

Ruth Nettles

060476-TL

From: Woods, Vickie [vf1979@att.com]
Sent: Monday, August 17, 2009 12:54 PM
To: Filings@psc.state.fl.us
Subject: 060476-TL AT&T Florida's Supplemental Comments
Attachments: Document.pdf

- A. Vickie Woods
Legal Secretary to E. Earl Edenfield, Jr., Tracy W. Hatch
and Manuel A. Gurdian
AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vf1979@att.com
- B. Docket No. 060476-TL: Petition to Initiate Rulemaking to amend Rules 25-24.630(1) and 25-24.516(1), F.A.C. by BellSouth Telecommunications, Inc.
- C. AT&T Florida
on behalf of Manuel A. Gurdian
- D. 9 pages total (including letter, certificate of service, and pleading)
- E. BellSouth Telecommunications, Inc.'s d/b/a AT&T Florida's Supplemental Comments
.pdf

<<Document.pdf>>

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers. GA621

8/17/2009

DOCUMENT NUMBER-DATE
08515 AUG 17 8
FPSC-COMMISSION CLERK



Manuel A. Gurdian
General Attorney

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (305) 347-5561
F: (305) 577-4491
manuel.gurdian@att.com

August 17, 2009

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

**Re: Docket No.: 060476-TL: Petition to Initiate Rulemaking to
amend Rules 25-24.630(1) and 25-24.516(1), F.A.C., by
BellSouth Telecommunications, Inc.**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Supplemental Comments, which we ask that you file in the captioned docket.

Copies were served on the parties shown on the attached Certificate of Service.

Sincerely,



Manuel A. Gurdian

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

CERTIFICATE OF SERVICE
Docket No. 060476-TL

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 August, 2009 to the following

Interested Persons:

Richard Bellak
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
rbellak@psc.state.fl.us

Davis Graham & Stubbs LLP
Steven H. Denman
9040 Town Center Parkway, Suite 213
Brandenton, FL 34202
Tel. No. (941) 784-3657x1478
steve.denman@dgsllaw.com

Embarq Florida, Inc.
Mr. F. B. (Ben) Poag
Mailstop: FLTLHO0107
P.O. Box 2214
Tallahassee, FL 32316-2214
Tel. No. (850) 599-1027
Fax. No. (850) 878-0777
ben.poag@embarq.com

Embarq Florida, Inc.
Susan Masterton
Mailstop: FLTLHO0102
1313 Blair Stone Rd.
Tallahassee, FL 32301
Tel. No. (850) 599-1560
Fax. No. (850) 878-0777
susan.masterton@embarq.com

Florida Public Telecommunications
Assn., Inc. (FPTA)
Bruce W. Renard, Executive Director
9432 Baymeadows Road
Suite 140
Jacksonville, FL 32256
Tel. No. (904) 425-6050
Fax. No. (904) 425-6010
brenard@fpta.com

Qwest Communication Corp.
Ms. Cathy Hansen
1801 California Street, 47th Floor
Denver, CO 80202-2605
Tel. No. (303) 896-0032
Fax. No. (303) 896-2726
jeff.wirtzfeld@qwest.com

Verizon Florida, LLC
Mr. David Christian
106 East College Avenue, Suite 710
Tallahassee, FL 32301-7721
Tel. No. (850) 224-3963
Fax. No. (850) 222-2912
david.christian@verizon.com

Dulaney O'Roark III
Vice Pres. & Gen. Counsel – SE Region
Verizon
5055 N Point Parkway
Alpharetta, GA 30022
Tel. No. (678) 259-1449
Fax No. (678) 259-1589
De.OROark@verizon.com

Intellicall Operator Services, Inc./
ILD Telecommunications
Ms. Marsha Pokorny
1049 N.E. Macedonia Church Avenue
Lee, FL 32059-7419
Tel. No. (850) 971-5335
Fax. No. (503) 961-9474
marsha.pokorny@ildmail.com

Pay Tel Communications, Inc./SE
Vincent Townsend
P.O. Box 8179
Greensboro, NC 27419
Tel. No. (336) 852-7419x227

Administrative Procedures Committee
Scott Boyd
Executive Director and General Counsel
Holland Building, Room 120
Tallahassee, FL 32399-1300
Tel. No. (850) 488-9110
Fax. No. (850) 922-6934



Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications,) Docket No.: 060476-TL
Inc. to Initiate Rulemaking to Amend Rules)
25-24.630(1) and 25-24.516(1), Florida)
Administrative Code)
_____) Filed: August 17, 2009

AT&T FLORIDA'S SUPPLEMENTAL COMMENTS

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") submits the following supplemental comments in the above-captioned docket pursuant to Florida Public Service Commission ("Commission") staff's August 6, 2009 request for parties to "to address the subject of the applicability or non-applicability of rate caps to calls made by inmates within confinement facilities." As will be established below, the Commission does not have the authority to set rate caps to calls made by inmates within confinement facilities.¹ In support thereof, AT&T Florida submits the following comments:

A. Commission Has Limited Authority

The Commission must determine whether the Legislature has granted it any authority to determine rate caps for calls made by inmates within confinement facilities. 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, "the Public Service Commission was created and exists

¹ AT&T Florida does not provide operator services to inmates within confinement facilities but is filing these comments because of its belief that Section 364.01 does not provide the Commission jurisdiction to determine rate caps on the calls made by inmates within confinement facilities. If the Commission believes that rate caps in confinement facilities are necessary, it has to persuade the Florida Legislature to enact them as there is no authority for the Commission to enact operator service rate caps under Chapter 364.

through legislative enactment. Being a statutory creature, its powers and duties are only those conferred expressly or impliedly by statute.” *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977). *See also City of Cape Coral v. GAC Utility*, 281 So. 2d 493, 496 (Fla. 1973)(same); *Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977)(“[t]he Commission has only those powers granted by statute expressly or by necessary implication.”); and *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). *See also, Radio Tel. Comm., Inc. v. Southeastern Tel. Co.*, 170 So.2d 577, 582 (Fla. 1965)(Where the Court stated that if a reasonable doubt exists as to the “lawful exercise of a particular power that is being exercised, the further exercise of the power should be arrested.”).

B. Recent Amendment of Section 364.3376, Florida Statutes

On June 24, 2009, SB 2626 was signed by Governor Charlie Crist into law and become effective on July 1, 2009. SB2626 amended various sections of Chapter 364, Florida Statutes, including Section 364.3376. In amending Section 364.3376, the Florida

Legislature removed language that required the Commission to establish maximum rates and charges for providers of operator services within the state.² Specifically, the Florida Legislature struck the following language from Section 364.3376:

For operator services, the Commission shall establish maximum rates and charges for all providers of such services within the state.

The rule of construction in Florida is that the Legislature intended the amendment to serve a useful purpose. *See Carlile v. Game and Fresh Water Fish Commission*, 354 So.2d 362, 364 (Fla. 1977). It is presumed that in adopting an amendment, the legislature intends to change the meaning of a statute. *See Equity Corp. Holdings, Inc. v. Dep't. of Banking and Finance*, 772 So.2d 588, 590 (Fla. 1st DCA 2000). Thus, when the legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of the law, unless a contrary indication is clear, and the court must give due significance to such a change. *See Caruso v. Caruso*, 814 So.2d 498, 502 (Fla. 4th DCA 2002). Moreover, when the legislature amends a statute by omitting words, courts may presume it intends the statute to have a different meaning than that accorded before the amendment. *See Guadalupe v. Peterson*, 779 So.2d 494, 497 (Fla. 2^d DCA 2000). Where it is apparent that substantive portions of a statute have been omitted by the process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential. *See Carlile*

² As indicated in AT&T Florida's January 22, 2008 Comments filed in this docket, Florida Statutes § 364.3376(1)(b) states that F.S. 364.3376 did not apply to operator services provided by local exchange telecommunications companies or intrastate interexchange telecommunications companies, except as required by the Commission in the public interest. The current version of the statute continues to contain this same exemption.

v. Game and Fresh Water Fish Commission, 354 So.2d 362, 364-5 (Fla. 1977).
See also, Kelly v. Retail Liquor Dealers Ass'n of Dade County, 126 So.2d 299,
301 (Fla. 3d DCA 1961) (Where the court stated that “in the case of a change in a
statute it should be assumed that the legislature accorded significance to the
change and had reasonable motive for it, and that the change effected was
intentional”).

The Florida Legislature, in striking the requirement that the Commission
establish maximum rates and charges for providers of operator services within the
state, clearly removed the Commission’s jurisdiction to set operator services rate
caps for all providers, including providers of operator services within confinement
facilities.³ Accordingly, it would be inappropriate to use Section 364.01(4)(c),
Florida Statutes or any other section of Chapter 364, Florida Statutes to set rate
caps for providers of operator services in confinement facilities, or in any other
scenario where the Legislature has specifically removed such authority from the
Commission.

**C. A Commission Rule That Imposes a Rate Cap on Operator Services,
Would Conflict with the Legislature’s Amendment to F.S. 364.3376**

In light of the recent amendment to F.S. 364.3376 which removed the
Commission’s authority to impose rate caps on operator services, a Commission Rule
that imposes a rate cap on operator services, even operator services provided in a
confinement facility, would be an invalid exercise of delegated legislative authority as it

³ While we do not need to refer to the legislative history because the statute is unambiguous, the legislative history does provide that SB 2626 modifies existing regulation for local exchange service by removing Commission authority to “[e]stablish maximum rates and charges for operator services” and that “the bill removes the commission’s authority to establish maximum rates and charges for operator services.” The Florida Senate’s Bill Analysis and Fiscal Impact Statement on CS/SB 2626 dated April 20, 2009 at pp. 1, 15. Significantly, the legislative history does not discuss any exception allowing the Commission to impose rate caps in confinement facilities.

would be “action which goes beyond the powers, functions, and duties delegated by the Legislature.” F.S. § 120.52(8). Specifically, it would exceed the Commission’s “grant of rulemaking authority” and would enlarge, modify and contravene the specific provisions of law implemented. F.S. § 120.52(8)(b), (c). Florida law is also clear that the Commission “may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.” F.S. § 120.52(8) and F.S. § 120.536(1). Moreover, “[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required.” F.S. § 120.536(1).

Florida Statutes § 364.01 describes the powers of the commission and the legislative intent of Chapter 364, it is not a “specific law to be implemented.” As stated very clearly by the First District Court of Appeal in *State of Florida, Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc.*, 794 So.2d 696, 700 (Fla. 1st DCA 2001):

agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.

Moreover, as indicated above, the Legislature has spoken and removed from the Commission’s jurisdiction its authority to set rate caps for operator services.⁴ As stated by the Supreme Court of Florida in *State ex. Rel. Finlayson v. Amos*, 79 So. 433, 435

⁴ “It is well settled... that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms.” *Adams v. Culver*, 111 So.2d 665, 667 (Fla. 1959). As indicated above, the Florida Legislature, by amending F.S. § 364.3376, removed any rate cap authority from the Commission. Therefore, to the extent applicable, the Commission cannot use a general statutory provision to violate the Legislature’s intent and this well-settled rule of statutory construction.

(1918), “[t]here is no authority for a department of government charged with the execution of a law, to restore a provision which the legislature strikes from the act when in the progress of passage. Whatever the legislature does within its constitutional authority, no other department of the government may change, modify, alter or amend.”⁵ Accordingly, the Commission, cannot now enact a rule which sets a rate cap over operator services in confinement facilities by using Florida Statutes § 364.01(4)(c) or any other section of Chapter 364, Florida Statutes, to do so, where the Legislature has specifically removed such authority from the Commission.

D. Conclusion

In conclusion, based upon the foregoing, AT&T Florida respectfully requests that the Commission refrain from using Section 364.01(4)(c) or any other section of Chapter 364, Florida Statutes, to enact a rule which provides for rate caps to calls made by inmates within confinement facilities.

Respectfully submitted this 17th day of August, 2009.

AT&T FLORIDA



E. EARL EDENFIELD, JR.

TRACY W. HATCH

MANUEL A. GURDIAN

c/o Gregory R. Follensbee

150 South Monroe Street, Suite 400

Tallahassee, FL 32301

(305) 347-5558

⁵ In *State Dep't of Ins. v. Insurance Servs. Office*, 434 So.2d 908, 911 (Fla. 1st DCA 1983), the Court indicated that the Legislature's consideration of, and refusal to enact, proposed legislation is "strong evidence" that agency was not authorized to promulgate rules doing what the Legislature refused to do. In the instant case, the Legislature amended a statute which had required the Commission to establish maximum rates and services for operator services and removed the Commission's authority to set maximum rate caps on operator services. Similar to the situation in the *Insurance Servs. Office* case cited above, the amendment to F.S. 364.3376 is "strong evidence" that the Commission is not authorized to promulgate rules doing what the Legislature refused to do, i.e. continuing to allow the Commission to set rate caps on operator services.