

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: May 22, 2014

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Murphy) *Can AF*
Office of Telecommunications (Curry) *KIC*

RE: Docket No. 140055-TP – Complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida. *Ward*

AGENDA: 06/05/14 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On November 7, 2011, FLATEL, Inc. (FLATEL), a certificated telecommunications service provider, filed a petition for an emergency stay against BellSouth Telecommunications, Inc. d/b/a AT&T Florida's (AT&T-FL) disconnection of services for nonconformance with the interconnection agreement (ICA) payment terms. FLATEL alleged that it was entitled to promotional credits and that its nonpayment of services billed was for outstanding promotional credits. On November 28, 2011, AT&T-FL filed a motion to dismiss FLATEL's petition. On February 24, 2012, by Order No. PSC-0085-FOF-TP (Order), the Florida Public Service Commission (Commission) granted AT&T-FL's motion, thereby dismissing FLATEL's petition without prejudice and closing Docket No. 110306-TP.¹ In its Order, the Commission noted that FLATEL had failed to request resolution of any promotional credit disputes. The Commission then invited FLATEL to refile its petition as follows: "Should FLATEL choose to file an

¹ Request for emergency relief and complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute.

amended petition, the petition shall conform to the pleading requirements of Rules 25-22.036, F.A.C., and 28-106.201, [Florida Administrative Code (F.A.C.)], and identify all disputes for which FLATEL requires resolution.”²

On December 30, 2013, FLATEL filed a “Motion to Amend Docket 110306-TP” (Amended Petition) in which FLATEL asks to amend the petition against AT&T-FL that FLATEL had previously filed with the Commission. FLATEL alleges that AT&T-FL has implemented unlawful practices that severely impact the way that FLATEL can offer service to its Florida customers. On February 13, 2014, AT&T-FL filed a Response to FLATEL’s Amended Petition (Response) in which it asserts that FLATEL has failed to comply with applicable procedural requirements and has failed to establish any claim for relief. AT&T-FL asserts that the Amended Petition should be dismissed with prejudice. On April 14, 2014, AT&T-FL filed another response (Amended Response) to the FLATEL Amended Petition in which it adopts the prior Response and provides updated information related to separate litigation between the parties. AT&T-FL asserts that filing the Amended Response is proper because, until the Commission opened the instant docket on March 19, 2014, AT&T-FL had never been served with the Amended Petition.

This recommendation addresses FLATEL’s Amended Petition and AT&T-FL’s Amended Response. The Commission has jurisdiction over this subject matter pursuant to Section 364.16, Florida Statutes (F.S.).

² Order No. PSC-0085-FOF-TP, at 6.

Discussion of Issues

Issue 1: Should the Commission grant FLATEL's Amended Petition?

Recommendation: No. the Commission should dismiss FLATEL's Amended Petition with prejudice for again failing to comply with applicable rules. (Murphy)

Staff Analysis:

FLATEL's Amended Petition

Although FLATEL identifies its pleading as a Motion to Amend Docket 110306-TP, the pleading appears to be an amended petition filed in response to the Commission's 2012 Order. FLATEL asserts that AT&T-FL is engaging in unlawful practices when it offers immediate relief via promotions to its end users without similarly offering immediate relief to FLATEL's end users. FLATEL argues that AT&T-FL has acknowledged the following problems with its promotions but has failed to make any attempt to resolve the issues.

FLATEL must wait a minimum of 60 days, and on average 75 days, for a promotional credit to impact its bill and the process is cumbersome. In contrast, the same promotion is reflected on the first AT&T-FL customer's bill. Promotional disputes dating back to January of 2009 have not been addressed by AT&T-FL.

In November of 2008, AT&T-FL introduced two new local service packages to replace its three existing local service packages. In December 2008, BellSouth updated its tariff and "accessible letters" to include subscribers to the new services. In January 2009, FLATEL noticed a sharp decrease in the approval rating of the Line Connection Charge Waiver and the Cash Back Acquisition promotion. FLATEL sampled the lines that were denied and determined that each had one of the two new packages. FLATEL brought the issue to the attention of AT&T-FL which, in February, 2009, acknowledged problems with the offerings. FLATEL was assured that AT&T-FL would reevaluate the promotions that were denied incorrectly; however, that reevaluation process has yet to take place.

On September 1, 2009, AT&T-FL attempted to lower the value of the "Cash Back" from \$50.00 to \$6.07. AT&T-FL failed to notify the Commission of this lowering and "short paid" FLATEL. FLATEL asserts that AT&T-FL "should be required to credit additionally any lines that were paid at the lesser amount."

AT&T-FL has been reducing cash-back credits by the amount of the wholesale discount in each state. FLATEL asserts that this is a violation of the 2007 *BellSouth v. Sanford* decision³ which FLATEL asserts requires that promotions not be discounted.

³ Although FLATEL did not provide a complete citation to the case, this is believed to be *BellSouth v. Sanford*, 494 F.3d 439, United States Court of Appeals 4th Cir., (2007).

From 2006 to 2008, AT&T-FL rejected legitimately-requested promotional credits, and failed to provide any reason or detail for the rejection. In contrast, AT&T-FL offers immediate consumer relief via a Line Connection Waiver promotion on the AT&T-FL website.

FLATEL then references Section 364.162, F.S., which was repealed in 2011⁴ and finally, FLATEL concludes with the following:

This is an action to cure PROMO actions by AT&T[-FL] for very serious damages as a result of AT&T[-FL]'s unreasonable practice in direct violation of the Communications Act of 1934. FLATEL is exercising any grounds to demand AT&T[-FL]'s be held accounted for their actions operating under the laws set forth in the Telecommunication Act. FLATEL has been providing quality telecommunication services to the customer for over 15 years and we have always been in compliance. Please do not disregard our appeal.

AT&T-FL's Amended Response

AT&T-FL asserts 1) that FLATEL's Amended Petition is, "a four-page, disjointed letter, styled as an Amended Complaint," 2) that FLATEL has failed to comply with the procedural filing requirements set forth in Rules 28-106.201, 28-106.110, and 28-106.208, F.A.C., Section 120.569(2)(c), F.S., and Order No. PSC-12-0085-FOF-TP issued in Docket No. 110306-TP, and 3) that FLATEL's substantive allegations are vague and ambiguous and fail to establish any claim for relief. AT&T-FL argues that FLATEL's Amended Petition was not properly filed by FLATEL's CEO, Mr. Abby Matari, because he is neither a Florida Bar licensed attorney nor has he been designated a qualified representative by the Commission.

AT&T-FL observes that the Amended Petition was filed in Docket No. 110306-TP, which was closed on February 24, 2012, when the Commission dismissed FLATEL's Complaint and Request for Emergency Stay.⁵ At that time, the Commission had required that, "[s]hould 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." AT&T-FL contends that, despite the Commission's specific admonishment, FLATEL has again failed to follow the requirements of Rules 28-106.201 and 25-22.036, F.A.C.

AT&T-FL asserts that FLATEL failed to comply with Rule 28-106.201(d)-(g), F.A.C., by failing to provide a statement of all disputed issues of material fact, a concise statement of the ultimate facts alleged, a statement of the specific rules or statutes justifying the relief sought, or a statement of the relief sought stating precisely the action the petitioner wishes the agency to take.

⁴ Chapter 2011-36, Section 24, at 17, Laws of Florida.

⁵ See Order No.PSC-12-0085-FOF-TP.

AT&T-FL argues that FLATEL failed to comply with Rule 25-22.036(3)(b)(1)-(4), F.A.C., by failing to identify 1) the rule, order or statute that has been violated, 2) the actions that constitute the violation, 3) the name and address of the person against whom the complaint is lodged, and 4) the specific relief requested.

AT&T-FL asserts that FLATEL relies on the Communications Act of 1934, and Section 364.162, F.S., to support its Amended Petition. In this context, AT&T-FL argues that FLATEL fails to identify any provision of the Communications Act of 1934 that AT&T-FL has violated. AT&T-FL asserts that Section 364.162 was repealed effective in July of 2011, and that, to the extent that Section 364.162 was effective during the time period over which FLATEL's claims stretch, FLATEL does not explain how AT&T-FL's actions constitute a violation of the provisions of Section 364.162, F.S. AT&T-FL argues that the federal Telecom Act of 1996 governs the duties of AT&T-FL and how those duties are incorporated in its contract with FLATEL. AT&T-FL observes that FLATEL fails to even mention the Telecom Act of 1996 or to identify any violation of the Act. AT&T-FL contends that FLATEL has failed to abide by the procedural rules governing administrative proceedings as well as Section 120.569(2)(c), Florida Statutes, and has further failed to provide support for any of its claims. Thus, AT&T-FL concludes that, pursuant to Section 120.569(2)(c), F.S., FLATEL's Amended Petition must be dismissed for failure to substantially comply with the model rules and the Commission's rules. AT&T-FL argues that, in view of FLATEL's continued disregard of the rules, FLATEL's Amended Petition should be dismissed with prejudice.

Analysis

Section 120.569(2)(c), F.S., provides that,

Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition *shall be dismissed if it is not in substantial compliance with these requirements* or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition. (emphasis added).

By Order No. PSC-12-0085-FOF-TP, issued on February 24, 2012, in Docket No. 110306-TP, the Commission dismissed FLATEL's Petition in this matter without prejudice. In that Order, the Commission stated that, "[s]hould 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. Staff recommends that in its Amended Petition FLATEL has failed to comply with the rules referenced in the Commission's Order.

In its Amended Petition, FLATEL asks the "Commission to look into what we believe to be unlawful practice whereby AT&T[-FL] offers immediate relief via Promotions to its End Users without parity to instantly offer the same exact relief to FLATEL's End Users." After

describing the nature of the dispute (as generally set forth above under the heading *FLATEL's Amended Petition*) FLATEL makes the following legal argument:

"Florida Statute 364.162, Negotiated prices for interconnection and for the resale of services and facilities; commission rate setting. - "

This is an action to cure PROMO actions by AT&T [-FL] for very serious damages as a result of AT&T[-FL]'s unreasonable practice in direct violation of the Communications Act of 1934. FLATEL is exercising any grounds to demand AT&T[-FL]'s be held accountable for their actions operating under the laws set forth in the Telecommunication Act. FLATEL has been providing quality telecommunication services to the consumer for over 15 years and we have always been in compliance. Please do not disregard our appeal.

Staff observes that FLATEL provides no indication of how Section 364.162, F.S., which has been repealed, might apply to the case. FLATEL also makes general reference to holding AT&T-FL accountable under the Communications Act of 1934, but provides no specific provision of law that has been violated and no description of how the facts alleged violate the referenced law. FLATEL does assert that AT&T-FL's discounting cash-back credits is a "direct violation of the BellSouth vs. Sanford decision of 2007 that states that promotions should not be discounted." However, FLATEL does not explain how a decision of the United States Court of Appeals for the Fourth Circuit upholding a decision of the North Carolina Utilities Commission is 1) dispositive of FLATEL's issues with AT&T-FL, or 2) binding precedent for the Commission.

Under the circumstances, staff recommends that the Amended Petition is not in substantial compliance with Rule 28.106.201(2), F.A.C., which requires that a written petition must contain a statement of all issues of material fact, a concise statement of the ultimate facts alleged, a statement of the specific rules or statutes that apply, an explanation of how the alleged facts relate to the specific rules and statutes, and a statement of the relief sought by the petitioner stating precisely the action the petitioner wishes the agency to take.⁶ Thus, pursuant to Section 120.569(2)(c), F.S., staff recommends that the FLATEL Amended Petition should be dismissed.

This is the second time that FLATEL has filed a petition regarding the same matter and FLATEL has again failed to meet the requirements of applicable rules governing such filings. FLATEL failed to meet these requirements notwithstanding that, by Order No. PSC-12-0085-FOF-TP, the Commission specifically brought the applicable filing requirements to FLATEL's attention. Thus, staff recommends that dismissal should be with prejudice.

To the extent that the Commission decides to dismiss FLATEL's Amended Petition but does not wish to make the dismissal with prejudice, staff recommends that the Commission should specify that any subsequent petition by FLATEL must be filed by an attorney licensed to

⁶ FLATEL's Amended Petition also fails to comport with similar requirements set forth in Rule 25-22.036(3), F.A.C., by substantially failing to identify the rule, order or statute that has been violated, the actions that constitute such violation, and the specific relief requested.

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practice law in the State of Florida or by qualified representative. Staff believes that this is appropriate because “[a] corporation may not represent itself through non-lawyer employees, officers, or shareholders.” *Richter v. Higdon Homes, Inc.* 544 So.2d 300 (Fla. 1st DCA 1989). *See also Meardy v. Butterworth*, 783 So.2d 1222. (Fla. 1st DCA 2001). Subject to Commission approval, Rule 28-106.106, F.A.C., does permit representation by a qualified, non-attorney representative; however, there is no indication that FLATEL has heretofore received such approval.

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Issue 2: Should this docket be closed?

Recommendation: Yes. If staff's recommendation is approved, this docket should be closed.
(Murphy)

Staff Analysis: If the Commission approves staff's recommendation, nothing remains to be done and this docket should be closed.