

Dorothy Menasco

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Monday, May 03, 2010 2:32 PM
To: Filings@psc.state.fl.us
Subject: 100175-TL AT&T's Motion to Dismiss Complaint
Importance: High
Attachments: Document.pdf

- A. Vickie Woods
BellSouth Telecommunications, Inc. d/b/a AT&T Florida
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- B. In re: Docket No. 100175-TL: Complaint against AT&T d/b/a BellSouth for Alleged

Violation of various sections of Florida Administrative Code, Florida Statutes, and AT&T

Regulations pertaining to billing of charges and Collection of charges, fees, and taxes

- C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida

on behalf of Manuel A. Gurdian

- D. 14 pages total (includes letter, pleading and certificate of service)

- E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss Complaint

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5/3/2010

DOCUMENT NUMBER-DATE

03641 MAY-3 2010

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May 3, 2010

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

In re: Docket No. 100175-TL: Complaint against AT&T d/b/a BellSouth for Alleged violation of various sections of Florida Administrative Code, Florida Statutes, and AT&T Regulations pertaining to billing of charges and Collection of charges, fees, and taxes

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss Complaint, 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,

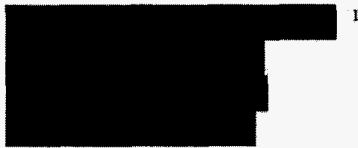
Manuel A. Gurdian


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

CERTIFICATE OF SERVICE
Docket No. 100175-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 3rd day of May, 2010 to the following:

Adam Teitzman
General Counsel
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Manuel A. Gurdian

¹ Commission Legal Staff has requested that AT&T Florida redact the customer's name and contact information.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against AT&T d/b/a BellSouth for) Docket No. 100175-TL
Alleged violation of various sections of Florida)
Administrative Code, Florida Statutes, and AT&T)
Regulations pertaining to billing of charges and)
Collection of charges, fees, and taxes)
_____) Filed: May 3, 2010

AT&T FLORIDA'S MOTION TO DISMISS COMPLAINT

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") hereby files, pursuant to Rule 28-106.204, Florida Administrative Code, this Motion to Dismiss the Complaint¹ filed by [REDACTED] ("Petitioner") in this docket. For the reasons set forth below, the Florida Public Service Commission ("Commission") should dismiss the Petitioner's Complaint.

I. INTRODUCTION

Petitioner's Complaint should be summarily dismissed because it falls far short of the well-established pleading requirements that a Complaint must meet to be deemed sufficient. The various deficiencies in the Complaint do not just render it inadequate to meet the requirements of Florida law. The Complaint is so vague as to both the operative facts and the law for which Petitioner seeks relief that it would be impossible for the Commission to properly issue a decision on the Complaint. The vagueness of the Complaint also makes it impossible for AT&T Florida to adequately respond without engaging in a substantial amount of conjecture as to the true facts in the instant situation. For these reasons, the Complaint should be dismissed as a matter of law.

¹ Commission Legal Staff has requested that AT&T Florida redact the customer's name from the pleading.

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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). 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 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. "In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not the pleading should be dismissed." *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI at 3, Docket No. 981923-EI, (Issued May 24, 1999).

B. Petitioner's Complaint Fails to State A Cause of Action for Which Relief Can Be Granted

1. Alleged Statutory and Rule Violations

In paragraph (a) of the Complaint, Petitioner alleges that

AT&T violates Florida Administrative Code Chapter 25-4.113(f) and various sections of Florida Administrative Code, Florida Statutes, and AT&T Regulations that pertain to billing of charges and collection of charges, fees and taxes; fraud – [AT&T representative], AT&T violated law it appears when she demanded and received payment of charges that customers are not required to pay according to F.S. 202, 203, (350), 364, 365, 366, 367 and 427, and the company regulations.

While Petitioner alleges that AT&T Florida violated Rule 25-4.113(f), Petitioner fails to explain how and why AT&T Florida violated this rule provision when it allegedly billed and collected certain unnamed “charges, fees and taxes.” Moreover, other than the citation to Rule 25.4.113(f), Petitioner does not allege which specific sections of Florida Administrative Code, AT&T Florida allegedly violated or how AT&T Florida violated same. Similarly, while Petitioner alleges that “AT&T violates ...Florida Statutes” Petitioner does not allege which specific sections² of Florida Statutes, AT&T Florida violated or how AT&T Florida violated same. While Petitioner makes a vague and general reference to “F.S. 202, 203, (350), 364, 365, 366, 367 and 427”, Petitioner fails to cite which 220 sections³ of these chapters of Florida law, AT&T Florida allegedly violated or specifically allege how AT&T Florida violated same⁴. In responding to Petitioner’s Complaint, AT&T Florida should not required to guess which of these 220 statutory sections Petitioner claims AT&T Florida violated when it “demanded payment and received payment of charges that customer are not required to pay” or the “charges, taxes

² In her Complaint, Petitioner does cite to “Chapter 364.10(d) and 427.704(4)”; however, Petitioner does not specifically allege that AT&T Florida violated these sections but only that they “appear ambiguous.”

³ Chapter 202 has 39 statutory sections, Chapter 203 has 8 sections, Chapter 350 has 30 sections, Chapter 364 has 73 sections, Chapter 365 has 8 sections, Chapter 366 has 37 sections and Chapter 427 has 25 sections.

⁴ Moreover, AT&T Florida does not believe that the Commission would have jurisdiction to enforce against AT&T Florida some of the chapters of Florida law cited by Petitioner. As an example, Petitioner references Chapter 366 Public Utilities and Chapter 367 Water and Wastewater Systems in her Complaint; however, these referenced chapters of Florida Statutes are not applicable to AT&T Florida. Since Petitioner’s Complaint lacks sufficient factual allegations, AT&T Florida is unable to further respond at this time.

and fees” AT&T Florida allegedly improperly charged. Accordingly, the Petition fails to state a cause of action by failing to state the elements necessary to show AT&T Florida violated Florida Statutes or Commission Rules and the Complaint should be dismissed. *See In re: Complaint and petition of Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI at 5 (Issued May 24, 1999)(Where on a motion to dismiss, Commission dismissed claim that company violated a commission rule because the claim failed to allege the elements necessary to show the company violated the rule). *See also*, Rule 25-22.036 and Rule 28-106.201.

2. Alleged Violation of AT&T Regulations

Petitioner makes a vague reference to “AT&T violates... various sections of...AT&T Regulations that pertain to billing of charges and collection of charges, fees and taxes.” To the extent Petitioner is attempting to claim that AT&T Florida violated its own “regulations”, her claim fails to state a cause of action in that the Petitioner fails to allege which of its “regulations”⁵ were allegedly violated and how the “regulations” were violated and this claim should be dismissed.

3. Alleged Violation of Federal Law

Petitioner makes a vague reference to “federal law” in her Complaint indicating that “[f]ederal law does not demand payment of taxes or money from those e.g. children, elderly and jobless who lack adequate access to it.” To the extent Petitioner is attempting to claim that AT&T Florida violated federal law, her claim fails to state a cause of action in that the Petitioner fails to allege which federal statutory provision AT&T Florida allegedly violated and how AT&T Florida violated same and this claim should be dismissed.

⁵ AT&T Florida does not concede that Petitioner could state a cause of action for an alleged violation of its own regulations but since Petitioner’s Complaint lacks sufficient factual allegations, AT&T Florida is unable to further respond at this time.

Moreover, the Commission must determine whether the Legislature has granted it any authority⁶ to find that AT&T Florida is in violation of federal law. 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 . . .”). 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.

⁶ 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. 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). 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.”).

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 find that AT&T Florida violated “federal law”. 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 law.⁷

Here, to the extent that the Petitioner is requesting that the Commission find that AT&T Florida violated federal law, pursuant to Commission precedent and Florida law, the Commission lacks jurisdiction to make such a finding. Accordingly, AT&T Florida requests that the Commission dismiss Petitioner’s Complaint to the extent it seeks a finding that AT&T Florida has violated “federal law”.

4. Alleged Improper Billing and Collection of Charges, Fees and Taxes

Petitioner alleges in her Complaint that AT&T Florida violated “Chapter 25-4.113(f) and various sections of Florida Administrative Code, Florida Statutes and AT&T Regulations that pertain to billing of charges and collection of charges, fees and taxes” and

⁷ 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 (5th Cir. 1980)). Since Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five.”)

that it “violated law” when its representative “demanded and received payment of charges that customers are not required to pay. However, Petitioner fails to allege with specificity which “charges, fees and taxes” AT&T Florida has improperly charged or collected from Petitioner and how it improperly billed or collected these unnamed “charges, fees and taxes”, and, thus, fails to state a cause of action for which relief can be granted.

5. Alleged “Fraud”

Petitioner makes a vague reference to “fraud – [AT&T representative], AT&T violated law” in her Complaint but fails to allege any facts and circumstances surrounding the alleged fraud with specificity as required by Florida law. *See Robertson v. PHF Life Ins. Co.*, 702 So.2d 555, 556 (Fla. 1st DCA 1997)(“*Florida Rule of Civil Procedure 1.120(b)* requires that allegations of fraud be pled with specificity. Appellants' complaint fails to specifically identify misrepresentations or omissions of fact, the time, place or manner in which they were made, and how the representations were false or misleading. *See Myers v. Myers*, 652 So. 2d 1214, 1215 (Fla. 5th DCA 1995).” *See also, Daugharty v. Daugharty*, 456 So. 2d 1271, 1274 (Fla. 1st DCA 1984)(“It is axiomatic that the facts and circumstances constituting an alleged fraud must be pled with specificity and particularity”); *Thompson v. Bank of N.Y.*, 862 So. 2d 768 (Fla. 4th DCA 2003) (concluding that debtor's allegations of fraud were not pled with sufficient particularity, and thus, debtor was not entitled to amend his answer in foreclosure action, to assert the affirmative defense of fraud; the allegations were conclusory in their content and lacking in any real allegations of ultimate fact showing fraud on the part of creditor); and *Hembd v. Dauria*, 859 So. 2d 1238, 1239-40 (Fla. 4th DCA 2003) (fraud must not be “flung into [a] case willy-nilly” by stating “legal conclusions”).

Moreover, a cause of action for fraud is not within the Commission's jurisdiction as 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.") and *In re: Complaint and petition of Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI at 4 (Issued May 24, 1999) ("counts one through eight and ten involve 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."). Therefore, pursuant to Commission precedent and Florida law, the Commission lacks the authority to find that Petitioner is entitled to any relief for a cause of action based upon "fraud". Accordingly, AT&T Florida requests that the Commission dismiss Petitioner's Complaint to the extent she is attempting to state a cause of action for "fraud."

6. Request for Declaratory Statement

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.

In addition, 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).

Petitioner’s Complaint states that the “[p]etition seeks action according to AT&T regulations and that benefits customers according to law, e.g. Commission declares customer free from paying tax obligations of the company.” and that the “[l]anguage of Florida Administrative Code Chapter 25-4.113(f) and Florida Statutes Chapter 364.10(d) and 427.704(4) appear ambiguous. Some persons read the code and statutes in a manner that is harmful to the ordinary customer.” (emphasis added). To the extent, Petitioner is attempting to request a Declaratory Statement from the Commission, Petitioner, again, fails to state a cause of action for which relief can be granted.

Section 120.565(2), Florida Statutes, requires that “[t]he petition seeking a declaratory statement shall state with particularity the petitioner’s set of circumstance and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.” Similarly, Rule 28-105.002 requires that a Petition seeking a declaratory statement to contain “[t]he statutory provision(s), agency rule(s), or orders may substantially affect the petitioner in the petitioner’s particular set of circumstances” and “[a] description of

how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's set of circumstances." Rule 28-105.002 (4)-(5).

Petitioner's request as stated above woefully fails to meet this standard in that it fails to describe with particularity the circumstances that are the basis for her request for relief. Petitioner has provided deficient and speculative allegations of AT&T Florida billing and collecting unnamed "charges, fees and taxes" and that customers should be free from "paying tax obligations of the company." Florida courts and the Commission have rejected these types of general and speculative allegations to support a petition for declaratory statement by an administrative agency. *See, e.g., 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 at 13 (Issued June 4, 2008)(Where Commission denied Petition for Declaratory Statement because, among other things, it failed to comply with the legal requirements for a declaratory statement) and *National Ass'n of Optometrists and Opticians v. Florida Dep't. of Health*, 922 So.2d 1060 (Fla. 1st DCA 2006)(Declaratory statement issued by state agency overturned because the facts presented support the petition were not actual and current but merely speculative).

Moreover, 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." Petitioner's request, as set forth above, does not conform to Rule 28-105.001, Florida Administrative Code, to the extent it is asking the Commission to declare that AT&T Florida is not entitled to take certain actions,

i.e. billing and collection of certain charges, fees and taxes. The Commission has rejected similar requests in the past.⁸

For all of these reasons, Petitioner's request, to the extent she is seeking a Declaratory Statement from the Commission, is insufficient and improper and should be dismissed.

III. CONCLUSION

In conclusion, Petitioner's Complaint fails to state a cause of action for which relief can be granted and should be dismissed as a matter of law.

WHEREFORE, based upon the foregoing, AT&T Florida requests that the Commission enter an order dismissing Petitioner's Complaint.

⁸ See *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)(Where Commission held that "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.") and *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 at 15 (Issued June 4, 2008)("In the Petition at issue here, [petitioner] asks us to determine the conduct of [other persons] in addition to its own interests, which is prohibited by Rule 28-105.001, F.A.C."). See also, *Tampa Electric Co. v. Florida Dept. of Community Affairs*, 654 So.2d 998 (Fla. 1st DCA 1995)(Declaratory statement not confined to particular set of circumstances but applying to an entire class of persons rejected by appellate court as being "impermissibly broad.").

Respectfully submitted this 3rd day of May, 2010.



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