

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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NOV 17 2009
COMMISSION CLERK

DATE: November 17, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy) *CM*
Division of Regulatory Analysis (Bloom) *B*

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: 12/01/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Klement

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,

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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.

On April 7, 2009, AT&T filed a Partial Motion to Dismiss and Answer to Cbeyond's Complaint. On April 14, 2009, Cbeyond filed its Response to AT&T's Partial Motion to Dismiss ("Response"). By Order No. PSC-09-0382-PCO-TP, issued on May 29, 2009, the Florida Public Service Commission ("Commission") denied AT&T's Partial Motion to Dismiss. An Issue Identification Conference was held on August 26, 2009. By Order No. PSC-09-0653-PCO-TP, issued on September 30, 2009, the Commission established procedure and scheduled a hearing for March 17, 2010, to resolve the issues presented in this matter. On November 4, 2009, Cbeyond filed its Notice of Voluntary Dismissal of Complaint without Prejudice ("Notice of Voluntary Dismissal").

Discussion of Issues

Issue 1: Should the Commission acknowledge the Cbeyond Notice of Voluntary Dismissal and close the docket?

Recommendation: Yes. The Commission should acknowledge the Cbeyond Notice of Voluntary Dismissal and close the docket. **(Murphy)**

Staff Analysis: On November 4, 2009, Cbeyond filed a Notice of Voluntary Dismissal in this docket in which Cbeyond asks the Commission to dismiss without prejudice the Cbeyond complaint filed on March 18, 2009.

A plaintiff's right to take a voluntary dismissal is absolute. Fears v. Lunsford, 314 So.2d 578, 579 (Fla. 1975). Once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act on a matter. Randle Eastern Ambulance Service, Inc. v. Vasta, 360 So.2d 68, 69 (Fla. 1978). The voluntary dismissal by Cbeyond is without prejudice. *See* Rule 1.420(1), Florida Rules of Civil Procedure.

Thus, staff recommends that the Commission acknowledge Cbeyond's Notice of Voluntary Dismissal and close Docket No. 090135-TP.