

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: November 13, 2012
TO: Office of Commission Clerk (Cole)
FROM: Office of the General Counsel (Murphy)
Office of Telecommunications (Bates, Fogleman, Hawkins)
RE: Docket No. 120231-TP – Complaint of Budget Prepay, Inc. against BellSouth Telecommunications, LLC d/b/a AT&T Florida.

AGENDA: 11/27/12 – Regular Agenda – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: Disconnection of Service – November 27, 2012

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120231.RCM.DOC

CASE BACKGROUND

On August 28, 2012, pursuant to Section 364.16, Florida Statutes (F.S.), and Rules 25-22.036 and 28-106.201, Florida Administrative Code (F.A.C.), Budget Prepay, Inc. (Budget) filed a complaint against BellSouth Telecommunications, LLC d/b/a AT&T Florida (AT&T FL or Company) for “imposing an unlawful restriction on the resale of bundled local and long distance cash back promotions” and “engaging in actions that are preferential, discriminatory and anti-competitive as AT&T [FL] seeks to impair competition, enhance its competitive position, and gain a competitive advantage through an inappropriate intra-corporate transaction and/or tying arrangement with its affiliate long distance company.” (Complaint).

On September 17, 2012, pursuant to Rule 28-106.203, F.A.C., AT&T FL filed its Answer and Counterclaim to the Budget Complaint (Answer and Counterclaim), in which AT&T FL

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asserts: that it is not required to make its long distance affiliate's offerings available to Budget for resale; that its actions are not anticompetitive; and, that Budget has breached the interconnection agreement (ICA) by withholding payment for services it has ordered from AT&T FL under the ICA. AT&T FL asks the Commission to require Budget to pay AT&T FL the full amount it has wrongfully withheld, or at least pay the amount into escrow pending the outcome of this proceeding.

On October 8, 2012, pursuant to Rule 28-106.204(2), F.A.C., Budget filed its Motion to Dismiss Counterclaim in which it asserts that AT&T FL has failed to state a cause of action for which relief can be granted (Motion to Dismiss).

On October 15, 2012, AT&T FL filed its Response in Opposition to Budget's Motion to Dismiss Counterclaim (Response in Opposition) in which it asserts: that the ICA does not require dispute resolution before pursuing a collection action; that AT&T FL nonetheless sought dispute resolution; and, that Budget has waived its right to demand informal dispute resolution.

On October 19, 2012, AT&T FL filed its Notice of Commencement of Collection Action (Notice). In its Notice, AT&T FL states that Budget is in breach of its ICA by withholding nearly three quarters of a million dollars it owes AT&T FL and that the Company has notified Budget of its intent to suspend Budget's order processing and disconnect services if Budget does not cure its breach within the time frames specified in the ICA. AT&T FL notes that, if Budget files a motion with the Commission, AT&T will delay suspension and disconnection until after the November 27, 2012 Agenda Conference which is the first opportunity that the Commission will have to address such a motion. In the alternative, AT&T FL indicates that it is agreeable to the Commission ordering Budget to post a bond sufficient to ensure recovery of withheld amounts or to pay into escrow all amounts Budget has wrongfully withheld pending the outcome of this proceeding.

On November 7, 2012, Budget filed a Request for Oral Argument (Request) and a Response to AT&T FL's Notice of Commencement of Collection Action (Response). In its Response, Budget asserts that, by its Notice, AT&T FL encroaches on the Commission's ability to resolve the pending billing dispute. Budget asserts that the billing dispute is subject to the terms of the parties' ICA and that Budget is entitled to withhold disputed amounts pursuant to the ICA. Budget argues that AT&T FL's request that Budget be required to post a bond or escrow disputed amounts impermissibly rewrites the terms of the ICA.

This recommendation addresses only the issues that the Commission must decide at this juncture, based on AT&T FL's Notice and Budget's Request and Response.¹ This recommendation does not recount the full scope of each party's nuanced substantive arguments regarding the merits of its respective case before the Commission. Those arguments will be

¹ Although the parties' arguments regarding disconnection and a requirement that Budget post a bond are intertwined, Staff primarily addresses disconnection under Issue 2 and withholding of disputed amounts, bonds and escrow under Issue 3.

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considered by the Commission in a Chapter 120, F.S., proceeding.² The Commission has jurisdiction pursuant to Sections 364.01 and 364.16, F.S.

² Although the issues have not yet been established in this Docket, at a minimum, Staff believes that the Commission ultimately will need to resolve: whether any promotional credits associated with bundled local and long distance service, provided by AT&T LD and marketed under the name "AT&T", are required to be offered to Budget by AT&T FL; whether Budget's withholding payment for such promotional offerings represents a billing dispute under the terms of the ICA; and, if AT&T FL disconnects service, whether such disconnection is permitted by the ICA.

DISCUSSION OF ISSUES

Issue 1: Should the Commission grant Budget's Request for Oral Argument?

Recommendation: Yes. The Commission should grant Budget's Request for Oral Argument and set a 5 minute per side limit.

Staff Analysis: Pursuant to Rule 22-22.058, F.A.C., Budget asks that it be granted oral argument regarding AT&T FL's October 19, 2012 Notice. Budget asserts that oral argument "would assist the Commission in understanding and evaluating issues raised" by the Notice and Budget's Response. Budget observes that the action proposed by AT&T FL could "disrupt the lives of more than 1,500 Floridians" and suggests that, under the circumstances, the Commission should hear from the parties. Budget asks that each side be given 10 minutes. Staff believes that oral argument would be beneficial in this matter and recommends that it be granted with a 5 minute limit for each side.

Issue 2: Should the Commission prohibit AT&T FL from suspending Budget's order processing and/or disconnecting Budget's services while the Commission hears Budget's Complaint in this Docket?

Recommendation: No. The Commission should not prohibit AT&T FL from suspending order processing for Budget and/or disconnecting Budget's service.

Staff Analysis: The parties have made the following arguments.

AT&T FL

In its Notice, AT&T FL asserts that Budget is in breach of the ICA by withholding more than \$700 thousand in payments that Budget owes AT&T FL for local services Budget has ordered under the ICA. Budget is withholding payment based on claims that it is entitled to rewards under a long distance service offering by BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service (AT&T LD) that is not offered by AT&T FL. The Company argues that, under the terms of the ICA, AT&T FL has notified Budget that it will suspend Budget's order processing, and ultimately disconnect Budget's services, if Budget does not cure this breach within the time frames specified in the ICA. However, the Company notes that, if Budget files a motion with the Commission seeking relief from this suspension or disconnection of service, AT&T FL will delay suspension and disconnection until close of business on November 27, 2012.

AT&T FL asserts that Budget is in breach of the ICA based on nonpayment and that the Company has the contractual right to suspend Budget's order processing and to disconnect its services if Budget fails to timely cure the breach.

BUDGET

In its substantial Response, Budget asserts that AT&T FL's Notice encroaches on the Commission's ability to resolve Budget's pending Complaint which addresses a two-year dispute over the resale of bundled promotional offerings. Budget asserts that such offerings were made available to AT&T FL's local service customers and were unlawfully restricted from resale to Budget in contravention of both AT&T FL's resale obligations under the Telecommunications Act of 1996 and the ICA. Budget argues that this is a billing dispute under the ICA and that Budget is entitled to withhold the amount in dispute pending resolution. Budget contends AT&T FL has failed to follow the terms of the ICA regarding dispute resolution and that disconnection of Budget's nearly 1,500 local service customers by AT&T FL before resolution of the dispute would be a breach of the ICA by AT&T FL. Budget recounts the history of its attempts to resolve the dispute and argues that it has taken appropriate steps to address the matter including initiating proceedings before this Commission and seven other state commissions. Budget asserts that, under the circumstances presented, disconnection would be harmful to continued competition in the Florida telecommunications marketplace and is not supported by the ICA or public policy.

Budget asks the Commission to “prohibit AT&T from threatening Budget with anti-competitive tactics while Budget pursues resolution of the billing dispute at the Commission” and to use its jurisdiction under Section 364.01, F.S., to protect the public interest, ensure fair competition and prevent anti-competitive behavior.

ANALYSIS

By Section 364.01(1), F.S., the Florida Legislature has provided that, “The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.” The Commission has been granted authority to resolve disputes among carriers related to the resale of services.³ However, it is well established that the Commission does not have authority to grant an injunction⁴ and, in its Response, Budget acknowledges that no such authority exists.⁵

By its Notice, AT&T FL does not ask the Commission to take any action; rather, the Company gives notice that it intends to suspend order processing and disconnect service to Budget unless Budget pays AT&T FL the approximately \$700 thousand that is the subject of Budget’s Complaint before the Commission. Anticipating that Budget would file a pleading in response to the Company’s Notice, AT&T FL argues the promotion that is the subject of the Complaint: is offered by AT&T LD and not AT&T FL; applies to long distance services and not local services; and, is not appropriately addressed under the ICA. Thus, AT&T FL asserts that Budget is inappropriately withholding payment and that there is not a billing dispute within the meaning of the ICA. As such, AT&T provides notice that it intends to take the actions described above. AT&T FL indicates that it will not suspend ordering or disconnect Budget if the Commission requires Budget to place the disputed amount in escrow or obtain a bond for the disputed amount.⁶

Budget has asked the Commission to prohibit AT&T FL from threatening Budget with “anticompetitive tactics.” In the context of the Notice and the Budget Response, this appears to be a request that the Commission prohibit AT&T Florida from disconnecting service to Budget until the Commission reaches a decision in Budget’s Complaint against AT&T FL. Budget argues that, by filing its Notice, AT&T FL is circumventing both the Chapter 120, F.S., process and the process set forth in the ICA. It is Budget’s position that the marketing of bundled local and long distance services under the generic name “AT&T,” when such bundled services are only available to customers of AT&T FL local service, is a promotional discount that must be made available by AT&T FL to its competitors. Thus, Budget asserts that it has withheld payment for disputed amounts associated with the promotional offering under the terms of the ICA. In this regard, Budget argues: that it has followed the requirements in the ICA for handling disputed amounts; that there is no danger of the amount in dispute increasing since the promotion

³ Section 364.16, F.S.

⁴ See e.g., *In re: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.*, Order No 080631-TP, issued July 21, 2009, in Docket No PSC-09-0515-PCO-TP (In response to a request that the Commission enjoin AT&T FL from suspending services to DSLi, the Commission found that “this Commission does not have the authority to provide injunctive relief to DSLi.”).

⁵ See Response at 16-17.

⁶ This suggestion by AT&T FL is the subject of Issue 3 below.

is no longer offered; and, that AT&T FL will violate the ICA if it takes the actions set forth in its Notice.

Staff believes that prohibiting AT&T FL from suspending order processing for Budget or disconnecting Budget's service amounts to the Commission granting an injunction. In its Response, Budget argues that the Commission has only the authority granted by the Florida Legislature and does not have the power to grant injunctions.⁷ Moreover, the Commission has acknowledged that it does not have authority to provide injunctive relief.⁸ Thus, consistent with Commission precedent, and Budget's assertions in its Response, Staff recommends that the Commission should not prohibit AT&T FL from suspending order processing and/or disconnecting service to Budget pending the outcome of a Chapter 120, F.S., hearing in this Docket.⁹

⁷ See Response at 15-17.

⁸ See *e.g.*, note 4 above.

⁹ Nonetheless, as referenced at note 2 above, staff believes that this Docket presents several significant substantive issues for the Commission to resolve through the Chapter 120 hearing process. Among them is whether Budget's claim constitutes a "billing dispute" under the terms of the parties' ICA. See *e.g.*, Complaint at 3, Response at 4. If it does, Budget is authorized to withhold disputed amounts until the dispute is resolved. See Attachment 7, Section 2.2 of the parties' ICA. Significantly, AT&T FL is authorized to disconnect Budget for nonpayment of only undisputed amounts. *Id.*, at Section 1.7.2. Staff believes that if AT&T FL disconnects Budget at this juncture, it risks violating the terms of its ICA with Budget and that such a violation may also be construed as anticompetitive behavior pursuant to Section 364.16, F.S. As with any action of this sort, Staff believes that AT&T FL suspends Budget's order processing and/or disconnects Budget's service at its own risk, subject to any liability provisions of the ICA and the penalty provision of Chapter 364, F.S.

Issue 3: Should the Commission require Budget to post a bond sufficient to ensure AT&T FL's recovery of withheld amounts or pay into escrow all amounts Budget has withheld pending the outcome of this proceeding?

Recommendation: No. The Commission should not require Budget to post a bond or place funds in escrow pending the outcome of this proceeding.

Staff Analysis: The parties have made the following arguments.

AT&T FL

As an alternative to AT&T FL suspending Budget's order processing or disconnecting Budget's services, the Company suggests that it would be acceptable, in this case, if the Commission ordered Budget to post a bond sufficient to ensure recovery of withheld amounts or pay into escrow all amounts it has withheld pending the outcome of this proceeding. AT&T FL asserts that the Commission has previously required a CLEC to post a bond for the amount due to AT&T FL during the pendency of a case addressing a CLEC's promotion claims. The Company quotes a Commission order from a previous proceeding as follows:

Given the magnitude of the sum in dispute (approximately \$1.4 Million), we are concerned with ensuring that once this docket is resumed, and we make a final determination of the correct disposition of the amount currently in dispute, sufficient funds will be available for [CLEC] to pay AT&T such sums as we may determine are due and owing to AT&T. Therefore, as a further condition of allowing [CLEC] to continue to receive service from AT&T under the ICA during the pendency of this dispute, we order [CLEC] to post a bond in the amount of \$1.4 Million [within 15 days of the order]. The bond will remain in place throughout the remainder of this proceeding.¹⁰

BUDGET

Budget argues that the ICA in the *LifeConnex* case, relied upon by AT&T FL, contained express contractual provisions requiring that LifeConnex make payment to AT&T for all services billed including disputed amounts and that such payments were due on or before the next bill date. In contrast, the ICA between AT&T FL and Budget provides that Budget "may withhold disputed amounts until the dispute is resolved." Budget argues that AT&T FL is bound by this clear language in its ICA with Budget, and that the ICA should be enforced as written. Budget contends that AT&T FL's request for bond or escrow payment is improper and should be denied because it asks the Commission to materially change the terms of the ICA, which expressly allows for withholdings, to the benefit of AT&T FL and to the detriment of Budget. Budget argues that this is contrary to the express requirements in the ICA for modifying terms of the ICA.

¹⁰ *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecom., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 8-9 (July 16, 2010).

Budget argues that the Commission has neither statutory nor injunctive power to require either the posting of litigation bonds or the payment of funds into an escrow account pending the resolution of an ICA dispute. Budget asserts that an order requiring the payment of funds into escrow, in the absence of such a requirement in the ICA, is unauthorized injunctive relief. Thus, Budget concludes that, even if the Commission had injunctive power, it would be improper for the Commission to require Budget to place funds in escrow or to spend its assets procuring a litigation bond.

ANALYSIS

Staff notes that AT&T does not ask the Commission to require that Budget procure a bond or place the amount of disputed funds in escrow; rather, the Company suggests that it is agreeable to not taking action against Budget if those requirements are met. In this context, AT&T FL relies on the Commission's *LifeConnex* Order as precedent.

As discussed above, Budget asserts that its case is distinguished from the *LifeConnex* case relied upon by AT&T FL. Staff believes that Budget argues persuasively that bond or escrow requirements are not contemplated by the Budget ICA and imposing such requirements would equate to the Commission impermissibly rewriting the ICA. Staff notes that, in *LifeConnex*, the Commission found, based on clear language in the parties' ICA, that AT&T FL was entitled to payment of all sums billed, and in the absence of such payment, was entitled to take the actions in its Notice of Commencement of Treatment, which included termination of LifeConnex's service in Florida.¹¹ Nonetheless, the Commission determined that, if AT&T FL were held harmless with a bond or escrow, service should continue to be provided.¹²

Based on the foregoing, and the facts presented, Staff recommends that the Commission should not require Budget to obtain a bond or place funds in escrow pending the outcome of this proceeding.

¹¹ Order No. PSC-10-0457-PCO-TP, at 6.

¹² *Id.*, at 8-9.

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Issue 4: Should this Docket be closed?

Recommendation: No. This Docket should remain open to address Budget's Complaint.

Staff Analysis: Staff recommends that this Docket remain open to address Budget's Complaint against AT&T FL.