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Attachments: Cbeyond's Response to AT&T's Partial Motion to Dismiss 04.14.09.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

- a. The name, address, telephone number and email for the person responsible for the filing is:

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b. This filing is made in Docket No. 090135-TP, In re Complaint of Cbeyond Communications, LLC Against AT&T Florida For Anticompetitive Behavior And Violation of Interconnection Agreement.

c. The document is filed on behalf of Cbeyond Communications, LLC.

d. The total pages in the document is 7 pages.

e. The attached document is Cbeyond's Response to AT&T's Partial Motion to Dismiss.

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Cbeyond
Communications, LLC
Against AT&T Florida
For Anticompetitive Behavior
And Violation of Interconnection
Agreement

DOCKET No. 090135-TP

FILED: April 14, 2009

CBEYOND'S RESPONSE TO AT&T'S PARTIAL MOTION TO DISMISS

Cbeyond Communications, LLC, (Cbeyond) pursuant to rule 28-106.204, Florida Administrative Code, files this Response in opposition to the Partial Motion to Dismiss filed by BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T) on April 7, 2009. Cbeyond's Complaint demonstrates that AT&T has engaged in anticompetitive behavior, violated the terms of the parties' Interconnection Agreement, and engaged in cramming in violation of the Commission's statute and rules. AT&T asserts that Cbeyond's claim regarding AT&T's cramming behavior should be dismissed for lack of standing. AT&T is in error and its Partial Motion to Dismiss should be denied.

I. INTRODUCTION

On March 18, 2009, Cbeyond filed a Complaint against AT&T alleging that AT&T had (a) engaged in anticompetitive behavior in violation of sections 364.01(4), 364.10(1), and 364.3381, Florida Statutes; (b) violated the terms of the parties' Interconnection Agreement; and (c) engaged in cramming in violation of section 364.604(2), Florida Statutes, and rule 25-4.110(18), Florida Administrative Code.

On April 7, 2009, AT&T filed a Partial Motion to Dismiss Cbeyond's Complaint arguing that Cbeyond lacks standing to assert a violation of the cramming statute and rules. However,

Cbeyond has standing to bring such a claim and AT&T's Motion should be denied.

Further, the Commission has jurisdiction, on its own motion, to open an investigation¹ regarding AT&T's behavior, which AT&T does not deny.² AT&T's action impacts not only Cbeyond and its customers but all AT&T customers who seek to change providers. See, section 364.01, Florida Statutes.

II. ARGUMENT

A. Standard for Motion to Dismiss

The standard applied for ruling on a motion to dismiss is well-established. A motion to dismiss raises, as a question of law, the sufficiency of the ultimate facts alleged in the original petition or complaint to state a cause of action. See, *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); *Pizzi v. Central Bank and Trust Company*, 250 So. 2d 895, 897 (Fla. 1971). The standard to be applied in ruling on a motion to dismiss is whether, assuming all of the allegations in the complaint are true, the complaint states a cause of action upon which relief may be granted. *Id.* Applying this standard to Cbeyond's Complaint requires denial of AT&T's Partial Motion to Dismiss.

B. Cbeyond Has Standing to Raise A Cramming Violation

AT&T alleges that Cbeyond fails to meet the test for standing set out in Chapter 120, Florida Statutes, and in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981). *Agrico* requires that the petitioner show that its substantial interests are affected by the proceeding. This two-pronged test requires a demonstration that: 1)

¹ See, *i.e.*, Order No. 24877, Docket No. 890183-TL (the Commission, on its own motion, established a generic investigation of alternate access vendors because it shared the concerns of the Petitioner, GTEFL, raised in that docket).

² See, for example, paragraph 7 of AT&T's Answer: "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...." The fact that customers may receive a credit after the fact – and whether and how such customers do or not receive a credit is a matter in dispute – does not change the fact that customers are being billed by AT&T for service they do not receive in violation of this Commission's statute and rules.

petitioner will suffer injury in fact that is of sufficient immediacy to entitle it to a hearing; and 2) that the injury is of a type or nature the proceeding is designed to protect. *Id.* at 482.

Cbeyond meets both parts of the *Agrico* test. As to injury in fact of sufficient immediacy to entitle it to a hearing, Cbeyond's Complaint, all allegations of which must be taken as true, alleges that AT&T's cramming behavior has impacted Cbeyond's ability to bring on line and serve its customers. For example, the Complaint alleges that:

- AT&T has billed Cbeyond customers for services that they have not received (Cbeyond Complaint, ¶s 7, 8);
- Cbeyond customers are upset when they are double billed and often blame Cbeyond for the problem (Cbeyond Complaint, ¶s 9, 14);
- AT&T's behavior is anticompetitive and substantially affects Cbeyond's ability to bring on and serve new customers (Cbeyond Complaint, ¶ 12);
- Cbeyond has expended significant resources to address these customer complaints (Cbeyond Complaint, ¶ 14);
- AT&T has blamed the double billing on Cbeyond and has erroneously told customers it is due to Cbeyond's processes (Cbeyond Complaint, ¶ 15);
- AT&T fails to timely update its records when customers leave AT&T (Cbeyond Complaint, ¶ 16);
- AT&T fails to adequately staff its service centers to timely process change requests (Cbeyond Complaint, ¶ 16).

All of these allegations are more than sufficient to demonstrate that Cbeyond has suffered injury in fact of sufficient immediacy to entitle it to a hearing and that AT&T's cramming behavior substantially affects Cbeyond.

Nor are Cbeyond's allegations "speculative or conjectural" as AT&T claims. Cbeyond has made fact-based allegations describing actual AT&T behavior. As noted earlier, AT&T

admits that “some Cbeyond customers may have received a bill from AT&T Florida for service after having been transferred to Cbeyond. . . .”³

Cbeyond’s allegations are in marked contrast to the cases AT&T cites for its “speculative and conjectural” theory. In *International Jai-Alai Players Assn v. Florida Pari-Mutual Commission*, 561 So. 2d 1224 (Fla. 3rd DCA 1990), the court found jai-alai players’ claim that a change in playing dates would affect an on-going labor dispute and strike to be speculative. In *Village Park Mobile Home Assn v. State Department of Business Regulation*, 506 So.2d 426 (Fla. 1st DCA 1987), mobile park residents argued that they were affected by approval of a prospectus. The court found that it was speculative to assert that approval of the prospectus would affect the value of the residents’ homes. In this instance, as demonstrated by Cbeyond’s Complaint, its allegations are real not speculative.

Finally, AT&T complains that Cbeyond is not a customer and therefore should not be permitted to raise the cramming issue. As noted above, AT&T’s cramming behavior impacts not only retail customers who have chosen Cbeyond to provide their retail service, it impacts Cbeyond as well. AT&T should not be permitted to skirt the Commission’s statute and rules as delineated in Cbeyond’s Complaint.

AT&T does not contend that Cbeyond does not meet the second prong of the *Agrico* test - that the injury alleged is the type this proceeding is designed to protect. Cbeyond agrees that this part of the *Agrico* standard is met.

Further, this case is similar to *Fairbanks v. Department of Transportation*, 635 So.2d 58 (Fla. 1st DCA 1994). In *Fairbanks*, the court reversed the Department of Transportation’s denial of a hearing request from a manufacturer of truck weighing scales in a proceeding related to the

³ AT&T Motion and Answer, (¶ 7), emphasis supplied.

construction of weigh stations. The court noted that though the statute in question was intended to protect bidders for the construction project, a hearing was required because denial of a hearing would be at odds with the Legislature's overriding intent that competition not be frustrated. *Id.* at 60.

Similarly, the Legislature, in section 364.01, Florida Statutes, has clearly expressed its intent that competition in the provision of telecommunications services is a critical priority for Florida. *See, i.e.* section 364.01(4)(b) ("The Commission shall . . . [e]ncourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services"); section 364.01(4)(d) ("The Commission shall . . . [p]romote competition by encouraging innovation and investment in telecommunications markets"); and section 364.01(4)(g) ("The Commission shall . . . [e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . ."). Therefore, part of the Commission's charge is to ensure that competition is not frustrated by behavior such as that exhibited by AT&T. Thus, Cbeyond has satisfied the *Agrico* requirements.

III. CONCLUSION

Wherefore, for the reasons set forth above, the Commission should deny AT&Ts Partial Motion to Dismiss.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cbeyond's Response to AT&T's Partial Motion to Dismiss was served via Electronic Mail and U.S. Mail this 14th day of April, 2009 to the following:

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