

State of Florida



Public Service Commission

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COMMISSION CLERK

DATE: February 2, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Robinson) *PER*
Division of Regulatory Analysis (Hawkins, Lowery) *[Signatures]*

RE: Docket No. 110306-TP – Request for emergency relief and complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute.

AGENDA: 02/14/12 – Motion to Dismiss – Oral Argument not Requested; Participation at Commission’s Discretion.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110306.RCM.DOC

Case Background

On November 7, 2011, FLATEL filed a petition for an emergency stay in connection with BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) alleged disconnection of its services for nonconformance with the interconnection agreement (ICA) payment terms. The ICA requires timely payment of billed amounts including disputed amounts. FLATEL alleged that it is entitled to promotion credits and therefore its nonpayment of services billed was for outstanding promotion credits. FLATEL’s services have been disconnected.¹

¹ FLATEL began transferring its end-user customers from its ICA with AT&T Florida to its commercial agreement with AT&T Florida prior to the disconnection of its resale services.

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In its petition for an emergency stay, FLATEL alleged that (1) it attempted to resolve its dispute through negotiations with AT&T Florida; (2) it currently has no past due balance and AT&T Florida's offered extension payment plan is not an attempt to resolve any monetary issues between AT&T Florida and FLATEL; (3) AT&T Florida offered immediate relief for promotions to its end users but not the same instant offer to FLATEL's end users; (4) AT&T Florida positioned FLATEL to negotiate without counsel; and (5) AT&T Florida refused to address overcharges from 2007 to date.

On November 28, 2011, AT&T Florida filed its motion to dismiss FLATEL's petition. AT&T Florida asserted that FLATEL's petition failed as a matter of law as it ignored the "plain and unambiguous provision" in the ICA that requires timely payment of bills including disputed amounts.

On December 12, 2011, FLATEL filed a request for a 30-day extension to respond to AT&T Florida's dismissal motion. On December 14, 2011, AT&T Florida filed a response opposing FLATEL's request for an extension. FLATEL was granted 5 days to file its opposition. On December 20, 2011, staff had an informal meeting with the parties.

On December 21, 2011, FLATEL filed its opposition to the dismissal motion. On December 29, 2011, AT&T Florida filed its Response to FLATEL's Opposition.

Neither party requested oral argument; however, pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.), the Commission has the discretion to hear from the parties, if it so desires.

Staff filed a recommendation for the January 24, 2012 agenda conference, which was deferred.

This recommendation addresses AT&T Florida's dismissal motion. The Commission has jurisdiction over this subject matter pursuant to Section 364.16, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission grant AT&T Florida's Motion to Dismiss?

Recommendation: Yes. Staff recommends that the Commission grant AT&T Florida's dismissal motion, as the Commission lacks authority to grant an injunction, and further, FLATEL's petition is moot. (Robinson, Lowery, Hawkins)

Staff Analysis:

Standards of Review

A. Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a petition.² In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the petitioner, the petition still fails to state a cause of action for which relief may be granted.³ When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed and all reasonable inferences drawn from the petition must be made in favor of the petitioner.⁴ Where agreement terms are incorporated into the petition by reference and are the basis of the petition, the agreement can be reviewed in determining the "nature of the alleged claim."⁵ A court may not look beyond the four corners of the petition in considering its legal sufficiency.⁶ However, the attachment of a document to the petition that conclusively negates the petition is sufficient grounds for dismissal.⁷

B. Emergency Stay

Pursuant to Section 364.015, F.S., violations of Commission orders or rules, in connection with the impairment of a telecommunications company's operations or service, constitute irreparable harm for which there is no adequate remedy at law, and for which relief can be sought in the circuit court. To grant a petition for an emergency stay or injunctive relief, the Commission must have the authority to grant the requested relief. See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011 stating that the Commission has consistently held that it lacks authority to grant injunctive relief.⁸

² Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

³ *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

⁴ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁵ See Veal v. Voyager Prop. & Cas. Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011).

⁶ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

⁷ See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005) (citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

⁸ See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida

Staff Analysis

The ICA between AT&T Florida and FLATEL provides that disputes relating to the interpretation or the implementation of the agreement can be resolved by the Commission. See ICA, Sec. 8. The ICA defines the regulating commission as the appropriate regulatory agency in each state of AT&T's nine-state region. See ICA, Definitions. Pursuant to Section 364.16(3), F.S., the Commission may, upon request, arbitrate and enforce interconnection agreements and has jurisdiction to resolve disputes among carriers regarding, but not limited to, local interconnections and reciprocal compensation. Staff agrees with AT&T Florida that section 364.162, F.S., was repealed on July 1, 2011; however, staff believes the Commission retains jurisdiction over disputes regarding interconnection agreements pursuant to Section 364.16, F.S.⁹

AT&T Florida's Motion to Dismiss

AT&T Florida asserted that FLATEL's petition should be dismissed because:

- FLATEL's petition failed as a matter of law as AT&T Florida's action conforms to the "plain and unambiguous provisions" of the agreement between the parties in which FLATEL agreed to make payments for all services billed including disputed amounts. Therefore FLATEL's promotional claims do not oblivate its payment obligations.
- The Commission does not have jurisdiction to grant injunctions and FLATEL's petition failed to meet well established pleading requirements, as it is too vague as to both operative facts and law for the Commission to grant the relief sought.
- FLATEL failed to establish that its rights in negotiating and signing the agreement were not sufficiently protected by federal and state statutes and rules, and FLATEL's assertion that it was forced to sign the agreement without counsel is meritless. The Commission approved the agreement, and the Commission was afforded the opportunity to reject the agreement if it was inconsistent with the public's interest.
- FLATEL cited a repealed section of Chapter 364, F.S., in its petition as section 364.162, F.S., was repealed effective July 1, 2011, more than two months before AT&T Florida began its collection efforts for outstanding bills.
- AT&T Florida began disconnecting FLATEL service on November 8, 2011, and disconnection has been completed.

regarding interpretation of the parties' interconnection agreement (noting that a petition for an emergency stay is akin to a petition for an injunctive relief and the Commission lacks authority to grant injunctive relief).

⁹ See Order No. PSC-11-0420-PCO-TP, issued on September 28, 2011, in Docket No. 090538-TP, In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et. al. (stating that "[t]he legislation has not modified our exclusive jurisdiction over wholesale carrier-to-carrier disputes, and our obligation to ensure fair and effective competition among telecommunications service providers; therefore, we still retain jurisdiction to oversee fair and effective competition").

FLATEL's Response in Opposition

FLATEL asserted that the Commission's role is to protect the public's interest and that AT&T Florida is not providing services in accordance with the Telecommunications Act as evidenced by:

- The ICA was non-negotiable and unfair, FLATEL was forced to sign the amendments because it had an established client base that needed service, and FLATEL is not arguing the terms of the ICA but is attempting to resolve billing disputes with AT&T Florida.
- FLATEL paid AT&T Florida every month for 15 years and is not requesting an alteration of the ICA terms but is challenging AT&T Florida's practice of not granting instant credits to FLATEL end users in parity with AT&T Florida's end users.
- The promotional offers are not disputes and the payment provision of the ICA is not relevant. FLATEL defines disputes as defined in the ICA as overcharges, and AT&T Florida should reinstate FLATEL's account.

The Commission's rules do not contemplate the filing of a response to a Response in Opposition to a dismissal motion. The Commission considers such pleadings an inappropriate pleading and the arguments raised in these pleadings are not considered. See Order No. PSC-03-0525-FOF-TP, issued on April 21, 2003.¹⁰ Here, however, FLATEL's opposition to AT&T Florida's dismissal motion raised new issues not mentioned in FLATEL's initial petition. On December 29, 2011, AT&T Florida filed a response to FLATEL's opposition but AT&T Florida's response merely restated its arguments in its dismissal motion. On January 11, 2012, FLATEL filed a response to AT&T Florida's December 29, 2011 filing. On January 18, 2012, AT&T Florida filed its response to FLATEL's January 11, 2012 filing. Since the Commission considers these pleadings inappropriate pleadings, staff comports to the Commission's practice and did not consider these pleadings in formulating a recommendation. However, these pleadings are also irrelevant as the Commission lacks jurisdiction to grant the requested injunction.

Discussion

Staff believes that FLATEL failed to identify the violation of any statute, rule, order or the ICA sufficient to constitute a cause of action for an emergency stay. Additionally, the Commission lacks jurisdiction to grant emergency stays and FLATEL's services have been disconnected. Therefore, FLATEL's petition should be dismissed.

¹⁰ See Order No. PSC-03-0525-FOF-TP, issued on April 21, 2003, in Docket No. 020919-TP, In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreements with BellSouth Telecommunications, Inc. (finding that AT&T's Response to BellSouth's Response was an inappropriate pleading not contemplated by our rules or the uniform rules, and thus the Commission shall not consider the arguments raised in AT&T's Response to BellSouth's Response).

Staff recommends that FLATEL's petition should be dismissed as, even if taken as true, it fails to state a cause of action. FLATEL's allegations regarding AT&T Florida's disconnection of services is insufficient to constitute a cause of action, as FLATEL failed to allege any violated statute, rule, order, or the ICA in connection with the discontinuation of services.¹¹ The Commission articulated in Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, that carriers can enforce ICAs including the disconnection of services for violation of the ICAs where the payment terms are clear and unambiguous.¹² Here, the ICA provides that FLATEL should make payments for services provided by AT&T Florida including disputed charges on or before the next bill date. See ICA, Attach. 7, Sec. 1.4. The ICA also provides that services can be discontinued for nonpayment of bills. See ICA Attach. 7, Sec. 1.5. FLATEL's allegations fail to demonstrate that AT&T Florida violated any statutes, rules, or order or that AT&T Florida's disconnection of FLATEL's services was not in accordance with the ICA. Therefore, FLATEL failed to properly allege a cause of action for the relief of an emergency stay.

FLATEL's allegation that it was forced to negotiate with AT&T Florida without counsel, if taken as true, does not demonstrate the violation of a statute, rule or order sufficient to constitute a cause of action for an emergency stay. Likewise, FLATEL's statement that the parties failed attempt to resolve the matter through negotiations does not constitute a cause of action because it fails to show a violation of a statute, rule, or order. FLATEL's allegation that AT&T Florida's offered extended payment plan was not an attempt to resolve any monetary issues also fails to demonstrate the violation of a statute, rule, or order.

FLATEL's statement that the disputed balance includes promotions that should be offset against amounts it owes to AT&T Florida is not a cause of action as it relates to granting an emergency stay. The ICA requires that all services billed should be paid including disputed amounts, and FLATEL's petition is for an emergency stay to prevent disconnection of its service for nonpayment of bills. Therefore, FLATEL's assertion regarding the promotions does not show that AT&T Florida breached the ICA or violated any statute, rule, or order sufficient to constitute a cause of action for an emergency stay.

FLATEL filed its petition on November 7, 2011, citing Section 364.162, F.S., as its basis for the emergency stay. Section 364.162, F.S., which required a 30-day response to petitions for emergency relief, was repealed by the Legislature effective July 2011. Also, disconnection of FLATEL's service began on November 8, 2011 and is now complete. Since FLATEL's services

¹¹ See Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekn against Florida Power & Light Co., (noting that a determination of a petition's cause of action requires examining the substantive law elements and stating that the improper allegation of the "elements of the cause of action that seeks affirmative relief" is sufficient grounds for dismissal, citing Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957)).

¹²See Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, in Docket No. 100021-TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida (The Commission issued a procedural order requesting that LifeConnex post a bond for the \$1.4 Million owing to AT&T Florida and requesting that AT&T Florida postpone its intended disconnection. The Commission clarified that its order was not an equitable remedy or an injunction, and that AT&T Florida could enforce the ICA for nonpayment on a going forward basis including disconnection of services for nonpayment as the ICA provided that LifeConnex was required to make timely payments including disputed amounts).

have been disconnected, FLATEL's petition for an emergency stay is moot. Finally, FLATEL seeks an emergency stay, and staff interprets FLATEL's request as akin to a request for an injunctive relief. Although the Commission may, upon request, arbitrate and enforce interconnection agreements and has jurisdiction to resolve disputes among carriers, the Commission has consistently held that it lacks authority to grant injunctive relief.¹³ Therefore, staff recommends that FLATEL's petition be dismissed.

Section 120.569(2)(c), F.S., provides, in part, that the dismissal of a petition should be without prejudice to petitioner's filing a timely amended petition curing the defect. Staff recommends that the Commission dismiss FLATEL's petition without prejudice, and FLATEL may file an amended petition.

As mentioned above, Section 364.16(3), F.S., provides in part that the Commission may, upon request, arbitrate and enforce interconnection agreements and it has jurisdiction to resolve disputes among carriers, including but not limited to, local interconnections and reciprocal compensation. FLATEL petitioned for an emergency stay and did not request that the Commission resolve any promotional credit disputes. Should FLATEL choose to file an amended petition, staff recommends that the petition should 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 requests the Commission's resolution.

Conclusion

Staff recommends that the Commission grant AT&T Florida's dismissal motion, as the Commission lacks authority to grant an injunction, and further, FLATEL's petition is moot. The dismissal should be without prejudice.

¹³ See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement.

Docket No. 110306-TP
Date: February 2, 2012

Issue 2: Should the docket be closed?

Recommendation: Yes. If the Commission agrees with staff on issue 1, FLATEL's petition should be dismissed without prejudice and the docket should be closed. (Robinson, Lowery, Hawkins)

Staff Analysis: Yes. If the Commission agrees with staff on issue 1, FLATEL's petition should be dismissed without prejudice and the docket should be closed.