

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: March 15, 2007

TO: Commission Clerk (Cole)

FROM: Office of the General Counsel (Tan)
Division of Competitive Markets & Enforcement (Beard)

RE: Docket No. 060640-TP – 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. 070151-TP – Complaint to investigate Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Telecommunications, Inc. on behalf of Michael Russ for improper call blocking as established by Order PSC-07-0207-PCO-TP.

AGENDA: 3/27/07 – Regular Agenda – Proposed Agency Action -- Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060640.RCM.DOC

Case Background

Introduction

On September 22, 2006, Petitioner Bessie Russ (Petitioner), appearing *pro se*, filed a petition and complaint (Petition/Complaint) seeking relief from and remedies for certain alleged

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practices of Evercom Systems, Inc. (d/b/a Correctional Billing Services) and BellSouth Telecommunications, Inc. (BellSouth), jointly and severally.”¹ The petition arises out of her alleged inability to receive telephone calls from a relative incarcerated in an Escambia County confinement facility.

On October 17, 2006, BellSouth filed its responsive pleading entitled “Partial Motion to Dismiss and Answer (the Petition/Complaint).” On October 20, 2006, Petitioner Russ filed a Response to BellSouth’s Motion. Several additional documents have been filed in this docket by Petitioner Russ, BellSouth, Correctional Billing Services (CBS), and others, but they are not material to the motion to dismiss or to the legal sufficiency of the Petition/Complaint.

On December 11, 2006, Complainant Michael Russ filed a “Notice of Intervention; Petition to Intervene, Memorandum of Law, Sworn Statements of Facts, a Petition containing various allegations of violations, and Certificates of Services.” An affidavit was filed on January 12, 2007 by Allison Russ. On March 6, 2007, an Order Denying Intervention, Establishing Docket and Consolidating Dockets, was issued by the Prehearing Officer. Docket No.070151-TP was subsequently established on behalf on Complainant Michael Russ and the dockets were consolidated.²

Basic Facts

As noted above, the petition arises out of Petitioner’s alleged inability to receive telephone calls from a relative incarcerated in an Escambia County confinement facility. Under the system used by the confinement facility, Petitioner contracts directly with CBS to pay for calls she receives from her relative. CBS bills Petitioner through her local exchange carrier, BellSouth.

CBS provides this service as a subcontractor of Embarq Payphone Services, Inc. (Embarq).³ In other words, Embarq holds the direct contract with Escambia County to provide both the telephone equipment used by inmates in the Escambia County confinement facility system and the inmate payphone service, but has chosen to subcontract with CBS to operate the telephone system and to process the inmate collect calls.

Allegations and Claims

Petitioner Russ alleges that BellSouth and CBS have impaired her contractual rights to receive collect calls from her relative incarcerated in an Escambia County confinement facility. The Petition/Complaint includes many assertions, but two factual allegations seem key. First,

¹ Petitioner Russ’s initial pleading is entitled “Petition To Investigate, Claim Damages, Voice Her Complaint And Provide Other Statements Against Evercom Systems, Inc. (D/B/A Correctional Billing Services) And BellSouth Telecommunications, Inc. (BellSouth), Jointly And Severally.”

² Docket No. 070151-TP - Complaint to investigate Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Telecommunications, Inc. on behalf of Michael Russ for improper call blocking as established by Order PSC-07-0207-PCO-TP.

³ Formerly known as “Sprint.”

Petitioner alleges that she “has had service interrupted without just cause or explanation.”⁴ Next, Petitioner alleges that as a result of the actions of the respondents, she could not receive inmate collect calls. Petitioner Russ also makes the following claims:

1. The service interruptions were due to BellSouth’s “meddling, interference, or doing.”
2. When she complained to BellSouth about the service interruptions, BellSouth inappropriately used the complaint process to market other telecommunication products.
3. BellSouth has conspired with others to engage in anticompetitive practices in the provision of telecommunications services.
4. BellSouth has violated the Florida Antitrust Act, The Sherman Act, and the Federal Trade Commission Act.
5. BellSouth’s anticompetitive behavior has forced her to pay for certain telecommunication services prices that are too high.
6. As a result of BellSouth’s conduct, Petitioner Russ “...has incurred lost sleep in a titanic amount and suffered severe emotional distress because of lost telecommunication with such close relative...” and that her “...enjoyment of life has been reduced, and the value of the relationship with the close relative abridged.”
7. The Defendants have violated state and federal consumer protection and fair trade laws.

Relief Requested

As relief, Petitioner requests that the Commission do the following:

1. Investigate BellSouth and the other companies and provide to Petitioner Russ the findings of the investigation.
2. Issue a temporary and permanent injunction against the Companies enjoining them from proscribed behavior.
3. Order that Petitioner Russ be reimbursed \$500 for the cost of preparing the petition.
4. Order that Petitioner Russ’ services be re-established so that her relative can call her.
5. Terminate any waivers given to the companies by the Commission or the Federal Communications Commission.
6. Grant any and other all relief it deems to be just and reasonable.

⁴ Paragraph 7, page 4. It is not clear whether Petitioner is referring either to her basic local telecommunications service or to her contractual right to receive collect calls from her relative, or both.

Discussion of Issues

Issue 1: Should BellSouth's Partial Motion to Dismiss be granted?

Recommendation: Yes. The Petition/Complaint should be dismissed in part because the Commission does not have judicial power required to (a) adjudicate claims for relief under the Florida Antitrust Act, The Sherman Act, or the Federal Trade Commission Act; (b) issue injunctions or award attorney fees; or (c) handle matters of personal injury claims founded in tort. In addition, the Commission does not have the authority to abrogate a waiver granted by the Federal Communication Commission. (Tan, Wiggins)

Staff Analysis:

Standard of Review

Under Florida law the purpose of a motion to dismiss in state court is to challenge the legal sufficiency of the facts alleged to state a cause of action. 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: 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.

Claims That Must Be Dismissed With Prejudice

For several claims, the Petition/Complaint seeks relief not within the jurisdiction of the Commission to grant. It does this in two overlapping ways: (1) by asking the Commission to exercise judicial power it is prohibited from exercising; and (2) by asking the Commission to exercise legislative power it does not have.

Prohibited Judicial Power. The Petition/Complaint requests the Commission to grant relief that can only be effected through the exercise of judicial power. Specifically, the Petition/Complaint requests adjudication of claims under the Federal Trade Commission Act, the Sherman Act and the Florida Antitrust Act. It also requests an award in the nature of costs and attorney fees (\$500 for the cost of preparing the petition), relief grounded in tort (claim related to personal distress), injunctive relief, and monetary damages. Under Article V, Section 1, of the Florida Constitution, judicial power is "vested in a supreme court, district courts of appeal, circuit courts and county courts." As a Legislative agency, this Commission may not entertain requests that it act like a court. For this reason alone, the claims identified above must be dismissed with prejudice.

Non-Delegated Legislative Power. To test the legal sufficiency of a pleading, staff will assume that the Petition/Complaint is requesting the Commission to exercise the authority it does have, i.e., to exercise validly delegated legislative authority to address Petitioner's concerns. In this context, staff has reviewed the statutes establishing the Commission's jurisdiction and has found no delegated legislative authority with respect to claims proceeding under the Federal Trade Commission Act, Sherman Act, or the Florida Antitrust Act. Staff thus recommends that the claim for relief made under these laws be dismissed for failure to state a legally sufficient cause of action.

Petitioner Russ asks the Commission "to void" all waivers given by the Federal Communications Commission, but without specifying which waivers. The Commission does not have the authority to abrogate a waiver granted by the Federal Communication Commission. This claim for relief must also be dismissed with prejudice.

One Claim That Should Be Dismissed Without Prejudice

Petitioner Russ also requests the Commission to void all waivers it has given but without specifying which waivers. The Commission is not aware of any waivers filed by Petitioner Russ or waivers associated with this docket. The Petition/Complaint does not plead the claim for relief with sufficient specificity to put BellSouth and the other companies on reasonable notice as to what they must defend. For this reason, this portion of the Petition/Complaint should be dismissed without prejudice.

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Issue 2: Was Petitioner Bessie Russ' ability to receive incoming collect calls from the confinement facility in Escambia County improperly blocked?

Recommendation: No. Petitioner Bessie Russ' ability to receive incoming collect calls from the confinement facility in Escambia County was not improperly blocked. (Beard)

Staff Analysis: The payphone equipment in the Escambia County confinement facility is provided by Embarq. Embarq holds the contract to provide inmate calling services for the Escambia County confinement facility system. Embarq contracts with CBS to handle the billing for those payphones, and provides specialized inmate calling, such as number blocking, length of call restrictions, and other services. Escambia County allows for inmate telephone calls, but the correctional facility limits the length of those calls to 15 minutes.

If an inmate is eligible for telephone privileges, a third party must establish an account with CBS. The third party must be someone who is not incarcerated, but is in contact with the incarcerated. The third party may allow the inmate to select up to five (5) approved phone numbers to call from the confinement facility. Before the inmate can call any of these five (5) pre-selected parties, the third party is contacted and must grant permission for the call to connect. When a third-party establishes an account with CBS, a Payment Verification Point (PVP) is set. The PVP is a pre-set limit of dollars which is established by the third party.

According to BellSouth, when it received the dispute from Petitioner Russ, it removed the disputed charge from her account. BellSouth advised staff that because it was acting only as a billing agent for CBS and has no other financial interest in the disputed amount, it returned the disputed amount to the third party. CBS has a billing contract with BellSouth, the local service provider for Petitioner Russ. On behalf of Embarq, CBS sends the billing detail to BellSouth which is included on Petitioner Russ' monthly bill. On October 18, 2006, staff received correspondence from CBS stating that Embarq currently holds the contract with Escambia county confinement facility and would prefer to resolve any disputes from that facility.

The claim by Petitioner Russ was investigated by Embarq and BellSouth. It was found that the July 9, 2006, charges were legitimate, and there was an attempt to collect those charges. Because those charges were not paid, Embarq placed a block on the account, disabling the ability to receive inmate collect calls, which is consistent with the tariff. The block affected only inmate collect calls, not other collect calls.

In order to receive collect calls again from any facility for which CBS handles inmate telephone calls, the third party is instructed to pay the amount due directly to their LEC, which bills them. It is also the responsibility of the customer to contact CBS and inform them that the payment has been made. After verifying that the payment has been made, CBS removes the block.

CBS advised staff that because Petitioner Russ has formally disputed the \$6.25 charge made on July 9, 2006, the company unblocked the service as a courtesy on October 12, 2006, until the dispute is resolved. In addition, CBS told staff that there has been no activity on Petitioner Russ' account with the company since service was restored.

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Staff's analysis determined that on three occasions, including the period in question, CBS blocked the ability of Petitioner Russ to receive incoming collect calls from the Escambia County correctional facility. The following table provides an analysis of the three times CBS blocked Petitioner Russ' inmate collect call service:

Blocked	Reason	Restored	Notes
7/24/06	Exceeded P.V.P.	7/26/06	Petitioner Russ called CBS to report payment made.
8/20/06	Exceeded P.V.P.	8/29/06	Petitioner Russ called CBS to report payment made.
9/13/06	Legitimate call made July 9, 2006, lasting 15 minutes and billed at \$6.25 not including tax, recoured by BellSouth – customer claims call was dropped. Note: length of calls is limited to 15 minutes by the correctional facility. Blocked for non-payment. ⁵	10/12/06	CBS states service was restored at 4:05 p.m. as a courtesy until complaint resolved. CBS states the customer's account remains restored, but last activity occurred October 4, 2006 at 8:39 p.m.

CBS also stated that a call was attempted to be made to the customer on September 25, 2006, but because service to the customer was blocked, the call was not completed.

On January 12, 2007, Allison Russ, filed an affidavit stating she is the individual Petitioner Russ speaks of as the incarcerated individual mentioned in Petitioner Russ' Petition. Allison Russ states in her affidavit that she was unable to make calls to two telephone numbers on October 12 & 25, 2006. Allison Russ stated she was unable to contact either Petitioner Bessie Russ' or Complainant Michael Russ' phone numbers. Both numbers were listed with CBS as separate accounts. No specification was made regarding what date each number was called. Allison Russ states that she was advised that there was a block on those telephone numbers and that [the system] "did not and would not" allow receipt of collect calls from the Escambia County Jail.

Staff notes that the first date mentioned by Allison Russ, October 12, 2006, was the date CBS restored service pending outcome of this proceeding. Staff further notes that CBS states it restored service on that date at 4:05 p.m. In this instance, staff believes timing of a call would explain if a call on that date could have been completed or not – if it were made before 4:05 p.m. Central Time, the call would not have gone through; after 4:05 p.m., the call would have been completed.

Allison Russ also states that she was unable to "make contact" on the day she was released from the correctional facility, October 25, 2006. CBS maintains that Petitioner Bessie Russ' service was available on this date. CBS also informed staff that its records indicate the last attempt to contact Petitioner' Russ account was on October 4, 2006.

⁵ The parties provided code explanations on customer call records showing whether or not a call was connected. A legitimate call is a call placed at the correctional facility which is received and accepted by the CBS account holder.

Staff believes Petitioner Russ' claim that BellSouth blocked her ability to receive inmate collect calls stems from a possible misunderstanding of how the inmate payphone service provided by CBS, and the third-party billing services provided by BellSouth, work.

Staff has reviewed the petition by Petitioner Russ and has conducted telephone discussions with her, BellSouth, Embarq and CBS staff. Staff has also reviewed Petitioner Russ' billing detail by BellSouth, comparing that detail to the customer call history provided by CBS. After conducting an investigation into Petitioner Russ' claims and analyzing the information received, staff found no evidence that BellSouth blocked the ability of Petitioner Russ to receive incoming collect calls from the correctional facility in question. Therefore, staff recommends that the Commission find Petitioner Bessie Russ' ability to receive incoming collect calls from the confinement facility in Escambia County, Florida, was not improperly blocked.

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Issue 3: Did BellSouth improperly attempt to market its products and services to Petitioner Bessie Russ?

Recommendation: No. BellSouth did not improperly attempt to market its products and services to Petitioner Bessie Russ. BellSouth should acknowledge that the petition as filed indicates that Petitioner Bessie Russ no longer wishes to receive marketing calls to her telephone. (Beard)

Staff Analysis: In her petition, Petitioner Russ states that BellSouth marketed its products and services during phone calls to customer service. Petitioner Russ asserts that most of the offered plans would prohibit use by individuals incarcerated in a correctional facility and therefore would be unavailable for her benefit.

When asked by staff, BellSouth replied that it has no direct knowledge of marketing any specific products or services to Petitioner Russ. Staff reviewed Petitioner Russ' billing records and found no instances of products or services not requested by the customer being charged to her account. Staff could not find any evidence that any marketing activities by BellSouth were conducted "...in an effort to force [Petitioner Russ] to utilize their service" as Petitioner Russ states in her petition.

Staff notes that, under 16 CFR Ch. I, Section 310.4 (B)(ii), as a customer of BellSouth, the company is, in fact, allowed to make marketing calls to Petitioner Russ unless she tells BellSouth she does not wish to receive such calls. Staff cannot determine with certainty if Petitioner Russ made such a request.

Additionally, staff notes that any product or service offered by BellSouth would exist separate to the Embarq Payphones, Inc. services administered by CBS. BellSouth is the billing agent to Petitioner Russ and does not control the costs passed on to Petitioner Russ. These costs are determined by Petitioner Russ' agreement with the third party biller, CBS. A third party biller is a company that holds an agreement with a local exchange company to place charges to account holders on behalf of the customer and the company.

Staff cannot determine if BellSouth did or did not make any marketing calls to Petitioner Russ; however, staff could not find any evidence that any unauthorized products or services were billed to Petitioner Russ' account. Because Petitioner Russ has not provided any evidence beyond her statements that BellSouth has in the past, or is currently, improperly marketing its products to her, staff recommends that BellSouth did not improperly attempt to market its products and services to Petitioner Russ. Staff further recommends that BellSouth should acknowledge that the petition as filed indicates that Petitioner Bessie Russ no longer wishes to receive marketing calls to her telephone.

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Issue 4: Have the respondents improperly charged Petitioner Bessie Russ higher prices for telephone services?

Recommendation: No. The respondents have not improperly charged higher prices to Petitioner Bessie Russ for telephone services. (Beard)

Staff Analysis: In her petition, Petitioner Russ states that she "...has been forced to purchase respondents' products at a price substantially higher than [she] would have paid in the absence of respondents' unlawful conduct..." Staff reviewed Petitioner Russ' billing records for both BellSouth and CBS for the period June 11, 2006 through October 2, 2006 and compared the charges indicated to those authorized in both companies' tariffs. Staff was unable to find any instance in Petitioner Russ' monthly billing records where the amount charged for any products or services were different from what is authorized in either BellSouth's or CBS's tariff.

Given the above, staff recommends that the respondents have not improperly charged higher prices to Petitioner Bessie Russ for telephone services.

Issue 5: Was Complainant Michael Russ' ability to receive incoming calls from the confinement facility in Escambia County improperly blocked?

Recommendation: No, the ability to receive incoming calls from the confinement facility in Escambia County was not improperly blocked. (Beard)

Staff Analysis: On December 11, 2006, Complainant Michael Russ filed with the Commission a Notice of Filing, Petition to Intervene, Memorandum of Law, Sworn Statement of Facts, a Petition containing various allegations of violations, and Certificates of Service. On March 6, 2007, Order No. PSC-07-0207-PCO-TP Denying Intervention, Establishing Docket and Consolidating Dockets. Docket No. 070151-TP was established on behalf of Complainant Michael Russ.

Complainant Michael Russ alleges that he has experienced interference and difficulty working with BellSouth when establishing an account with CBS. The account with CBS was for the ability to receive phone calls from the Escambia County confinement facility. While Complainant Russ resides in the same household as Petitioner Bessie Russ; he holds an individual account with BellSouth. Complainant Russ also alleges that he suffered the same quality of damages as Petitioner Bessie Russ, as detailed in the case background. He states that CBS informed him that BellSouth had placed a block on his phone that prevents him from doing business with CBS.

While Complainant Russ' incoming calls from the Escambia County confinement facility were blocked, they were not improperly blocked. The account had a customer requested third party and toll call block, which does not allow the account the ability to receive incoming calls from third parties and toll calls. Due to the length of Complainant Michael Russ' account with BellSouth; and BellSouth records retention requirement of only three (3) years, staff was unable to review actual initial intake documents showing the customer requested third party toll call block. However, BellSouth's current account information for Complainant Michael Russ lists a start date for the block. Per information received from BellSouth, Complainant Michael Russ' account had been blocked from the time that the service began in late 1997.

Complainant Michael Russ alleges that once informed by CBS that a preexisting block prohibited the ability to receive third party and toll calls, he informed BellSouth that a block was no longer required. BellSouth states that its records reflect that the block was removed on September 16, 2006. On that date, all third party and toll calls were available for connection.

The following table provides an analysis of the four (4) times, BellSouth blocked Complainant Russ' inmate collect call service, as well as the two (2) times after BellSouth removed the block at the customer's request, and those calls were not completed.

Blocked	Reason	Company Blocking Call	Notes
08/22/06	Customer Established LEC Block in place	BellSouth	
09/02/06	Customer Established LEC Block in place	BellSouth	
09/16/06	Customer Established LEC Block in place	BellSouth	Customer contacted BellSouth customer service to remove the block.
09/19/06	Customer Established LEC Block in place	BellSouth	Call blocked due to technical lag time.
No Block on Line	Reason		
09/27/06	Call was either not accepted or no one was home.	N/A	
10/04/06	Call was either not accepted or no one was home.	N/A	

While Allison Russ alleges that she was unable to reach Complainant Michael Russ on October 25, 2006, the call records provided by CBS and BellSouth do not reflect an inmate collect call attempt, from Escambia County confinement facility after October 4, 2006.

Therefore, while Complainant Michael Russ' account had been blocked for the time period of 1997 until September 16, 2006, the block was requested and not improperly placed. Based on Complainant Michael Russ' account information from BellSouth, staff recommends that the Commission find Complainant Michael Russ' ability to receive incoming calls from the confinement facility in Escambia County was not improperly blocked.

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Issue 6: Should this docket be closed?

Recommendation: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, these dockets should be closed upon the issuance of a consummating order. A protest in one docket should not prevent the action in a separate docket from being final. (Tan)

Staff Analysis: At the conclusion of the protest period, if no protest is filed this docket should be closed upon the issuance of a consummating order.