

Diamond Williams

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Friday, August 05, 2011 3:21 PM
To: Filings@psc.state.fl.us
Subject: 110087-TP AT&T Florida's Motion to Dismiss, or in the Alternative, Motion for More Definite Statement

Importance: High

Attachments: Document.pdf

A. Vickie Woods

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

150 South Monroe Street

Suite 400

Tallahassee, Florida 32301

(305) 347-5560

vf1979@att.com

B. Docket No.: 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.

C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida
on behalf of Manuel A. Gurdian

D. 9 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Motion to Dismiss, or in the Alternative, Motion for More Definite Statement

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DOCUMENT NUMBER-DATE

05542 AUG-5 =

8/5/2011

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 5, 2011

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

Re: Docket No. 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Motion to Dismiss, or in the Alternative, Motion for More Definite Statement, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. 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
Suzanne L. Montgomery

909733

DOCUMENT NUMBER-DATE

05542 AUG-5 =

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CERTIFICATE OF SERVICE
Docket No. 110087-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 5th day of August, 2011 to the following:

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

Express Phone Service
Mr. Tom Armstrong
1803 West Fairfield Drive, Unit 1
Pensacola, FL 32501-1040
Tel. No.: (850) 291-6415
Fax No.: (850) 308-1151
tom@dei.qccoxmail.com

Keefe Law Firm
Vicki Gordon Kaufman
118 North Gadsden Street
Tallahassee, FL 32301
Tel. No.: 850-681-3828
Fax No.: 850-681-8788
vkaufman@kaqmlaw.com



Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of the Adoption of existing) Docket No. 110087-TP
interconnection, unbundling, resale, and)
collocation agreement between BellSouth)
Telecommunications, Inc. d/b/a AT& T)
Florida d/b/a AT&T Southeast and Image)
Access, Inc. d/b/a New Phone, Inc. by Express))
Phone Service, Inc.)
_____) Filed: August 5, 2011

**BELLSOUTH TELECOMMUNICATIONS, LLC'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR MORE
DEFINITE STATEMENT**

Pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), BellSouth Telecommunications, LLC¹ d/b/a AT&T Florida ("AT&T Florida") hereby files this Motion to Dismiss or, in the Alternative, Motion for More Definite Statement to Express Phone Service, Inc.'s ("Express Phone") Protest of Portions of Order No. PSC-11-0291-PAA-TP and Petition for Formal Hearing ("Protest") and states:

I. BACKGROUND AND SUMMARY OF ARGUMENT

1. This docket, Docket No. 110087-TP, was opened in response to Express Phone's March 29, 2011 unilateral filing of a Notice of Adoption with the Commission that it was purportedly adopting, in its entirety, the interconnection agreement between AT&T Florida and Image Access, Inc. d/b/a NewPhone ("Image Access ICA"). That filing was made without the knowledge and consent of AT&T Florida, and AT&T Florida objected to Express Phone's attempt to adopt an ICA different from its current and effective ICA on file with the Commission.

¹ Effective July 1, 2011, BellSouth Telecommunications, Inc. was converted to BellSouth Telecommunications, LLC by operation of Georgia law.

2. On July 6, 2011, the Commission issued Order No. PSC-11-0291-PAA-TP in Docket Nos. 110087-TP and 110071-TP, holding, among other things, that Express Phone cannot adopt the Image Access ICA because it is in material breach of its current ICA with AT&T Florida.

3. On July 27, 2011, Express Phone filed a Protest in Docket No. 110087-TP, purportedly pursuant to sections 120.569 and 120.57, Florida Statutes and Rules 25-22.029 and 28-106.201, F.A.C.

4. However, Express Phone's Protest fails to comply with Rule 28-106.201, F.A.C. and Section 120.569, Florida Statutes because it does not provide a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification, and improperly purports to reserve the right to assert ultimate facts later in the proceeding. Express Phone's Protest therefore should be dismissed, or, in the alternative, Express Phone should be required to provide a more definite statement.

II. RELEVANT FLORIDA STATUTES AND RULES

5. Pursuant to section 120.569, Florida Statutes, any person whose substantial interests are to be determined by an agency action may institute proceedings by filing a petition or request for hearing with the agency responsible for making the determination.

6. Section 120.569(2)(c), Florida Statutes, provides in pertinent part:

Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. (emphasis added)

7. Rule 28-106.201, F.A.C., sets forth the items required of petitions that initiate proceedings determining substantial interests, and provides in pertinent part:

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

8. In addition, Section 120.80(13)(b), Florida Statutes, provides that "[i]ssues in the proposed action which are not in dispute are deemed stipulated." *See also*, Rule 25-22.029(3), F.A.C., which provides that "[i]ssues in the proposed action that are not identified in the petition or a cross-petition shall be deemed stipulated."

III. EXPRESS PHONE'S PROTEST FAILS TO SUBSTANTIALLY COMPLY WITH RULE 28-106.201, F.A.C., AND SECTION 120.569, FLORIDA STATUTES

9. Pursuant to the Florida statutes and rules cited above, the protesting party, Express Phone, has the burden to state in its Protest all disputed issues of material fact, as well as

provide a concise statement of the ultimate facts alleged, including the specific facts Express Phone contends warrant reversal or modification of Order No. PSC-11-0291-PAA-TP. As stated by the court in *Brookwood Extended Care Center of Homestead*, 870 So. 2d 834, 840 (Fla. 3d DCA 2003):

The amended statute and rules are crystal clear. In a proceeding governed by Rule 28-106.201, the burden is now on the person or entity petitioning for an administrative hearing to state the ultimate facts, to identify the facts that are in dispute, and to allege the facts that warrant, in the petitioner's opinion, reversal.

10. When, as here, the petitioner fails to meet the "crystal clear" requirements of Rule 28-106.201, F.A.C., and Section 120.569, Florida Statutes, its petition should be dismissed. *See In re: Petition of approval of new standard offer for purchase of firm capacity and energy from renewable energy facilities or small qualifying facilities and approval of tariff schedule REF-1, by Gulf Power Company, In re: Petition for approval of renewable energy tariff standard offer contract, by Florida Power & Light Company, In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc., In repetition for approval of standard offer contract for small qualifying facilities and producers of renewable energy, by Tampa Electric Company, Docket Nos. 070232-EQ, 070234-EQ, 070235-EQ, 070236-EQ, Order No. PSC-07-0724-PCO-EQ (Issued September 5, 2007) (where Commission granted non-protesting parties' motion to dismiss where petition failed to meet the pleading requirements contained in Rule 28-106.201, F.A.C.); see also, Blackwood v. Agency for Health Care Admin., 869 So.2d 656 (Fla. 4th DCA 2004)(upholding denial of petition for failure to comply with pleading requirements in rule 28-106.201(2)(e)).*

11. The "statement of ultimate facts" set forth in Express Phone's Protest does not meet the specific pleading requirements of Rule 28-106.201, F.A.C, because it does not include a

statement of “the specific facts the petitioner contends warrant reversal or modification of the agency’s proposed action.”

12. The “Statement of Ultimate Facts” in Express Phone’s Protest (paragraph 13) is wholly inadequate and is nothing more than a cursory repeat of its legal position. Express Phone did not allege a single fact in that section of its Protest, and failed to list any facts that, if true, warrant reversal or modification of the Commission’s decision that it cannot unilaterally adopt the Image Access ICA while in material breach of its existing, unexpired ICA with AT&T Florida.

13. For example, Express Phone failed to list any facts that it is not in material breach of its current ICA, that any such breach should be excused such that it can adopt a new ICA, or that support its position that it can unilaterally terminate an existing, unexpired contract in favor of a contract with more favorable terms. These ultimate facts, and all others, therefore should be deemed stipulated by Express Phone by operation of Rule 25-22.029(3), F.A.C (“[I]ssues in the proposed action that are not identified in the petition or a cross-petition shall be deemed stipulated.”).

14. Notwithstanding this “crystal clear” provision of the Rules, Express Phone purports to somehow reserve its rights to allege additional ultimate facts later in the proceeding. The first clause of the opening sentence of the “Statement of Ultimate Facts” section of its Protest, that it is not “[w]ithout waiving or relinquishing the right to allege additional ultimate facts should they become know through discovery or otherwise,” is simply improper and without legal effect under Rule 25-22.029(3), F.A.C. Similarly, Section 120.80(13)(b), Florida Statutes, which is the underlying authority for Rule 25-22.029(3), F.A.C., provides that, “[n]otwithstanding ss.120.569 and 120.57, a hearing on an objection to proposed action of the

Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated."

15. Express Phone's opening statement in Paragraph 13 of its Protest illustrates its mistaken belief that it may continue to raise additional ultimate facts beyond those contained in its initial Protest as the parties move forward through the formal hearing process. Therefore, unless Express Phone through its initial Protest, or AT&T Florida through a cross-petition, clearly identify an issue contained in the Commission's Order that is in dispute, it shall be deemed stipulated, and, therefore, cannot be at issue in the hearing going forward.

16. Express Phone's Protest fails to comply with Rule 28-106.201 for the additional reason that it does not include "an explanation of how the alleged facts relate to the specific rules or statutes" that it contends require reversal or modification of Order No. PSC-11-0291-PAA-TP. *See* Rule 28-106.201(2)(f), F.A.C. Paragraph 14 purports to be the section of the Protest required by this rule, but that paragraph does nothing more than cite and cursorily summarize the statutes and regulation that Express Phone believes support its legal position. Presumably because it lists no ultimate facts that warrant reversal of the Commission's decision, Express Phone makes no effort to explain how the ultimate facts relate to the statutes and regulation it relies on.


IV. CONCLUSION

17. For the reasons set forth above, Express Phone fails to meet the pleading requirements contained in Rule 28-106.201, F.A.C. Thus, its Protest must be dismissed as provided in Section 120.569. *See In re: Petition of approval of new standard offer for purchase of firm capacity and energy from renewable energy facilities or small qualifying facilities and approval of tariff schedule REF-1, by Gulf Power Company, In re: Petition for approval of*

renewable energy tariff standard offer contract, by Florida Power & Light Company, In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100 kW tariff, by Progress Energy Florida, Inc., In repetition for approval of standard offer contract for small qualifying facilities and producers of renewable energy, by Tampa Electric Company, Docket Nos. 070232-EQ, 070234-EQ, 070235-EQ, 070236-EQ, Order No. PSC-07-0724-PCO-EQ (Issued September 5, 2007) (where Commission granted non-protesting parties' motion to dismiss petition where protest of PAA failed to meet the pleading requirements contained in Rule 28-106.201, F.A.C.)

For the reasons expressed, AT&T Florida respectfully requests that Express Phone's Protest be dismissed. In the alternative, AT&T Florida requests that the Commission direct Express Phone to file a more definite statement to bring its Protest into compliance with the above cited Rules and Statutes.

Respectfully submitted this 5th day of August, 2011.



Tracy W. Harch
Manuel A. Gurdian
AT&T Florida
c/o Gregory R. Follensbee
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
Tel. No. (305) 347-5561
Fax. No. (305) 577-4491
th9467@att.com
mg2708@att.com

ATTORNEYS FOR BELLSOUTH
TELECOMMUNICATIONS, LLC d/b/a
AT&T FLORIDA