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Sent: Wednesday, April 01, 2009 4:11 PM
To: Filings@psc.state.fl.us
Cc: Charles Murphy; Tracy Hatch; ke2722@att.com; gene.watkins@cbeyond.net
Subject: Docket No. 090142-TP
Attachments: Amended Complaint 04.01.09.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. (not assigned), In re Complaint of Cbeyond Communications, LLC Against AT&T Florida for failure to pay intrastate access charges pursuant to Cbeyond's Price List and for violation of Section 364.16(3)(a), Florida Statutes.

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

d. The total pages in the document is 10 pages.

e. The attached document is Amended Complaint.

Lynette Tenace

NOTE: New E-Mail Address

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

4/1/2009

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Cbeyond Communications,
LLC against AT&T Communications
of the Southern States, LLC, d/b/a
AT&T and AT&T Florida for failure
to pay intrastate access charges pursuant
to Cbeyond's Price List and interconnection
Agreement and for violation of Section
364.16(3)(a), Florida Statutes.

Docket No. 090142-TP

Filed: April 1, 2009

AMENDED COMPLAINT

Cbeyond Communications, LLC (Cbeyond), through its undersigned counsel and pursuant to rule 1.190, Florida Rules of Civil Procedure and rules 28-106.201, 28-106.202 and 25-22.036, Florida Administrative Code, hereby files this Amended Complaint against AT&T Communications of the Southern States, LLC and BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (collectively, AT&T). Cbeyond requests that the Commission enter a final order finding that:

1. AT&T has violated Cbeyond's Access Services Price List, filed with this Commission, setting forth its intrastate access charges.

2. AT&T has violated section 364.16(3), Florida Statutes, by intentionally and knowingly delivering traffic to Cbeyond to which terminating access applies but failing to pay such incurred terminating access charges.

3. In an earlier workshop on this subject, AT&T expressly represented that it was not only obligated to pay the tariff access rate, but that a refusal to do so would be unlawful. Excerpts from those comments are attached as Exhibit 1. Cbeyond agrees.

4. AT&T has violated the parties' Interconnection Agreement by failing to pay terminating access charges for interexchange traffic terminated by Cbeyond.

As a result of those findings, Cbeyond requests that the Commission:

1. Order AT&T to pay all intrastate access charges due and owing to Cbeyond for intrastate access charges.

2. Order such other relief as the Commission deems appropriate, including the assessment of penalties to the fullest extent allowed by section 364.285, Florida Statutes.

In support of this Complaint, Cbeyond states:

PARTIES

1. The name and address of Petitioner is:

Cbeyond Communications, LLC
320 Interstate North Parkway, Suite 300
Atlanta, Georgia 30339

2. The name, address, and telephone number of Complainant's representatives for purposes of service during the proceeding are:

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3. Cbeyond is a certified CLEC and interexchange carrier (IXC) authorized to do business in Florida. It provides local exchange services in Florida, including interconnection services and exchange access services pursuant to its Price List on file with the Commission and

the Federal Communications Commission (FCC) and pursuant to interconnection agreements with incumbent local exchange companies, including AT&T.

4. AT&T is a certificated incumbent local exchange company (ILEC) and long distance (LXC) provider in Florida. It provides wholesale services and retail services in the state.

5. AT&T Florida's address is:

150 South Monroe Street, Suite 400
Tallahassee, FL 32301

JURISDICTION

6. The Commission has jurisdiction over this Complaint pursuant to sections 364.01, 364.02, 364.16, 364.163, 364.185, 364.19, 364.27, 364.285, 364.337, Florida Statutes.

FACTUAL BACKGROUND

7. When Cbeyond terminates interexchange traffic to one of its customers that originates from a non-Cbeyond customer, it is entitled to assess access charges to the customer's carrier.

8. Thus, when interexchange traffic destined for a Cbeyond customer is sent from an AT&T customer to Cbeyond, Cbeyond is entitled to be compensated for terminating such traffic via access charges.

9. Cbeyond has on file with this Commission an Access Services Price List, effective March 21, 2008 (attached hereto as Exhibit 2) which sets out the prices for access services.

10. Cbeyond has been providing interexchange access services in Florida pursuant to its Access Services Price List since March 22, 2008. AT&T has utilized Cbeyond's intrastate access services since that date and continues to use these services today.

11. Cbeyond has timely billed AT&T for the intrastate access services by sending monthly invoices beginning in April 2008 and continuing to date. AT&T paid the first two invoices, April and May 2008, in full and then began paying only a small portion of the remaining invoices activities. The total outstanding balance on all invoices is \$13,739.43 through February 2009.

12. The parties have endeavored to resolve this billing dispute to no avail.

COUNT I

Violation of Section 364.16(3), Florida Statutes

13. Cbeyond realleges the allegations made in paragraphs 1 through 12 of this Complaint as though fully set forth herein.

14. Section 364.16(3)(a), Florida Statutes, provides:

No local exchange telecommunications company or competitive local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

15. Section 364.16(3)(b), Florida Statutes, provides:

Any party with a substantial interest may petition the commission for an investigation of any suspected violation of paragraph (a). In the event any certificated local exchange service provider knowingly violates paragraph (a), the commission shall have jurisdiction to arbitrate bona fide complaints arising from the requirements of this subsection and shall, upon such complaint, have access to all relevant customer records and accounts of any telecommunications company.

16. AT&T knowingly delivered interexchange traffic to Cbeyond. Therefore, AT&T should have paid Cbeyond access charges for the termination of interexchange traffic.

17. Cbeyond alleges that AT&T knew that traffic delivered to Cbeyond was, in fact, interexchange traffic, and that such traffic was knowingly delivered with no intent to pay Cbeyond for termination of such traffic.¹

18. AT&T is well aware of and has admitted its obligation to pay access charges for intrastate traffic. In comments filed with this Commission on September 5, 2008, AT&T responded to the following question:

13. Do large IXCs have monopsony power in their purchase of switched access services from CLECs? If so, *do those IXCs use that monopsony power to withhold payment and to engage in other unjust and unreasonable conduct to force CLECs to provide access service at rates other than tariffed rates?*

[AT&T] Response:

CompSouth's response to this question erroneously implies that Large IXCs have meaningful influence on the CLEC pricing, and suggests that IXCs can refuse payment or engage in other self help methods. Comp South is wrong; *all of the self help practices alleged are prohibited either by statute or regulations.*

...

Second, once the CLEC rate is filed, AT&T is *compelled* to pay...²

19. In support of its statement that it must pay CLEC access charges, AT&T included the following footnote to the above paragraph:

See Hyperion Order, 12 FCC Rcd 8596, 8608-8611, 1111 23-29 (1997). *Cf. Advemtel*, 118 F. Supp. 2d at 687 (concluding that parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed with the Commission). See *also* e.g. Order No. PSC-04-0974-FOF-TP,

¹ In a matter before the Kentucky Public Service Commission, *Brandenbrug Telecom LLC v. AT&T Communications of the South Central States, Inc.* the Kentucky Commission found that: "AT&T admits that it provides long-distance service to customers in Kentucky, including some end-users who receive local exchange service from Brandenburg. AT&T admits that it has not paid Brandenburg for intrastate switched access services. AT&T has informed Brandenburg that it will pay only for access services that it orders through a CSA for access service. AT&T claims that this document will contain additional terms and conditions not found in Brandenburg's tariff." *Order* at 1-2 (May 1, 2003).

² AT&T Reply Comments, Docket No. 080000, CLEC Intrastate Access Charges Workshop at 10-11 (Sept. 5, 2008), emphasis supplied. (Exhibit 1).

issued October 7, 2004 (discussion of the "filed rate doctrine" and finding that the tariff rates that were on file were the rates *that* were required to be charged).³

20. Further, when AT&T's Mr. Follensbee was questioned regarding instances where AT&T had refused to pay access charges to CLECs, he disclaimed such a policy and said:

I didn't know this [failure to pay access charges] was going on, and I will find out more about it, because this [obligation to pay] was clearly the policy of the company. We wouldn't have put it in there [response to question 13] if it wasn't. So now I've got to go back and say, all right, guys, why is practice not policy.⁴

21. Thus, AT&T has admitted and recognized that it is required to pay access charges on the intrastate interexchange traffic it sends to Cbeyond.

22. Based on the foregoing, AT&T has violated section 364.16(3)(a), Florida Statutes, by knowingly delivering traffic for which terminating access service charges would apply without paying the appropriate charges for such access service. Cbeyond has estimated the amount of access charges due to be in excess of \$13,000 plus interest, for the period April 2008 February 2009. AT&T continues to route interexchange traffic to Cbeyond. Therefore, Cbeyond reserves the right to amend this count to include additional amounts that have accrued since February 2009 and will accrue after the filing of this Complaint.

23. AT&T has refused to comply with or willfully violated section 364.16(3)(a), Florida Statutes.

COUNT II

Failure to Pay Tariffed Charges

24. Cbeyond realleges the allegations made in paragraphs 1 through 23 of this Complaint as though fully set forth herein.

³ *Id.* at 10.

⁴ Transcript of Staff Workshop, July 26, 2008 at 159-160.

25. During the period at issue, Cbeyond has had on file with the Commission its Access Services Price List by which Cbeyond provides IXCs access services and assesses charges for such services.

26. The Access Services Price List requires payment of access charges for Cbeyond termination of interexchange traffic to AT&T users.

27. Order No. PSC-04-0974-FOF-TP, which AT&T relied on in its response to question 13 quoted above (Exhibit 1), states:

The 'filed rate doctrine holds that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged. 'Global Access Limited v. AT&T Corp., 978 F. Supp. 1068 (S.D. Fla. 1997); citing Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 615 (11th Cir. 1995). Simply, BellSouth states, the filed rate doctrine precludes a party from disputing a filed rate. 'Application of the filed rate doctrine can at times be harsh, but its justification lies in the principle that carriers should not be able to discriminate against customers in the setting of service rates; one rate -- the filed rate -- is the applicable rate for all... ' Global Access Limited, 978 F. Supp. at 1073; see also MCI Telecomm. Corp. v. Best Tel. Co., 898 F. Supp. 868, 872 (S.D. Fla. 1994).

This doctrine is equally applicable to rates AT&T must pay.

28. AT&T has knowingly delivered traffic for which terminating access service charges would apply without paying the appropriate charges for such access service. Cbeyond has estimated the amount of access charges due to be in excess of \$13,000, plus interest. AT&T continues to route interexchange traffic to Cbeyond. Therefore, Cbeyond reserves the right to amend this count to include additional amounts that have accrued since February 2009 and will accrue after the filing of this Complaint.

COUNT III

Violation of Interconnection Agreement

29. Cbeyond realleges the allegations made in paragraphs 1 through 28 of this Complaint as though fully set forth herein.

30. On March 13, 2007, BellSouth (now AT&T) and Cbeyond executed an Interconnection Agreement (ICA). The ICA was approved by the Commission in Docket No. 040514-TP.

31. Section 8.4.4 of the ICA provides:

When the originating Party delivers a call to the terminating Party over Switched Access arrangements, the originating Party will pay the terminating Party terminating switched access charges as set forth in the appropriate Party's tariff as filed and effective with the FCC or Commission, or reasonable and nondiscriminatory web-posting if the FCC or Commission does not require filing a tariff.

32. This provision applies to any traffic delivered to AT&T by any toll carrier, including any AT&T affiliated companies. AT&T has violated this provision of the ICA by failing to pay terminating access to Cbeyond for traffic which it terminates.

WHEREFORE, for the reasons set forth above, Cbeyond respectfully requests that the Commission issue an Order and:

A. Find that AT&T has failed to pay Cbeyond access charges due and owing under Cbeyond's Access Services Price List since March 2008;

B. Find that AT&T has failed to pay Cbeyond access charges due and owing under its ICA with Cbeyond since March 2008;

C. Find AT&T to be in violation of section 364.16(3)(a), Florida Statutes, for knowingly terminating traffic for which access charges would apply without paying the appropriate access charges for such service;

D. Require AT&T to pay the sums identified herein for unpaid access charges plus interest at the maximum statutory rate, and applicable late payment penalties;

E. Find that AT&T refused to comply with or willfully violated section 364.16(3)(a), Florida Statutes, and is therefore subject to penalties to be determined by the Commission pursuant to section 364.285, Florida Statutes; and

F. Grant such other relief as the Commission deems just and proper.

s/ Vicki Gordon Kaufman

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Attorneys for Cbeyond

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Complaint was served via Electronic Mail and U.S. Mail this 1st day of April, 2009 to the following:

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s/ Vicki Gordon Kaufman
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