

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: May 7, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy)
Division of Regulatory Compliance (Bloom, King)

RE: Docket No. 090135-TP – Complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast for anticompetitive behavior in violation of Sections 364.01(4), 364.10(1), and 364.3381, F.S., violating terms of interconnection agreement, and engaging in cramming in violation of Sections 354.604(2), 364.10(1), F.S., and Rule 25-4.110(18), F.A.C., by Cbeyond Communications, LLC.

AGENDA: 05/19/09 – Regular Agenda – Partial Motion to Dismiss – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\090135.RCM.DOC

Case Background

On March 18, 2009, Cbeyond Telecommunications, LLC (“Cbeyond”) filed its Complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (“AT&T”) for Anticompetitive Behavior, Violation of Interconnection Agreement, and Request for Investigation (“Complaint”). In its Complaint, Cbeyond asserts that AT&T is engaging in anticompetitive behavior in violation of Sections 364.01(4), 364.10(1), and 364.3381, Florida Statutes (“F.S.”), violating the terms of the parties’ interconnection agreement,

and violating Sections 364.604(2) and 364.10(1), F.S., and Rule 25-4.110(18), Florida Administrative Code (“F.A.C.”), relating to cramming. Specifically, Cbeyond alleges that AT&T continues to bill former customers for service that is now provisioned by Cbeyond.

On April 7, 2009, AT&T filed a Partial Motion to Dismiss and Answer to Cbeyond’s Complaint. AT&T argues that Cbeyond lacks standing to seek relief for a cramming violation on behalf of Cbeyond or AT&T customers and that Cbeyond has not sought relief for any bills sent to Cbeyond. AT&T asserts that the cramming portion of the Cbeyond Complaint should be dismissed.

On April 14, 2009, Cbeyond filed its Response to AT&T’s Partial Motion to Dismiss (“Response”). Cbeyond asserts that it has standing to raise a cramming violation because it is harmed by AT&T’s behavior and the Commission is charged with encouraging and promoting competition and the fair treatment of all providers of telecommunications providers.

This recommendation addresses AT&T’s Partial Motion to Dismiss.

The Florida Public Service Commission (“Commission”) has jurisdiction over this matter pursuant to Sections 364.012(2) and Section 120.57, F.S.

Discussion of Issues

Issue 1: Should AT&T's Partial Motion to Dismiss be granted?

Recommendation: No. AT&T's Partial Motion to Dismiss should be denied. **(Murphy)**

Staff Analysis:

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. *Id.* at 350. In determining the sufficiency of the petition, the Commission should confine itself to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

Parties' Arguments

Cbeyond Complaint

In its Complaint, Cbeyond raises issues related to alleged anticompetitive behavior by AT&T in violation of statute, violation of the interconnection agreement between Cbeyond and AT&T, and finally, cramming in violation of statute and Commission rule.

With respect to cramming, Cbeyond quotes Section 364.604(2), F.S., addressing customer liability for charges as follows:

A customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer.

Cbeyond then quotes Rule 25-4.110(18), F.A.C., which is the Commission's cramming rule, as follows:

If a customer notifies a billing party that they did not order an item appearing on their bill or that they were not provided a service appearing on their bill, the billing party shall promptly provide the customer a credit for the item and remove the item from the customer's bill.

Cbeyond then asserts that by billing customers for services that were not provided, AT&T has violated the quoted statute and rule. As a remedy for the alleged cramming, Cbeyond asks the Commission to "open an investigation to determine the magnitude and extent of this problem as it affects customers who are attempting to leave AT&T."

AT&T Partial Motion to Dismiss

In its Partial Motion to Dismiss, AT&T argues that the standard for evaluating a motion to dismiss is whether the complaint alleges sufficient facts to state a cause of action as a matter of law and that, in disposing of a motion to dismiss, the Commission must assume all allegations of the complaint as true. AT&T asserts that pursuant to *Agrico Chem Co. v. Dep't of Environ. Reg.*, 406 So.2d 478, 482, (Fla. 2d DCA 1981), Cbeyond must demonstrate that it will suffer an injury in fact that is of sufficient immediacy to entitle it to a hearing and that the injury suffered is of a type that the proceeding is designed to protect. AT&T argues that 1) nothing in the Cbeyond Complaint demonstrates that the substantial interests of Cbeyond have, or will be, affected by cramming, 2) Cbeyond does not allege that it is a customer, and 3) Cbeyond does not allege that it was billed for services that were not provided. Thus, AT&T asserts that Cbeyond fails to meet the first prong of the *Agrico* test to entitle a person to a hearing; namely, injury in fact of sufficient immediacy. AT&T contends that such injury cannot be speculative, conjectural or remote. AT&T argues 1) that the Complaint includes no allegation that Cbeyond paid any unauthorized charges, and 2) that any stated concern for its customers' allegedly unauthorized bills is speculative and conjectural and does not constitute injury in fact. AT&T argues that Cbeyond cannot bring a claim for cramming on behalf of Cbeyond's or AT&T's customers because it lacks standing to do so. AT&T concludes that, because Cbeyond lacks standing to seek relief for a cramming violation on behalf of Cbeyond's or AT&T's customers and has not sought relief for any bills sent to Cbeyond, this portion of the Cbeyond Complaint should be dismissed.

Cbeyond Response

In its Response, Cbeyond argues that the applicable review standard requires denial of AT&T's Partial Motion to Dismiss. Cbeyond lists allegations made in its Complaint: 1) AT&T has billed customers for services that they have not received; 2) Cbeyond customers are upset by double billing and blame Cbeyond; 3) AT&T's behavior is anticompetitive and affects Cbeyond's ability to serve new customers; 4) Cbeyond has expended resources to address customer complaints; 5) AT&T has blamed double billing on Cbeyond and erroneously told customers it is due to Cbeyond's processes; 6) AT&T has failed to timely update its records when customers leave AT&T; and 7) AT&T fails to adequately staff its service centers to timely process change requests.

Cbeyond asserts that it has suffered injury in fact of sufficient immediacy that is not speculative or conjectural. Cbeyond contends that it is harmed by the cramming notwithstanding that it is not a customer of AT&T. Cbeyond argues that AT&T does not contend that Cbeyond fails to meet the second prong of the *Agrico* test (that the injury is the type that the proceeding is designed to protect) and Cbeyond "agrees" with AT&T that this part of the *Agrico* test has been met. Cbeyond quotes portions of Section 364.01(4), F.S., to support its argument that the Commission must "ensure that competition is not frustrated by behavior such as that exhibited by AT&T." Cbeyond concludes that it has satisfied the *Agrico* requirements.

Analysis

AT&T has *not* asserted that the Cbeyond allegations against AT&T for anticompetitive behavior and violations of the Cbeyond/AT&T interconnection agreement should be dismissed; these allegations will be the subject of a Commission review in this docket. Staff believes that the alleged facts underlying the Cbeyond allegations of anticompetitive behavior and violation of the interconnection agreement may be inextricably entwined with the issue of whether AT&T has crammed customers, the extent to which such cramming may have occurred, and whether Cbeyond has suffered competitive harm as a result of such alleged cramming.

Staff believes that taken as true, the injuries related to billing and cramming set forth in the Cbeyond Complaint are injuries in fact that are not speculative or conjectural and are of a type that the proceeding is designed to protect. Therefore, staff believes that Cbeyond has standing to raise the cramming element of its Complaint pursuant to *Agrico*. Similarly, taking all allegations as true and construed in a light most favorable to Cbeyond, the Complaint states a cause of action upon which relief may be granted as required by *Varnes*. Finally, staff believes that the Commission, on its own initiative, has authority to investigate possible violations of rules and statutes which prohibit cramming and that the Commission should not exclude a review of alleged cramming in this docket. As such, staff recommends that the AT&T Partial Motion to Dismiss should be denied.¹

¹ Investigating the Cbeyond allegation of cramming by AT&T, in the context of allegations of anticompetitive behavior related to billing, is not the same as the Commission initiating a show cause proceeding against AT&T for cramming. Any penalty imposed by the Commission against AT&T for alleged cramming in violation of Section 364.604(2), F.S., and Rule 25-4.110(18), F.A.C., would necessarily be the result of a separate show cause proceeding.

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Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open to address the Cbeyond Complaint against AT&T. (**Murphy**)

Staff Analysis: Staff recommends that this docket should remain open to address the Cbeyond Complaint against AT&T.