

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: October 13, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Scott)
Division of Competitive Markets & Enforcement (Simmons, Dowds, Higgins)

RE: Docket No. 050194-TL – Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

AGENDA: 10/24/06 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050194.RCM.DOC

CASE BACKGROUND

On March 23, 2005, a Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief (Complaint) was filed by Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, as well as on behalf of all other BellSouth customers who have paid the Miami-Dade County Ordinance #83-3 (Manhole Ordinance) fee, (collectively as the Petitioners).¹

¹ Prior to filing the Complaint, the Petitioners served as representatives of a class of BellSouth customers in a class action suit before Judge Henry Harnage in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the same matters brought by the Complaint. See Hightshoe, et al. v. BellSouth Telecommunications,

On April 18, 2005, BellSouth filed its Motion to Dismiss the Complaint. By Order No. PSC-05-0762-PCO-TL, issued July 25, 2005, the Commission granted in part and denied in part BellSouth's Motion to Dismiss. The Commission further ordered staff to investigate the matter and present the results of its investigation to the Commission at a future Agenda Conference. On July 18, 2006, staff's recommendation and findings were addressed by the Commission at the Agenda Conference. The Commission voted to approve staff's recommendation with slight modifications.

On August 8, 2006, the Commission issued Proposed Agency Action Order PSC-06-0685-PAA-TL (PAA Order). Pursuant to the PAA Order, BellSouth was required to perform reconciliations for each future six-month period and to apply the overage/underage in collections as an accounting adjustment to determine the appropriate fee. The Commission further determined that a customer credit or refund was impractical, and therefore not required. Furthermore, the Notice of Further Proceedings or Judicial Review contained in the PAA Order required protests to be received by close of business on August 29, 2006.

On August 29, 2006, at 5:04 p.m. the Petitioners' Petition of Protest to Proposed Agency Action (Protest) was received by the Division of the Commission Clerk and Administrative Services (Commission Clerk); therefore, the protest was not officially filed until August 30, 2006. The Petitioners' protest was filed untimely. Commission legal staff discussed this with Petitioners' counsel. Petitioners' counsel acknowledged that the protest was filed untimely and stated that a motion would be filed requesting consideration of the untimely protest. Shortly thereafter, on September 1, 2006, the Petitioners filed their Motion to Consider Petition of Protest Timely Filed (Motion). In support of their Motion, the Petitioners noted counsel's inability to synchronize clocks across the state with that of the Commission's as the reason for the untimely filing.

On September 8, 2006, BellSouth filed its Response in Opposition to Petitioners' Motion (Response to Motion). BellSouth requests that the Petitioners' Motion be denied because the protest was filed untimely. On September 11, 2006, BellSouth filed its Response in Opposition to Protest (Response to Protest).

This recommendation addresses the untimely filing of the Petitioners' protest to the PAA Order and Motion, as well as BellSouth's Responses to the Motion and Protest.

Inc., Case No. 03-26623-CA11. The Court dismissed the Petitioners' Complaint for failure to exhaust administrative remedies and abated the action pending submission of a claim filed with the Commission.

DISCUSSION OF ISSUES

Issue 1: Should the Commission accept the Petitioners' untimely filed Protest of Proposed Agency Action Order PSC-06-0685-PAA-TL?

Recommendation: No. The Commission should deny the Petitioners' Protest on the basis that it is untimely, because the doctrine of equitable tolling does not apply. Moreover, the Protest does not substantially comply with Rule 28-106.201(2)(b), Florida Administrative Code. Therefore, staff recommends that this matter not be set for an administrative hearing and that Proposed Agency Action Order PSC-06-0685-PAA-TL be made final and effective. **(SCOTT)**

Staff Analysis:

I. Parties' Arguments

A. Petitioners' Protest

In support of their Protest, the Petitioners state that there is a lack of competent substantial evidence to support any findings of fact or conclusions made in the PAA Order. The Petitioners note that the Commission has indicated in its own PAA Order that certain data is unavailable and as a result it is difficult to reach a conclusion. The Petitioners disagree with several of the Commission's findings:

- First, that there was an over collection pursuant to the Manhole Ordinance tariff but no finding of a violation of the Tariff.
- Second, that no customer credit or refund is required.
- Third, that the cumulative overage in collections, with interest, as of year-end 2005 is set at \$469,176.
- Fourth, that the overage/underage in collections from future accounting reconciliations for each six-month period be applied as an accounting adjustment.

The Petitioners request a full evidentiary hearing, or in the alternative that this matter be returned to the 11th Judicial Circuit Court in and for Miami-Dade County Florida, where it was dismissed and abated pending action by the Commission. If returned, the Petitioners request that the Commission abate this proceeding pending final resolution by the Court. Furthermore, the Petitioners request that any adjustments made by BellSouth pursuant to the PAA Order that began on August 1, 2006, or while the evidentiary proceeding is pending, be readjusted pursuant to any order arising from a hearing.

B. Petitioners' Motion

In support of their Motion, the Petitioners assert that on August 29, 2006, counsel e-filed their Protest approximately five minutes before 4:00 p.m. Central Standard Time, the time zone in which Petitioners' counsel operates. According to the Petitioners, counsel was immediately

notified by the Commission Clerk that their filing was after business hours, and the Protest would be considered filed on August 30, 2006.

The Petitioners request that the Commission consider their Protest as timely filed. The Petitioners state that they intended to oppose the PAA Order. Furthermore, the Petitioners assert that their Protest was filed on the 21st day of the protest period and within three to four minutes of the deadline. The Petitioners claim that the untimely filing was not the result of purposeful neglect or delay; rather, it was the logistical impossibility of synchronizing clocks across the state with those of the Commission.

C. BellSouth's Response in Opposition to Motion

BellSouth requests that the Commission deny the Petitioners' Motion. BellSouth supports its position by citing relevant rules and statutes. BellSouth notes that the PAA Order clearly indicates the protest deadline was by close of business on August 29, 2006. BellSouth further notes Rule 28-106.111(2), Florida Administrative Code, which provides

[u]nless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing within 21 days of the receipt of written notice of the decision.

Furthermore, Rule 28-106.111(4), Florida Administrative Code, provides that "[a]ny person who receives written notice of any agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters." BellSouth also cites Section 120.569(2)(c) which states "[a] petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed."

BellSouth points out that the Petitioners acknowledge that they filed the Protest after the deadline and therefore there is no dispute that it is untimely. BellSouth contends that the Petitioners' reason for considering its Protest is insufficient and does not constitute excusable neglect.²

BellSouth further contends that the Commission does not have the discretion to consider an untimely filed protest. In Cann v. Department of Children and Family Services (DCF), 813 So.2d 237 (Fla. 2d DCA 2002), DCF denied the petitioners' request because it was undisputed that the request was untimely. On appeal, the Second District Court of Appeal rejected the availability of the doctrine of excusable neglect to cure an untimely protest of an agency decision. (See also Whiting v. Florida Department of Law Enforcement, 849 So.2d 1149 (Fla. 5th DCA 2003) and In re: Complaint GHF Associates against Southern Bell Telephone and Telegraph Company regarding billing for ESSX service, Docket No. 910486-TL, Commission Order No. 24971, issued August 26, 1991).

² Excusable neglect is defined as "[a] failure – which the law will excuse – to take some proper step at the proper time [...] not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident [...]" Black's Law Dictionary, Garner, 7th ed., at p. 1055.

In addition, BellSouth contends that the doctrine of equitable tolling is not applicable in this instance because the Petitioners have failed to allege that they have “been misled or lulled into inaction, [have] in some extraordinary way been prevented from asserting [their] rights, or [have] timely asserted [their] rights mistakenly in the wrong forum.” Machules v. Department of Administration, 523 So.2d 1132, 1134 (Fla. 1988); see also, Cann, 813 So.2d at 239.

D. BellSouth’s Response in Opposition to Protest

According to BellSouth, it filed its Response to the Protest in an abundance of caution and in the event the Commission decides to consider the Petitioners’ untimely Protest. BellSouth incorporates the arguments made in its Response to the Petitioners’ Motion and contends that the Commission should reject the Protest for this reason alone.

In addition to the Protest being untimely, BellSouth argues that the Petitioners failed to provide an explanation of how their substantial interests will be affected by the proposed agency action. Therefore, BellSouth contends that the Petitioners fail to adequately allege standing for an administrative hearing. BellSouth further contends that the Commission does not have the jurisdiction to entertain class actions. Also, BellSouth argues that the Petitioners’ Protest fails to comply with the requirements of Rule 28-106.201(2)(b) and (f), Florida Administrative Code, because the Protest does not include a citation or mention of any rule or statute that requires the reversal or modification of the PAA Order. Furthermore, the Protest does not include the addresses and telephone numbers of the Petitioners. BellSouth concludes that the Protest should be dismissed because it fails to substantially comply with the provisions of Rule 28-106.201(2)(b), Florida Administrative Code.

II. Analysis

A. Petitioners’ Untimely Protest

This matter is governed by Section 120.569(2)(c), Florida Statutes, which addresses decisions affecting substantial interests and provides in pertinent part that

[u]pon receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed.

Additionally, the requirements for a written petition are contained in Rule 28-106.201(2), Florida Administrative Code. Subsection (4) of Rule 28-106.201, Florida Administrative Code, reiterates that a petition shall be dismissed if it is not in substantial compliance with the requirements of subsection (2) or if it has been untimely filed. Generally, Rule 28-106.111(4), Florida Administrative Code, states that any person who receives written notice of an agency’s decision and fails to seek a hearing within 21 days waives his right to a hearing on the matter. The Florida Legislature recently carved out an exception in Section 120.569(2)(c), Florida

Statutes, to make available “equitable tolling³ as a defense to the untimely filing of a petition.”⁴ In the instant case, there is no dispute that the Petitioners filed their Protest after the deadline, which was clearly set forth in the PAA Order. The Petitioners acknowledge as much in their Motion in which they request the Commission to consider the Protest despite its late filing. This alone amounts to a waiver of the right to a hearing.

The ultimate issue in this case is whether equitable tolling applies. The Commission has noted in prior cases that “[a]lthough the plain meaning of the pertinent statutes and rules mandate that untimely petitions for hearing should not be considered, we and the courts in some instances allowed equitable tolling to excuse an untimely petition.”⁵ Additionally, the courts “have consistently held that the late filing of a request for an administrative hearing is not a jurisdictional defect.” Machules at 238. Nonetheless, staff recommends that the Commission only accept an untimely protest if a party successfully argues that equitable tolling applies.

Although not explicit, there are two instances in which it appears the Commission has granted untimely protests based on the doctrine of equitable tolling. In Order No. PSC-95-0630-FOF-TP, the Commission used its discretion to grant a late-filed petition on the basis that it was “fair and appropriate” to do so.⁶ The doctrine of equitable tolling was not addressed in the ruling; however, in making its determination the Commission noted Vocal Motion’s good faith attempt to file its petition via facsimile on the due date. In that case Vocal Motion was unaware that filings could not be made by facsimile. In Order No. PSC-04-0743-PCO-EI, the Commission invoked the doctrine of equitable tolling to grant a late-filed request for hearing when the petitioner attempted to file via facsimile. Upon learning that the Commission did not accept filings by facsimile, the petitioner sent the letter of protest via overnight mail.⁷ In both of these cases the Commission appears to have relied on the petitioners’ good faith efforts to file on time and lack of knowledge as to the Commission’s filing policies.

These two cases are distinguishable from the instant case in that the petitioners did not know that filing by facsimile was an unacceptable means until after the protest deadline had passed. In this case, the Petitioners were aware of the filing requirements prior to the deadline. It is important to note Rule 28-106.104(8), Florida Administrative Code, which provides that

³ Equitable tolling is defined as “the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired.” Black’s Law Dictionary, Garner, 7th ed., at p. 560.

⁴ Section 120.569(2)(c), Florida Statutes, was amended to include this language recognizing equitable tolling as a defense by Chapter 2006-82, Section 6, at 11, Laws of Florida.

⁵ In re: Application for transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to RealNor Hallandale, Inc., Docket No. 990975-SU, Order No. PSC-00-1276-FOF-SU, issued July 13, 2000, at pp. 6-7 (citation omitted); See also In re: Initiation of show cause proceedings against VOCAL MOTION, INC. for violation of Rule 25-24.510, F.A.C., Certificate of Public Convenience and Necessity Required, and Commission Order No. 24101, Docket No. 940719-TC, issued May 23, 1995, at p. 2. (The Commission ruled that “it may grant a petition for a formal proceeding even if it is untimely. Whether to grant or deny an untimely petition is within our discretion.”).

⁶ Docket No. 940719-TC, Order Granting Request for a Formal Proceeding, at p. 2.

⁷ In re: Consumer complaint against Florida Power & Light Company by Leticia Callard, Docket 040208-EI, Order Granting Late-Filed Request for Hearing, issued August 3, 2004, at p. 7.

[a]ny party who elects to file any document by electronic transmission shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result.

Staff submits that the Petitioners assumed the risks associated with e-filing. Moreover, staff believes that their inability to “synchronize their clocks” with the Commission’s is not an extraordinary circumstance worthy of applying the doctrine of equitable tolling.

In Order No. PSC-00-1276-FOF-SU, the Commission dismissed a protest that was 27 days late, and the explanation offered as to why the Commission did not receive the protest before the protest deadline was that it had been lost in the mail. In that case, the doctrine of equitable tolling was not applied because the Commission found that the petition at issue was facially insufficient “to provide an equitable basis to excuse his untimely filing.” Furthermore, the Commission found that the petitioner had not been “misled or lulled into inaction, or in some extraordinary way been prevented from asserting his rights. Nor does excusable ignorance excuse Mr. Miceli from filing his protest in a timely fashion.”⁸ For similar reasons, in Order No. PSC-98-0029-PCO-GU, the Commission denied an untimely protest for failure to show good cause where the petitioner did not provide an explanation as to why the protest was not timely filed.⁹

Staff believes that the circumstances of the instant case are such that equitable tolling should not apply. Staff recognizes that denying the Petitioners’ Protest on the basis that it is untimely may appear harsh; however, the relevant rules and case law support denial.

In Cann, the court stated that “[g]enerally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.” Cann citing Machules at 1134. The court concluded that those three circumstances did not exist because the agency’s notice was proper, the petitioners were aware of the correct forum, and two days for the postal delivery of a letter is not “extraordinary.” Cann at 239.

Staff believes that equitable tolling does not apply in the instant case for the very same reasons. First, the PAA Order’s notice was clear on the deadline for filing protests and that the protests must be received by the Commission Clerk by close of business on the date the protest period ends. Second, the Petitioners were aware of the forum in which they should file.¹⁰ Third, their excuse for the untimely filing, i.e. the inability to synchronize clocks across the state with that of the Commission’s, is not an extraordinary circumstance that would prevent them from exercising their right to protest.

In sum, there were no circumstances in this case that would have misled or lulled the Petitioners into inaction. Nothing prevented the Petitioners from filing prior to the 21st day or

⁸ Docket No. 990975-SU, Order Dismissing Late-Filed Protest, issued July 13, 2000, at p. 9.

⁹ In re: Application for rate increase by City Gas Company of Florida, Docket No. 960502-GU, Order Denying Protest, issued January 5, 1998, at p. 4.

¹⁰ Staff notes that the same Petitioners’ counsel has practiced before the Commission since March 2005.

earlier in the day for that matter. Petitioners waited until the last minutes before the deadline to file. Moreover, the Petitioners' Motion does not allege the defense of equitable tolling to excuse their late-filed Protest. Based upon the pleadings alone, equitable tolling does not apply in this case. Therefore, staff recommends that the Protest be denied.

B. Petition is Facially Insufficient

In addition to the Protest being filed untimely, the protest is facially insufficient. As stated above, Rule 28-106.201(2), Florida Administrative Code, provides the requirements for a written petition. The Petitioners' protest does not meet the requirement to provide the address and telephone number of the petitioner as set forth in subsection (2)(b). However, even if the Commission were to dismiss the Protest based on this defect, the Petitioners would have a chance to cure it without prejudice pursuant to subsection (2)(c) of the rule. Nonetheless, staff recommends that the Commission dismiss the Protest solely on the basis that it is untimely.

BellSouth argues that the Petitioners lack standing and failed to state how their substantial interests would be affected by the Commission's rulings in the PAA Order. Staff believes that this issue is res judicata, because the parties and issues are the same as when the Commission initially rendered a decision on the standing of the Petitioners. The Commission already determined that the Petitioners had standing to bring forth the initial complaint.¹¹ Therefore, the Petitioners have demonstrated that their substantial interests are affected.

BellSouth also argues that the Petitioners did not specifically state any rules and statutes that require reversal in their Protest. Staff believes that the rules and statutes are implied. The Commission has found in the past that where a petitioner did not protest with specificity the rules and statutes at issue, such rules and statutes are those that vested the Commission with the jurisdiction to preliminarily rule on the initial complaint.¹²

Notwithstanding BellSouth's arguments, staff believes that the only facial defect in the Petitioners' Protest is the absence of the individual Petitioners' addresses and phone numbers.

C. Alternative Request

If the Commission denies the protest, then the Petitioners' alternative request for this matter to be returned to the 11th Judicial Circuit Court in Miami-Dade County is implicitly granted. According to the Petitioners, the proceeding before the Court was dismissed and abated pending an outcome by the Commission. Staff believes that the Commission's findings in Order PSC-06-0685-PAA-TL resolved the issues brought by the initial Complaint. There would be no need for this docket to be abated pending any proceeding in the Court. Initially, this matter came before the Commission on the basis that the Petitioners were ordered by the Court to exhaust their administrative remedies. Their administrative remedies have been exhausted; therefore, there would be no need for this docket to be abated. In the event that the Commission accepts the Petitioners' Protest as timely, this matter should be set for an administrative hearing.

¹¹ See Order PSC-05-0762-PCO-TL at p. 5.

¹² See Order PSC-04-0743-PCO-EI at p. 11; see footnote 7 for the full citation. Staff notes that this particular docket involved a consumer. The Commission has generally given leeway to consumers with regard to the requirements for a petition.

CONCLUSION

The Commission should deny the Petitioners' Protest on the basis that it is untimely, because the doctrine of equitable tolling does not apply. Moreover, the Protest does not substantially comply with Rule 28-106.201(2)(b), Florida Administrative Code. Therefore, staff recommends that this matter not be set for an administrative hearing and that Proposed Agency Action Order PSC-06-0685-PAA-TL be made final and effective.

Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, there is no further action for the Commission to take. Therefore, this docket may be closed. Furthermore, Proposed Agency Action Order No. PSC-06-0685-PAA-TL should be made final and effective. If the Commission denies staff's recommendation in Issue 1, then this matter should be set for an administrative hearing. **(SCOTT)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, there is no further action for the Commission to take. Therefore, this docket may be closed. Furthermore, Proposed Agency Action Order No. PSC-06-0685-PAA-TL should be made final and effective. If the Commission denies staff's recommendation in Issue 1, then this matter should be set for an administrative hearing.