

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 090135-TP
ORDER NO. PSC-09-0382-PCO-TP
ISSUED: May 29, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING PARTIAL MOTION TO DISMISS

BY THE COMMISSION:

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

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harmd 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 Order addresses AT&T's Partial Motion to Dismiss.

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, we review 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 this 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 us 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, we 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 we 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.

Decision

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 our review in this docket. We find the alleged facts underlying the Cbeyond allegations of anticompetitive behavior and violation of the interconnection agreement to 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.

Taken as true, we find that 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, we find 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, we find that the Complaint states a cause of action upon which relief may be granted as required by *Varnes*. Finally, we find that this Commission, on its own initiative, has authority to investigate possible violations of rules and statutes which prohibit cramming and that we should not exclude a review of alleged cramming in this docket. As such, we hereby deny the AT&T Partial Motion to Dismiss.¹

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T's Partial Motion to Dismiss is denied. It is further

ORDERED that this docket shall remain open to address the Cbeyond Complaint against AT&T.

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 this Commission initiating a show cause proceeding against AT&T for cramming. Any penalty imposed by this 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.

By ORDER of the Florida Public Service Commission this 29th day of May, 2009.

ANN COLE
Commission Clerk

By: Dorothy E. Menasco
Dorothy E. Menasco
Chief Deputy Commission Clerk

(SEAL)

CWM

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.