

Marguerite McLean

100021-TP

From: nicki.garcia@akerman.com
Sent: Thursday, February 25, 2010 4:46 PM
To: Filings@psc.state.fl.us
Cc: Charles Murphy; Jamie Morrow; mg2708@att.com; th9467@att.com; hwalker@babco.com; matthew.feil@akerman.com
Subject: Electronic Filing - Docket No. 100021-TP
Attachments: 20100225174333400.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

Person Responsible for Filing:

Matthew Feil
AKERMAN SENTERFITT
 106 East College Avenue, Suite 1200
 Tallahassee, FL 32301
 (850) 425-1614 (direct)
 (850) 222-0103 (main)
 matt.feil@akerman.com

Docket No. and Name: Docket No. 100021 -TP - In Re: Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC

Filed on behalf of: LifeConnex Telecom, LLC

Total Number of Pages: 14

Description of Documents: Answer, Affirmative Defenses and Counterclaims of LifeConnex Telecom, LLC

Nicki Garcia

Office of:
 Lila A. Jaber
 Matthew Feil
 Braulio Baez

Akerman Senterfitt
 106 East College Avenue, Suite 1200
 Tallahassee, FL 32301
 (850) 425-1677
 Nicki.Garcia@Akerman.com



www.akerman.com

CONFIDENTIALITY NOTE: The information contained in this transmission may be privileged and confidential information, and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this transmission in error, please immediately reply to the sender that you have received this communication in error and then delete it. Thank you.

CIRCULAR 230 NOTICE: To comply with U.S. Treasury Department and IRS regulations, we are required to advise you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this transmittal, is not intended or written to be used, and cannot be used, by any person for the purpose of (i) avoiding penalties under the U.S. Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this e-mail or attachment.

DOCUMENT NUMBER: 01293 FEB 25 2010

2/25/2010

FPSC-COMMISSION CLERK



Dallas
Denver
Fort Lauderdale
Jacksonville
Los Angeles
Madison
Miami
New York
Orlando
Tallahassee
Tampa
Tysons Corner
Washington, DC
West Palm Beach

Suite 1200
106 East College Avenue
Tallahassee, FL 32301
www.akerman.com
850 224 9634 *tel* 850 222 0103 *fax*

February 25, 2010

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

**Re: Docket 100021-TP – Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T
Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC**

Dear Ms. Cole:

Please find attached for filing the Answer, Affirmative Defenses and Counterclaims of LifeConnex Telecom, LLC.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Matthew Feil

Attachments

DOCUMENT NUMBER DATE

01293 FEB 25 09

FPSC-COMMISSION CLERK

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Complaint of BellSouth Telecom-)
munications, Inc., d/b/a AT&T Florida)
Against LifeConnex Telecom, LLC f/k/a)
Swiftel, LLC)
_____)

Docket No. 100021-TP

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS OF
LIFECONNEX TELECOM, LLC

LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex" or "Respondent") hereby responds to the Complaint filed by BellSouth Telecommunications, Inc., d/b/a AT&T Florida ("AT&T") concerning a billing dispute between the parties, posits its affirmative defenses and sets forth its counterclaims. In support hereof, LifeConnex states as follows:

NARRATIVE SUMMARY

LifeConnex is a competitive local exchange telephone company providing service to approximately 6,800 subscribers in Florida, all of whom are residential and nearly all of whom are low income customers receiving lifeline service. LifeConnex resells the services of AT&T. As a reseller, LifeConnex is entitled under federal law to receive from AT&T the same "cash back" credits and promotional discounts that AT&T gives to its own retail customers. Those credits and discounts can offset, in large part, LifeConnex's monthly bills from AT&T.¹

¹ AT&T's Complaint should not be read to imply that Respondent must be behind on its bills. That implication is incorrect. LifeConnex is currently up-to-date on its bills and regularly pays AT&T all amount owed, less the promotional discounts and rebates owed by AT&T to LifeConnex, and in dispute by the parties. LifeConnex primarily purchases AT&T services which qualify for rebates and discounts. This

AT&T is not entitled to any relief sought in its Complaint. To the contrary, AT&T owes LifeConnex a substantial amount of money in unpaid -- or underpaid -- rebates and discounts which AT&T offers its own retail customers but refuses to pay its wholesale customers in violation of federal law and the parties' interconnection agreement.

Under the Federal Telecommunications Act and the rules and orders of the Federal Communications Commission, AT&T is required to offer its services for resale (1) "subject to the same conditions" that AT&T offers its own end users and at (2) "the rate for the telecommunications service less avoided retail costs." 47 CFR §51.603(b) and 47 CFR §51.607. Other than in limited circumstances not applicable here, AT&T cannot impose any restrictions on the resale of its services unless AT&T "proves to the state commission that the restriction is reasonable and non-discriminatory." 47 CFR §51.613.

For example, when AT&T offers new customers a rebate of "\$50 cash back" for subscribing to residential telephone, AT&T must make the same offer available to resellers. In other words, the reseller will still pay AT&T the normal wholesale rate, that is, the tariffed price less the wholesale discount as determined by the state regulators.

litigation is not about whether LifeConnex pays its bills, but about the proper amount of those bills and whether AT&T is giving LifeConnex the full amount of the discounts and rebates to which a reseller is entitled under federal law. There have also been, and continue to be, disagreements between the parties over the time it takes AT&T to calculate the rebates and discounts and credit them to the reseller's account. AT&T has, at various times, been months behind while many resellers, including LifeConnex, typically deduct the amounts owed by AT&T when paying their monthly bills. Although AT&T has worked on reducing these delays, operational problems remain a continuing source of dispute between the parties. The operational disputes are not before the Commission at this time.

The reseller is also, however, entitled to purchase this service "under the same conditions" as an AT&T retail customer, that is, with a rebate of "\$50 cash back."

In this example, the rebate offer does not change the competitive balance between the carriers. On the one hand, AT&T earns exactly the same margin – the tariffed rate less the wholesale discount – whether or not AT&T offers new customers a rebate. On the other hand, Respondent receives exactly the same benefit that it normally receives from the avoided cost discount – the tariffed rate less the wholesale discount – and the same \$50 rebate that AT&T offers new retail customers. Like AT&T, Respondent is no better or worse off than Respondent would be if AT&T was not offering the \$50 rebate. Neither carrier gains a competitive advantage or a financial windfall as a result of the rebate program.

That is the way the resale obligation is supposed to work. Assuming that the avoided retail costs are calculated correctly, the resale rules preserves competitive neutrality. Neither AT&T nor the reseller gains a competitive advantage whether a service is sold at retail or wholesale and neither gains an advantage whether AT&T is selling at the tariffed rate or offering a cash rebate.

But AT&T does not follow the rules. When AT&T offers its retail customers a \$50 rebate, AT&T will not offer the same rebate to a reseller. Instead, AT&T subtracts the wholesale discount from the rebate before giving it to the reseller. If, for example, the wholesale discount is 20%, AT&T will pay the reseller only \$40 instead of \$50, gaining a \$10 windfall – and a competitive advantage – each time a line is sold at wholesale rather than retail. Here is a simple example, which assumes that the wholesale

discount is 20%: When AT&T sells a residential telephone service for a tariffed rate of \$30 per month, the reseller pays a wholesale rate of \$24 a month for the line (Retail rate less 20%.) If AT&T pays a \$50 rebate in connection with the sale of the line to a new customer, AT&T only gives the reseller a credit of \$40 (\$50 less the 20% wholesale discount). When the first month's credits and payments are balanced, the reseller has a net credit of \$16 (the \$40 credit to the reseller less the \$24 payment to AT&T). The retail customer, on the other hand, has a net credit of \$20 at the end of the month (the \$50 credit less the \$30 tariffed price). Using AT&T's approach, the "retail" rate is actually \$4 less than the "wholesale" rate -- a classic, illegal price squeeze. If, on the other hand, AT&T gave the reseller credit for the full, \$50 rebate, the reseller would have a net credit of \$26 (the \$50 credit to the reseller less the \$24 payment to AT&T) and the net wholesale price would, as it should, be six dollars less than the retail price.

This, then, is the first issue raised in AT&T's Complaint: When AT&T offers its retail customers a cash rebate, what is proper amount of the rebate AT&T must offer to resellers? Respondent's contends AT&T must offer the same cash rebate to a reseller. AT&T contends that it is only required to offer the amount of the rebate minus the wholesale discount. In either case, the reseller is still charged for the line itself at the regular tariffed rate, less the wholesale discount. Under Respondent's approach, the competitive balance reflected in the calculation of the avoided cost discount is preserved whether or not AT&T offers a rebate of \$100, \$50, or any other amount. Under AT&T's approach, AT&T gains a competitive advantage by giving the reseller only a percentage

of the rebate. The larger the rebate, the larger the windfall, the larger AT&T's competitive advantage.

The second issue raised in the Complaint is not about calculating the amount of a rebate owed to a reseller but about determining whether a particular AT&T promotion is even subject to the resale requirement.

Since a 2007 decision of the US Court of Appeals for the Fourth Circuit in BellSouth v. Sanford, 197 F.3d 663 (4th Circuit, 2007), BellSouth (now AT&T) has not disputed that when it offers a cash rebate to attract new retail customers, the company must also offer a rebate – at least of some amount – to resellers serving similarly situated wholesale customers. But when the cash is offered, not to the new user but to an existing AT&T customer as a reward for referring new business to the company, AT&T argues that this "referral" promotion is not subject to resale and that AT&T owes nothing to a reseller serving similarly situated customers.

The Sanford court held that when AT&T offers cash, gift cards, or other items of value to its retail customers in exchange for the purchase of regulated service, AT&T has, in effect, reduced the price of that service and must offer that same price reduction, along with the value of the avoided cost discount, to resellers. In an apparent attempt to evade the Court's holding, AT&T has decided to offer cash, gift cards, or other items of value to its retail customers in exchange for the purchase of regulated service, *not by the existing customer, but by a new customer who is referred to AT&T by the existing customer*. The rebate, in other words, goes to an existing customer, not for purchasing services himself, but as a reward for persuading someone else to purchase AT&T's telephone service. The

impact on AT&T is the same, of course, as if AT&T had paid the new customer directly. In exchange for a payment of, for example, \$50, AT&T has gained a new subscriber. But the impact on a reseller is quite different, according to AT&T. The company contends that this promotion is not subject to resale and refuses to pay anything when an existing customer of an AT&T reseller refers new business to the reseller. The advantage to AT&T is the same whether the referral brings a new retail customer or a new wholesale customer to AT&T. But in the retail market, AT&T pays a fee for getting a new customer, while in the wholesale market, AT&T gets the same new business but pays nothing at all.

This is the second issue raised in the Complaint. LifeConnex believes it is entitled to resell AT&T's referral promotion and collect a rebate equal to the value of the payment offered by AT&T to its retail customers for referring new business. AT&T contends that it is not required to offer this promotion to resellers and that it owes LifeConnex nothing for bringing new, wholesale business to AT&T.

Finally, LifeConnex brings its own counter-claims against AT&T concerning some of AT&T's other restrictions on the resale of regulated services.

- a. AT&T offers to waive the line connection charge for new retail customers and is, therefore, required to offer resellers a waiver of equal value. Instead, AT&T offers resellers only a portion of the value of the waiver of the line connection fee.
- b. AT&T offers retail customers a discount on the purchase of regulated telephone service if the customer purchases a bundle of

regulated and non-regulated services. AT&T, however, refuses to offer unbundled telephone service for resale at a comparable discount.

- c. AT&T has recently announced its intention to eliminate almost entirely the cash rebates paid to resellers. For example, AT&T has stated that competitive carriers in Florida who resell a "\$50 cash back" promotion are entitled to receive a rebate of only \$6.07. Implementation of this proposal has been enjoined by a Federal District Court in Texas. That decision is now under review by the Fifth Circuit. Oral argument is scheduled for March 1, 2010.

In each case, AT&T has imposed, or tried to impose, a restriction on the resale of its service without first "prov[ing] to the state commission that the restriction is reasonable and non-discriminatory" as AT&T is required to do under the FCC's rules. 47 C.F.R. §51.613(b).

SPECIFIC RESPONSES TO AT&T'S COMPLAINT

The Section of AT&T's Complaint entitled "Background and Summary of Petition" and all included footnotes are AT&T's version of the situation and require no response from Respondent. Unless below Respondent specifically admits any of the matters asserted, those matters are denied.

1. Admitted.
2. Admitted.

3. Admitted. The Respondent is a competitive local exchange carrier certified by the Commission to offer intrastate telecommunications services. The Respondent currently serves approximately 6,800 customers in Florida, primarily through the resale of AT&T's services. The address of Respondent's corporate headquarters is: 13700 Perdido Key Drive, Unit B222, Perdido Key, FL 32057.

4. Because of the voluminous Exhibits to AT&T's Complaint, Respondent has not been yet able to review each page of those exhibits and is thus without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 4 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied. However, Respondent also states that it has no reason to dispute AT&T's assertion that the Exhibits are accurate copies of the interconnection agreement between AT&T and the Respondent.

5. Denied.

6. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 6 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied.

7. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 7 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied.

8. Denied.

9. Respondent denies that AT&T is owed an unpaid balance. Respondent is without knowledge or information sufficient to form a belief as to the truth or falsity of

the allegations of Paragraph 9 of the Complaint and therefore cannot either admit or deny the same. Thus, such allegations stand denied.

10. Respondent admits only that it disagrees with AT&T's erroneous calculation of the credit. Otherwise this paragraph is denied.

11. Denied.

12. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

13. Admitted.

14. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

15. The language of the Federal Telecommunications Act speaks for itself. Otherwise, this allegation is denied.

16. Admitted.

AFFIRMATIVE DEFENSES

1. Respondent asks that Commission to dismiss this Complaint in deference to the primary jurisdiction of the Federal Communications Commission which currently has before it a Petition requesting a declaratory ruling on the same issues raised in this Complaint. FCC Docket WC Docket No. 06-129, *In the matter of Petition of Image Access, Inc., d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules* (the "FCC Resale Docket").

2. In the alternative, Respondent asks that this Complaint be held in abeyance pending the outcome of two federal lawsuits. One is pending in the United States Court of Appeals for the Fifth Circuit, Case No. 09-11188 and 09-11099, on appeal from a Texas U.S. District Court, Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc., Case No. 3:09-cv-1494-P (N.D. TX 2009). Oral argument is scheduled for March 1, 2010. The other case is pending in the United States District Court for the Western District of North Carolina, CGM, LLC v. BellSouth Telecommunications, Inc., Case No. 3:09-cv-00377 (W.D. N.C. 2009).

COUNTERCLAIMS

I. AT&T Must Prove its Resale Restrictions are Reasonable and Nondiscriminatory.

1. For its own retail customers, AT&T offers to waive the line connection charge, a one-time payment of about \$40. AT&T, however, refuses to give Respondent the full value of that \$40 credit, offering instead only about \$32 (the value of the retail credit less the wholesale discount). The reseller is entitled to receive the full value of the line connection waiver. Thus, based on the assumption that the wholesale discount is 20%: When a reseller orders a new line, he pays AT&T a wholesale rate of \$32 for the line connection fee (the tariffed rate of \$40 less the 20% wholesale discount.) If AT&T waives the line connection charges for its retail customer, AT&T will give the reseller a credit of \$32 (\$40 credit less the wholesale discount). Since the \$32 charge to be reseller is offset by the \$32 credit, the reseller is charged \$0 for the line connection. If, as

Respondent claims, AT&T is required to give the reseller the full, \$40 value of the waiver, the reseller would end up with a credit of \$8 instead of \$0 (the \$40 credit less the \$32 charge). Respondent asks the Commission to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

3. AT&T offers discounted telephone service bundled with other, non-regulated services such as cable television and internet services. AT&T, however, refuses to offer its telephone services for resale at a comparable discounted rate. Respondent asks the Commission to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

4. AT&T has recently informed Respondent that AT&T intends to reduce from approximately \$40 to 6.07 the amount paid to resellers under AT&T's "\$50 cash back" rebate offer. Respondent asks the Commission to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

WHEREFORE, Respondent LifeConnex asks the Commission to determine that the AT&T practices cited in this Counterclaim are not reasonable and nondiscriminatory in accordance with 47 C.F.R. § 51.613(b).

RELIEF SOUGHT

WHEREFORE, Respondent respectfully requests that the Commission issue an
Order

1. Denying the relief sought by AT&T;
2. Dismissing this Complaint in deference to the primary jurisdiction of the
FCC or, in the alternative, holding this Complaint in abeyance pending the outcome of
two federal lawsuits addressing the same issues raised in this Complaint;
3. Granting Respondent's Counterclaims and such further relief as the
Commission deems fair and equitable.

Respectfully submitted this 25th day of February, 2010.



Matthew Feil, Esq.
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1614


Attorneys for LifeConnex Telecom, LLC

Answer, Affirmative Defenses and
Counterclaim
February 25, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 25th day of February, 2010.

Charles Murphy, Esq. Jamie Morrow, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us jmorrow@psc.state.fl.us	E. Earl Edenfield, Jr. Tracy W. Hatch Manuel A. Guardian c/o Gregory R. Follensbee 150 South Monroe Street Suite 400 Tallahassee, FL 32301 mg2708@att.com th9467@att.com
Henry M. Walker, Esq. Bradley Arant Boult Cummings, LLP 1600 Division Street, Ste 700 Nashville, TN 37203 hwalker@babco.com	

By: 
Matthew Feil, Esq.