

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for emergency relief and
complaint of FLATEL, Inc. against BellSouth
Telecommunications, Inc. d/b/a AT&T Florida
to resolve interconnection agreement dispute.

DOCKET NO. 110306-TP
ORDER NO. PSC-12-0085-FOF-TP
ISSUED: February 24, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

BY THE COMMISSION:

Background

On November 7, 2011, FLATEL filed its petition for an emergency stay against BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) disconnection of its services for nonconformance with the interconnection agreement (ICA) payment terms. The ICA requires timely payment of billed amounts including disputed amounts. FLATEL alleged that it is entitled to promotion credits, and, therefore, its nonpayment of services billed was for outstanding promotion credits. FLATEL's services have been disconnected.¹

In its petition for an emergency stay, FLATEL alleged that (1) the attempted resolution of the dispute with AT&T Florida through negotiations was unsuccessful; (2) currently, it has no past due balance and AT&T Florida's offered extension payment plan was not an attempt to resolve any monetary issues between AT&T Florida and FLATEL; (3) AT&T Florida offered immediate relief for promotions to its end users but not the same instant offer to FLATEL's end users; (4) AT&T Florida positioned FLATEL to negotiate without counsel; and (5) AT&T Florida refused to address overcharges from 2007 to date.

On November 28, 2011, AT&T Florida filed its motion to dismiss FLATEL's petition. AT&T Florida asserted that FLATEL's petition failed as a matter of law as it ignored the "plain and unambiguous provision" in the ICA that requires timely payment of bills including disputed amounts.

¹ FLATEL began transferring its end-user customers from its ICA with AT&T Florida to its commercial agreement with AT&T Florida prior to the disconnection of its resale services.

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On December 12, 2011, FLATEL filed a request for a 30-day extension to respond to AT&T Florida's dismissal motion. On December 14, 2011, AT&T Florida filed a response opposing FLATEL's request for an extension. FLATEL was granted 5 days to file its opposition. On December 20, 2011, Commission staff held an informal meeting with the parties.

On December 21, 2011, FLATEL filed its opposition to the dismissal motion. On December 29, 2011, AT&T Florida filed its Response to FLATEL's Opposition. On January 11, 2012, FLATEL filed a response to AT&T Florida's December 29, 2011 filing. On January 18, 2012, AT&T Florida filed its response to FLATEL's January 11, 2012 filing.

We have jurisdiction over this subject matter pursuant to Section 364.16, Florida Statutes (F.S.).

Discussion

Standards of Review

A. Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a petition.² In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the petitioner, the petition still fails to state a cause of action for which relief may be granted.³ When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed and all reasonable inferences drawn from the petition must be made in favor of the petitioner.⁴ Where agreement terms are incorporated into the petition by reference and are the basis of the petition, the agreement can be reviewed in determining the "nature of the alleged claim."⁵ A court may not look beyond the four corners of the petition in considering its legal sufficiency.⁶ However, the attachment of a document to the petition that conclusively negates the petition is sufficient grounds for dismissal.⁷

B. Emergency Stay

Pursuant to Section 364.015, F.S., violations of our orders or rules, in connection with the impairment of a telecommunications company's operations or service, constitute irreparable harm for which there is no adequate remedy at law, and for which relief can be sought in the circuit court. To grant a petition for an emergency stay or injunctive relief, we must have the authority to grant the requested relief. In Order No. PSC-11-0180-PCO-TP, issued on March 30,

² Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

³ *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

⁴ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁵ See Veal v. Voyager Prop. & Cas. Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011).

⁶ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)(citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

⁷ See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005)(citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

2011, we reiterate our consistent holding that this Commission lacks authority to grant injunctive relief.⁸

Additionally, the ICA between AT&T Florida and FLATEL provides that disputes relating to the interpretation or the implementation of the agreement can be resolved by the regulating commission. The ICA defines the regulating commission as the appropriate regulatory agency in each state of AT&T's nine-state region. We are the regulating commission for Florida; therefore, we have jurisdiction to resolve disputes relating to the interpretation or implementation of the agreement. Additionally, pursuant to Section 364.16(3), F.S., we may, upon request, arbitrate, and enforce interconnection agreements and may exercise our jurisdiction to resolve disputes among carriers regarding, but not limited to, local interconnections and reciprocal compensation. Although Section 364.162, F.S., was repealed on July 1, 2011, we retain jurisdiction over disputes regarding interconnection agreements pursuant to Section 364.16, F.S.⁹

AT&T Florida's Motion to Dismiss

AT&T Florida asserted that FLATEL's petition should be dismissed because:

- FLATEL's petition failed as a matter of law as AT&T Florida's action conforms to the "plain and unambiguous provisions" of the agreement between the parties in which FLATEL agreed to make payments for all services billed including disputed amounts.
- This Commission does not have jurisdiction to grant injunctions and FLATEL's petition failed to meet well established pleading requirements, as it is too vague as to both operative facts and laws for this Commission to grant the relief sought.
- FLATEL failed to establish that its rights in negotiating and signing the agreement were not sufficiently protected by federal and state statutes and rules, and FLATEL's statement that it was forced to sign the agreement without counsel is meritless. This Commission approved the agreement, and this Commission was afforded the opportunity to reject the agreement if it was inconsistent with the public's interest.

⁸ See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement (noting that a petition for an emergency stay is akin to a petition for an injunctive relief and we lack authority to grant injunctive relief).

⁹ See Order No. PSC-11-0420-PCO-TP, issued on September 28, 2011, in Docket No. 090538-TP, In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et. al. (stating that "[t]he legislation has not modified our exclusive jurisdiction over wholesale carrier-to-carrier disputes, and our obligation to ensure fair and effective competition among telecommunications service providers; therefore, we still retain jurisdiction to oversee fair and effective competition").

- FLATEL cited a repealed section of Chapter 364, F.S., in its petition as Section 364.162, F.S., was repealed effective July 1, 2011, more than two months before AT&T Florida began its collection efforts for the outstanding bills.
- AT&T Florida began disconnecting FLATEL service on November 8, 2011, and disconnection has been completed.

FLATEL's Response in Opposition

FLATEL asserted that our role is to protect the public's interest and that AT&T Florida is not providing services in accordance with the Telecommunications Act as evidenced by:

- The ICA was non-negotiable and unfair, FLATEL was forced to sign the amendments because it had an established client base that needed service, and FLATEL is not arguing the terms of the ICA but is attempting to resolve billing disputes with AT&T Florida.
- FLATEL paid AT&T Florida every month for 15 years and is not requesting an alteration of the ICA terms but is challenging AT&T Florida's practice of not granting instant credits to FLATEL end users in parity with AT&T Florida's end users.
- The promotional offers are not disputes and the payment provision of the ICA is not relevant. FLATEL defines disputed amounts as overcharges and stated that AT&T Florida should reinstate its account.

Analysis

Our rules do not contemplate the filing of a response to a Response in Opposition to a dismissal motion. We consider such pleadings as inappropriate pleadings, and the arguments raised are not considered.¹⁰ Here, however, FLATEL's opposition to AT&T Florida's dismissal motion raised new issues not mentioned in FLATEL's initial petition. On December 29, 2011, AT&T Florida filed a response to FLATEL's opposition but AT&T Florida's response merely restated its arguments in its dismissal motion. Both parties submitted additional pleadings that were not contemplated by our rules. Since we consider these pleadings inappropriate pleadings, we did not consider these pleadings. These pleadings are also irrelevant as we lack jurisdiction to grant the requested injunction.

We have determined that FLATEL failed to identify the violation of any statute, rule, order, or the ICA sufficient to constitute a cause of action for an emergency stay. Additionally,

¹⁰ See Order No. PSC-03-0525-FOF-TP, issued on April 21, 2003, in Docket No. 020919-TP, In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreements with BellSouth Telecommunications, Inc. (finding that AT&T's Response to BellSouth's Response was an inappropriate pleading not contemplated by our rules or the uniform rules, and thus we did not consider the arguments raised in AT&T's Response to BellSouth's Response).

we lack jurisdiction to grant emergency stays and FLATEL's services have been disconnected, which makes its petition moot. Therefore, FLATEL's petition shall be dismissed.

Further, FLATEL's petition shall be dismissed as, even if taken as true, it failed to state a cause of action. FLATEL's allegations regarding AT&T Florida's disconnection of services is insufficient to constitute a cause of action, as FLATEL failed to allege any violation of any statute, rule, order, or the ICA in connection with the discontinuation of services.¹¹ We articulated in Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, that carriers can enforce ICAs including the disconnection of services for violation of the ICAs where the payment terms are clear and unambiguous.¹² Here, the ICA provides that FLATEL should make payments for services provided by AT&T Florida including disputed charges on or before the next bill date.¹³ The ICA also provides that services can be discontinued for nonpayment of bills.¹⁴ FLATEL's allegations failed to demonstrate that AT&T Florida violated a statute, rule, or order, or that AT&T Florida's disconnection of FLATEL's services was not in accordance with the ICA. Therefore, FLATEL failed to state a cause of action for the requested relief of an emergency stay.

Likewise, FLATEL's statement that the parties failed attempt to resolve the matter through negotiations does not constitute a cause of action because the statement fails to demonstrate the violation of a statute, rule, or order. FLATEL's allegation that AT&T Florida's offered extended payment plan was not an attempt to resolve any monetary issues also failed to demonstrate a violation of a statute, rule, or order.

FLATEL's statement that the disputed balance includes promotions that should be offset against amounts it owes to AT&T Florida is not a cause of action as it relates to granting an emergency stay. The ICA requires that all services billed should be paid including disputed amounts, and FLATEL's petition is for an emergency stay to prevent disconnection of its service for nonpayment of bills. Therefore, FLATEL's assertion regarding the promotions failed to satisfy the requirements for a cause of action for an emergency stay.

Moreover, FLATEL filed its petition on November 7, 2011, citing Section 364.162, F.S., as the statutory authority for the requested emergency stay. The Legislature repealed Section 364.162, F.S., effective July 1, 2011. FLATEL's services have been disconnected; therefore,

¹¹ See Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekn against Florida Power & Light Co., (noting that a determination of a petition's cause of action requires examining the substantive law elements and stating that the improper allegation of the "elements of the cause of action that seeks affirmative relief" is sufficient grounds for dismissal, citing Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957)).

¹² See Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, in Docket No. 100021-TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida (we issued a procedural order requesting that LifeConnex post a bond for the \$1.4 Million owing to AT&T Florida and requesting that AT&T Florida postpone its intended disconnection. We clarified that the order was not an equitable remedy or an injunction, and that AT&T Florida could enforce the ICA for nonpayment on a going forward basis including disconnection of services for nonpayment as the ICA provided that LifeConnex was required to make timely payments including disputed amounts).

¹³ See ICA, Attach. 7, Sec. 1.4.

¹⁴ See ICA Attach. 7, Sec. 1.5.

FLATEL's petition for an emergency stay is moot. Finally, FLATEL sought an emergency stay, and we interpret FLATEL's request as akin to a request for injunctive relief. Although this Commission may, upon request, arbitrate and enforce interconnection agreements and have jurisdiction to resolve disputes among carriers, this Commission has consistently held that we have no authority to grant injunctive relief.¹⁵ Therefore, we find it appropriate to dismiss FLATEL's petition.

Section 120.569(2)(c), F.S., provides, in part, that the dismissal of a petition should be without prejudice to petitioner's filing a timely amended petition curing the defect. We find it appropriate to dismiss FLATEL's petition without prejudice, and FLATEL may file an amended petition.

As mentioned above, Section 364.16(3), F.S., provides in part that this Commission may, upon request, arbitrate and enforce interconnection agreements and has jurisdiction to resolve disputes among carriers, including but not limited to, local interconnection and reciprocal compensation. FLATEL petitioned for an emergency stay and did not request the resolution of any promotional credit disputes. Should FLATEL choose to file an amended petition, the petition shall conform to the pleading requirements of Rules 25-22.036, F.A.C., and 28-106.201, F.A.C., and identify all disputes for which FLATEL requires resolution.

We find that FLATEL's petition is moot and that we lack authority to grant the requested injunctive relief. Therefore, we find it appropriate to dismiss FLATEL's petition, and the dismissal shall be without prejudice.

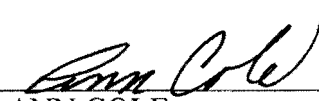
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss FLATEL's petition is hereby granted, without prejudice. It is further

ORDER that this docket shall be closed.

¹⁵ See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement.

By ORDER of the Florida Public Service Commission this 24th day of February, 2012.



ANN COLE
Commission Clerk
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

PER

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.