

Ruth Nettles

From: Woods, Vickie [vf1979@att.com]
Sent: Tuesday, April 07, 2009 4:06 PM
To: Filings@psc.state.fl.us
Subject: 090135-TP AT&T Florida's Partial Motion to Dismiss and Answer to Cbeyond's Complaint
Attachments: Document.pdf; LEGAL-#732956-v1-090135-TP_Partial_Motion_to_Dismiss_and_Answer_to_Cbeyond's_Complaint.DOC

A. Vickie Woods
Legal Secretary to E. Earl Edenfield, Jr., Tracy W. Hatch,
and Manuel A. Gurdian,
BellSouth Telecommunications, Inc. d/b/a AT&T Florida
150 South Monroe Street, Rm. 400
Tallahassee, FL 32301-1558
(305) 347-5560
vf1979@att.com

B. **Docket No. 090135-TP**
Complaint of Cbeyond Communications, LLC Against AT&T Florida
for alleged anticompetitive behavior and violation of Interconnection Agreement

C. BellSouth Telecommunications, Inc.
on behalf of Manuel A. Gurdian

D. 15 pages total in PDF format (includes letter, certificate, and pleading)
13 pages total in .word format (includes pleading)

E. AT&T Florida's Partial Motion to Dismiss and Answer to Cbeyond's Complaint

.pdf .word

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Manuel A. Gurdian
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

April 7, 2009

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

Re: **Docket No. 090135-TP:**
**Complaint of Cbeyond Communications, LLC Against AT&T
Florida For Anticompetitive Behavior And Violation of
Interconnection Agreement**

Dear Ms. Cole:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Partial Motion to Dismiss and Answer to Cbeyond Communications, LLC's 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.

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CERTIFICATE OF SERVICE
Docket No. 090135-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 7th day of April, 2009 to the following:

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

Cbeyond Communications, LLC
Charles E. (Gene) Watkins
320 Interstate North Parkway, Suite 30
Atlanta, GA 30339
Tel. No. (678) 370-2174
Fax No. (678) 424-2500
gene.watkins@cbeyond.net

Keefe Law Firm
Vicki Gordon Kaufman
The Perkins House
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: Complaint of Cbeyond) Docket No. 090135-TP
Communications, LLC Against AT&T Florida)
for alleged anticompetitive behavior and violation)
of Interconnection Agreement) Filed: April 7, 2009

**AT&T FLORIDA'S PARTIAL MOTION TO DISMISS AND ANSWER TO
CBEYOND'S COMPLAINT**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida"), hereby files its Partial Motion to Dismiss to Cbeyond Communications, LLC's ("Cbeyond") Complaint for Anticompetitive Behavior, Violation of Interconnection Agreement and Request for Investigation ("Complaint"). In addition, AT&T Florida provides its Answer and Affirmative Defenses to the remaining allegations in Cbeyond's Complaint.

I. INTRODUCTION

AT&T Florida has not engaged in anticompetitive behavior nor violated its interconnection agreement with Cbeyond. AT&T's Florida's process of issuing bills to customers (including final bills to customers who have ported their number) has been in place since 1996 and its billing system is no different than it was prior to the AT&T-BellSouth merger.

AT&T Florida's porting process is effective and complies with applicable law and industry guidelines. When a Competitive Local Exchange Carrier ("CLEC"), such as Cbeyond, acquires an end user served by AT&T's network, the CLEC will send a Local Service Request ("LSR") to AT&T Florida. Upon receipt of a valid LSR, AT&T Florida adds a "trigger" to the telephone number. This "trigger" allows the CLEC to port the telephone number on the due date and ensures that calls will route normally before,

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during and after the port. AT&T Florida also sends a Firm Order Confirmation (“FOC”) to the CLEC that the LSR has been processed and the telephone number is ready to be ported on the Due Date stated on the FOC. On the Due Date, the CLEC is required to send the Number Portability Administration Center (“NPAC”), the third party Local Number Portability administrator, a Subscription Services Activation. Subsequent to receiving the Subscription Services Activation from the CLEC, NPAC sends a broadcast to all telecommunications providers that the number has been ported to the CLEC’s switch. Upon receipt of this broadcast from NPAC, AT&T Florida issues an internal order to stop billing the end user effective the date of the port and removes the telephone number from AT&T Florida’s switch. This long standing process ensures that the telephone number has properly ported before AT&T Florida stops billing. It should be noted that generally the disconnect orders are generated mechanically on the day the number ports. When the disconnect order “drops” to AT&T Florida’s Wholesale Local Service Center (“LSC”) for manual handling, these orders are processed with the existing work load and will have an Effective Bill Date (“EBD”) as the port date. The EBD Date will ensure the end user’s Final Bill reflects credits for services billed past the port date.

There are a number of reasons why a CLEC end user may receive a regular bill from AT&T Florida after their number has been ported to a CLEC. One such instance is timing, as the port may have occurred around the end of the end user’s normal bill cycle. Another instance is that a CLEC may have issued the Subscription Services Activation to NPAC without receiving a FOC from AT&T. While the number would still port, this would result in the Disconnect Order “falling out” to the LSC for investigation. The LSC would investigate whether the CLEC intended to port the end user’s number and

subsequently issue the order to stop billing the end user if that is the case. As indicated above, the end user would receive a credit back to the port date and no double billing would occur.

Should a CLEC end user contact AT&T Florida's Retail Business Office about a bill after a number has been ported, the Retail Service Representative is instructed to refer the issue to a "Back Office Group", which has no retail sales and marketing responsibilities, that group then contacts Wholesale Customer Care to investigate. AT&T Florida's Retail service representative advises the end user of (1) the current status of the account, (2) that a referral will be sent to another department (the Wholesale LSC) to investigate, and (3) that normally a matter should be resolved within five (5) business days.

AT&T Florida reviewed the retail records of the Cbeyond's end users that required a manual disconnect order between February and March 2009. AT&T Florida retail records indicate four end users called AT&T Florida's Retail Business Office regarding their AT&T Florida bill. Of the four, one was referred back to Cbeyond because the end user was questioning the effective date of the new Cbeyond account; two end users were advised that their concern would be referred to another department and the issue should be resolved within five (5) days following the procedure outlined above and for one end user, AT&T Florida's records do not provide additional information as to how the fourth contact was handled.

As of March 20th, AT&T Florida Wholesale has issued all manual billing disconnect orders for end users that have ported their number to Cbeyond. In addition, AT&T is actively monitoring Cbeyond and other CLEC porting orders to ensure orders

requiring manual handling are issued in a timely manner. However, based on the timing of the port to Cbeyond and the Retail Bill Date, there may be instances where a monthly bill will be sent to the end user after the port date even when the process works perfectly. Regardless, the subsequent final bill will reflect credits back to the day the number is ported.

II. PARTIAL 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). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI, Docket No. 981923-EI, (Issued May 24, 1999)(citing to *Varnes*, 624 So.2d at 350).

B. Cbeyond Lacks Standing to Allege a “Cramming” Violation

Cbeyond alleges that AT&T Florida has violated the provisions of Section 364.604(2), Florida Statutes, and Rule 25-4.110(18), Florida Administrative Code, and, thus, engaged in “cramming”. See Complaint at ¶ 34. Section 364.604(2), Florida Statutes, provides that a “customer” shall not be liable for charges for telecommunications or information services that the “customer” did not order or that were not provided to the “customer”. Rule 25-4.110(18), Florida Administrative Code, provides that if a “customer” notifies a billing party that they did not order an item on the

bill or that they were not provided a service appearing on the bill, the billing party must provide the “customer” a credit for the item and remove it from the bill.

To participate as a party in proceeding pursuant to the Administrative Procedure Act, individuals and entities must demonstrate that their “substantial interests” will be affected by the proceeding. See, e.g., § 120.569, Fla. Stat.; Rule §§ 28-106.201, 25-22.036(2), Fla. Admin. Code; *Agrico Chem. Co. v. Dep’t of Environ. Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981). To demonstrate standing under the “substantial interests” test, individuals must show that they will suffer an injury in fact that is of sufficient immediacy to entitle them to a hearing and that the injury suffered is of a type that the proceeding is designed to protect. *Id.* at 482. The first aspect of the test relates to the degree of injury, and the second part deals with the nature of the injury. *Id.*; see also *Ameristeel v. Clark*, 691 So. 2d 473, 477 (Fla. 1997) (citing the *Agrico* standing test).

Nothing in the Complaint demonstrates that the substantial interests of Cbeyond have been or will be affected by what Complaint refers to “cramming”. This section of the Complaint does not even allege that Cbeyond is a “customer” as it is defined in the statute or rule referenced above. Because the Complaint does not allege that Cbeyond was billed for services it was not provided – the Complaint does not satisfy the first prong of the *Agrico* standing test, which requires a demonstration of “injury in fact which is of sufficient immediacy” to entitle a person to a hearing. 406 So. 2d at 482. Courts have held that the first prong of the *Agrico* test is not satisfied based on stated concerns that are speculative or conjectural. See *International Jai-Alai Players Ass’n v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990); *Village Park Mobile Home Ass’n, Inc. v. State, Dep’t of Bus. Reg.*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987)

(speculations on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process).

Cbeyond includes no allegations that it paid any unauthorized charges. Any stated concerns that its customers received allegedly unauthorized bills is purely speculative and conjectural and do not constitute "injury in fact". Moreover, Cbeyond can not bring a claim for "cramming" on behalf of AT&T or Cbeyond's customers as it does not have standing to seek relief for its or AT&T's customers. Because Cbeyond does not have standing to seek relief for a "cramming" violation on behalf of Cbeyond or AT&T's customers and has not sought relief for any bills sent to it, this portion of the Complaint should be dismissed.

III. ANSWER

1. Paragraph 1 of the Complaint requires no response from AT&T Florida.
2. Paragraph 2 of the Complaint requires no response from AT&T Florida.
3. Paragraph 3 of the Complaint requires no response from AT&T Florida.
4. Responding to the allegations in Paragraph 4 of the Complaint, AT&T Florida admits that Cbeyond is a CLEC in Florida and that Cbeyond competes with AT&T Florida for customers. Except as expressly admitted herein, the remaining allegations of Paragraph 4 of the Complaint are denied.

5. Responding to the allegations in Paragraph 5 of the Complaint, AT&T Florida admits that Cbeyond submits requests to AT&T Florida to transfer, or port, customers' telephone numbers and that AT&T Florida must update its billing systems when customers are transferred to Cbeyond. Except as expressly admitted herein, the remaining allegations of Paragraph 5 of the Complaint are denied.

6. Responding to the allegations in Paragraph 6 of the Complaint, AT&T Florida admits that when a customer's telephone number is transferred to another carrier, AT&T Florida must change its switch translations so that calls to the customer are routed to the new carrier. Except as expressly admitted herein, the remaining allegations of Paragraph 6 of the Complaint are denied.

7. Responding to the allegations in Paragraph 7 of the Complaint, AT&T Florida admits that since June 2008, some of its business customers have left AT&T Florida and transferred their service to Cbeyond. AT&T Florida admits that some Cbeyond customers may have received a bill from AT&T Florida for service after having been transferred to Cbeyond; however, on their final bill from AT&T Florida the customer receives a credit back to the requested due date of the transfer of the telephone number. Except as expressly admitted herein, the remaining allegations of Paragraph 7 of the Complaint are denied.

8. Responding to the allegations in Paragraph 8 of the Complaint, AT&T Florida admits that some Cbeyond customers may have received a bill from AT&T Florida for service after having been transferred to Cbeyond; however, on their final bill from AT&T Florida the customers receive a credit back to the requested due date of the transfer of the telephone number. Except as expressly admitted herein, the remaining allegations of Paragraph 8 of the Complaint are denied.

9. AT&T Florida denies the allegations set forth in Paragraph 9 of the Complaint and demands strict proof thereof.

10. AT&T Florida denies the allegations set forth in Paragraph 10 of the Complaint and demands strict proof thereof.

11. AT&T Florida denies the allegations set forth in Paragraph 11 of the Complaint and demands strict proof thereof.

12. AT&T Florida specifically denies that it has acted in an anticompetitive manner. AT&T Florida denies the remaining allegations set forth in Paragraph 12 of the Complaint and demands strict proof thereof.

13. AT&T Florida denies the allegations set forth in Paragraph 13 of the Complaint and demands strict proof thereof.

14. AT&T Florida denies the allegations set forth in Paragraph 14 of the Complaint and demands strict proof thereof.

15. AT&T Florida denies the allegations set forth in Paragraph 15 of the Complaint and demands strict proof thereof.

16. AT&T Florida denies the allegations set forth in Paragraph 16 of the Complaint and demands strict proof thereof.

17. AT&T Florida admits that some customer carrier change requests may have been delayed; however, there are a number of reasons why Cbeyond's end user may receive a regular bill from AT&T after their number has been ported to Cbeyond. One reason is timing. The port may have occurred around the end of the end user's normal bill cycle. Additionally, CLECs may have issued the Activate Request without receiving a FOC from AT&T. This would result in the Disconnect Order "dropping" to the LSC for investigation. The LSC would investigate whether the CLEC intended to port the end user and subsequently issue the order to stop billing the end user if that is the case.

AT&T Florida denies the remaining allegations set forth in Paragraph 17 of the Complaint and demands strict proof thereof.

18. AT&T Florida denies the allegations set forth in Paragraph 18 of the Complaint and demands strict proof thereof.

19. AT&T Florida denies the allegations set forth in Paragraph 19 of the Complaint and demands strict proof thereof.

20. Paragraph 20 of the Complaint purports to quote certain sections of state statutes. AT&T Florida respectfully refers the Commission to such statutes for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 20 of the Complaint and demands strict proof thereof.

21. Paragraph 21 of the Complaint purports to quote certain sections of state statutes. AT&T Florida respectfully refers the Commission to such statutes for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 21 of the Complaint and demands strict proof thereof.

22. Paragraph 22 of the Complaint purports to quote certain sections of Commission Rules. AT&T Florida respectfully refers the Commission to such Commission Rules for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 22 of the Complaint and demands strict proof thereof.

23. AT&T Florida specifically denies that it has violated any statute or Commission Rule. AT&T Florida denies the remaining allegations set forth in Paragraph 23 of the Complaint and demands strict proof thereof.

24. AT&T Florida specifically denies that it has violated any statute or Commission Rule, that it has an unfair competitive advantage and that it unfairly retains customers who have chosen to move to Cbeyond for service. AT&T Florida denies the remaining allegations set forth in Paragraph 24 of the Complaint and demands strict proof thereof.

25. Paragraph 25 of the Complaint purports to quote certain sections of state statutes. AT&T Florida respectfully refers the Commission to such statutes for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 25 of the Complaint and demands strict proof thereof.

26. AT&T Florida denies the allegations set forth in Paragraph 26 of the Complaint and demands strict proof thereof.

27. AT&T Florida denies the allegations set forth in Paragraph 27 of the Complaint and demands strict proof thereof.

28. Paragraph 28 of the Complaint purports to quote certain portions of the parties' Interconnection Agreement ("ICA"). AT&T Florida respectfully refers the Commission to such ICA for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 28 of the Complaint and demands strict proof thereof.

29. AT&T Florida denies the allegations set forth in Paragraph 29 of the Complaint and demands strict proof thereof.

30. Paragraph 30 of the Complaint purports to quote certain portions of the parties' Interconnection Agreement ("ICA"). AT&T Florida respectfully refers the

Commission to such ICA for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 30 of the Complaint and demands strict proof thereof.

31. Paragraph 31 of the Complaint purports to quote or summarize certain sections of federal law. AT&T Florida respectfully refers the Commission to such federal statutes for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 31 of the Complaint and demands strict proof thereof.

32. Paragraph 32 of the Complaint purports to quote certain sections of state statutes. AT&T Florida respectfully refers the Commission to such statutes for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 32 of the Complaint and demands strict proof thereof.

33. Paragraph 33 of the Complaint purports to quote a certain section of Commission Rules. AT&T Florida respectfully refers the Commission to such section of its Rules for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 33 of the Complaint and demands strict proof thereof.

34. AT&T Florida denies the allegations set forth in Paragraph 34 of the Complaint and demands strict proof thereof.

35. AT&T Florida denies the allegations set forth in Paragraph 35 of the Complaint and demands strict proof thereof.

36. AT&T Florida denies the allegations set forth in Paragraph 36 of the Complaint and demands strict proof thereof.

37. AT&T Florida denies the allegations set forth in Paragraph 37 of the Complaint and demands strict proof thereof.

38. Paragraph 38 of the Complaint purports to quote certain sections of state statutes or Commission Rules. AT&T Florida respectfully refers the Commission to such statutes or Commission Rules for its contents, and denies all inconsistent allegations or characterizations. AT&T Florida denies any other allegations set forth in Paragraph 38 of the Complaint and demands strict proof thereof.

39. Responding to the allegations contained in paragraph 39 of the Complaint, AT&T Florida denies that Cbeyond is entitled to any relief whatsoever.

40. Responding to the allegations contained in paragraph 40 of the Complaint, AT&T Florida denies that Cbeyond is entitled to any relief whatsoever.

41. Responding to the allegations contained in paragraph 41 of the Complaint, AT&T Florida denies that Cbeyond is entitled to any relief whatsoever.

42. Responding to the allegations contained in paragraph 42 of the Complaint, AT&T Florida denies that Cbeyond is entitled to any relief whatsoever.

43. Responding to the "Wherefore" clause portion of the Complaint, denies that Cbeyond is entitled to any relief whatsoever.

IV. AFFIRMATIVE DEFENSES

1. Cbeyond's Complaint fails to state a cause of action upon which relief may be granted.

2. Cbeyond lacks standing to allege a violation of 364.604(2) and Rule 25-4.110(18), Florida Administrative Code.

WHEREFORE, AT&T Florida respectfully requests the Commission to enter an Order in AT&T Florida's favor, deny Cbeyond the relief sought, and grant AT&T Florida such other relief as the Commission deems just and proper.

Respectfully submitted this 7th day of April, 2009.

AT&T FLORIDA



E. EARL EDENFIELD JR.
TRACY W. HATCH
MANUEL A. GURDIAN
c/o Gregory R. Follensbee
150 South Monroe Street, Ste. 400
Tallahassee, FL 32301
(305) 347-5558

732956