in Section 364.604 (or anywhere else in Sections 364.601 – 364.604) that confers jurisdiction upon the Commission to prohibit AT&T Florida from billing for non-telecommunications or non-information services.

Accordingly, based upon the language of the Act and the above cited decisions, Florida Statutes § 364.604 does not prohibit AT&T Florida from billing for non-telecommunications or non-information services nor does it confer jurisdiction upon the Commission to prohibit AT&T Florida from billing for non-telecommunications or non-information services.

### D. Petitioners' Interpretation of the Act Is Inconsistent with Rules of Statutory Construction

Public Counsel and Attorney General's interpretation of the Act is unreasonable and ignores the plain meaning of Florida Statutes §§ 364.602 and 364.604 in that the requirements of 364.604 apply only when the "service" that is being billed is a telecommunications or information service.

The rules that apply to statutory interpretation are well-settled and fairly straightforward. When construing a statute, it must be assumed that the legislature

[3] Examining the Commission's billing rules, it is clear that they are consistent with the limits on its statutory authority. The definitions of "billing carrier," "originating party" and "information service" tracks the definitions from the Act and, consistent with the Act, the billing rules themselves regulate only telecommunications services and 900 and 976 services. Fl. Admin. Code §§ 25-4.003, 25-4.110.

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 v. 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.

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." The plain and simple language of Florida Statutes § 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 Florida Statues). There is absolutely nothing on the face of the statute to prompt the conclusion that the legislature intended Florida Statutes § 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.

## IV. CONCLUSION

The Joint Petition should be summarily dismissed because it falls far short of the well-established requirements that a Petition for Declaratory Statement must meet to be

deemed sufficient. The various deficiencies in the Joint Petition render it inadequate to meet the requirements of Florida law. Even if the Commission were to allow Public Counsel and Attorney General to go forward on their deficient Petition for Declaratory Statement, their request for a declaration that telecommunications companies may only provide third party billing services for "telecommunications services" and "information services" as those terms are used and defined by the Act and for an order prohibiting telecommunications companies from providing third party billing service other than those authorized by the Act, must be denied.

Respectfully submitted this 16th day of March, 2009.

AT&T FLORIDA

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