

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010591-TI

In the Matter of:

CANCELLATION BY FLORIDA PUBLIC
SERVICE COMMISSION OF IXC
CERTIFICATE NO. 2497 ISSUED TO
AMERIVISION COMMUNICATIONS, INC.
FOR VIOLATION OF ORDER
NO. PSC-00-0827-PAA-TI.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 9

BEFORE: CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI
COMMISSIONER RUDOLPH "RUDY" BRADLEY

DATE: Tuesday, February 19, 2002

TIME: Commenced at 9:30 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

TRANSCRIBED BY: LINDA BOLES, RPR
(FROM TAPE) Official FPSC Reporter
 (850) 413-6734

1 PARTICIPATING:

2 LEE FORDHAM, Florida Public Service Commission,
3 Division of Legal Services, 2540 Shumard Oak Boulevard,
4 Tallahassee, Florida 32399-0870, appearing on behalf of the
5 Commission Staff.

6 RAY KENNEDY, Florida Public Service Commission,
7 Division of Competitive Markets and Enforcement, 2540 Shumard
8 Oak Boulevard, Tallahassee, Florida 32399-0870, appearing on
9 behalf of the Commission Staff.

10 PATRICK K. WIGGINS, Katz, Kutter, Haigler, Alderman,
11 Bryant & Yon, P.A., 106 East College Avenue, Tallahassee,
12 Florida 32301, representing AmeriVision Communications, Inc.

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P R O C E E D I N G S

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CHAIRMAN JABER: Item 9?

MR. FORDHAM: Commissioners, Item 9 is Docket Number 010591, cancellation by Florida Public Service Commission of IXC Certificate Number 2497 issued to AmeriVision Communications, Inc., for violation of Order No. PSC-00-0827-PAA-TI.

The reason, Commissioners, this docket was opened was AmeriVision's, excuse me, AmeriVision's continued use of the name "Lifeline Communications" in spite of this Commission specifically denying its right to do so. The sole issue before the Commission today is whether to accept a settlement offer tendered by AmeriVision in this docket.

Because that settlement offer did not contain a commitment by AmeriVision to discontinue the use of the term "Lifeline Communications," Staff is recommending that the settlement offer be rejected and that the matter proceed to hearing on the issue of whether the certificate should be cancelled.

CHAIRMAN JABER: Thank you, Mr. Fordham.
Mr. Wiggins, are you here to address us on this item?

MR. WIGGINS: Yes, ma'am. Patrick Wiggins for AmeriVision. Good morning.

I filed the settlement proposal and letter because we're, we're all seeking a solution to this problem, I think

1 Staff and AmeriVision, and we've, we've met a couple of times
2 and I think it came, it became clear to me we needed guidance
3 from the Commission in order to, to move forward to a solution
4 that would work for, for all of us. And I, once again, I want
5 to thank Staff for always being open and constructive and, in
6 Mr. Moses' cases, frank in our, in our exchanges.

7 We don't have a solution yet and the reason we don't
8 have a solution, I think, is that we have different definitions
9 of what the problem is. In my understanding of Staff's
10 perspective, the, they view that the company essentially
11 flouted, flouted the Commission's order denying the name change
12 request in a nutshell. In a nutshell Staff believes that the
13 company asked for permission to change its name, was denied in
14 a PAA, they did not protest, understood that that meant it
15 would restrict, there would be restrictions involved with that,
16 and then went ahead and did whatever it wanted. And given the
17 facts of this case, I understand how Staff came to that
18 perspective. I don't agree with it, but I understand. It's
19 not an unreasonable way to look at the facts.

20 If you'll notice in that discussion just there, in
21 that statement of the problem, we didn't talk much about
22 service marks and what rights there were under federal law to
23 use all of that. And I think, and you guys can tell me if I
24 got this wrong, but that's not really in the forefront at the
25 moment. That's kind of an overlay.

1 Our definition of the regulatory problem is a little
2 bit different. It's basically that there was a billing error.
3 If the Staff's view is that permission to change the name was
4 denied and, and that this permission to change the name, the
5 denial of it effected some change in what AmeriVision could do
6 and that AmeriVision understood this and disregarded it,
7 AmeriVision's perspective is totally different.

8 The company, for better or worse, viewed the PAA as
9 maintaining the status quo that, let's say it gets the PAA, the
10 PAA becomes final on Wednesday, its name is the same as it
11 always was and it continued to do what it always did, and
12 that's what it did; for four years or more had been marketing
13 in Florida and they also were using the service mark Lifeline.
14 It had been billing under the name AmeriVision in Florida for
15 Florida intrastate service and it went forward to do that. Now
16 unfortunately, as I think the letter details, there was a
17 billing error and, in fact, bills did go out with the Lifeline
18 name on it.

19 And when I pointed out to the, to the, to the company
20 that this was, in fact, a violation of the billing rules, their
21 response was immediate: Well, we violated the rules. Let's
22 own up to it and do the right thing because we're not trying to
23 shirk any responsibility here.

24 So from the company's perspective they had the same
25 name they've always had, the same service mark they've always

1 had registered, at least since 1988, I believe, and the same
2 conduct, except they did have this, this billing error, which I
3 think lasted two cycles.

4 As far as I'm aware, there are no significant
5 customer complaints. I think if you look at their regulatory
6 history, they have a pretty good regulatory history. This is
7 their first, first regulatory enforcement action; they hope
8 their last.

9 The sanctions that are suggested is cancellation,
10 which strikes me as a little draconian given the circumstances.

11 So what are the -- but why are we having such trouble
12 selling this? I think because there are two really huge real
13 interests here that aren't even addressed when you define the
14 problem, the regulatory problem.

15 The first real interest is this Commission cannot,
16 never has, never has and never will tolerate companies ignoring
17 its orders. Companies have to look at these orders and you
18 have to be in dialogue with them. I mean, anybody can call
19 Staff and find out what's going on. And a company cannot be
20 allowed to do that and you cannot allow a company to come
21 before you and say, oh, I didn't get it, and that's, that's got
22 to be clear. There's just too much going on in the state to
23 let that happen, and the company recognizes that.

24 CHAIRMAN JABER: Mr. Wiggins -- Staff, refresh my
25 memory. Is this the company where when I was driving back from

1 Gainesville --

2 MR. KENNEDY: Yes.

3 CHAIRMAN JABER: -- after we voted to deny their
4 certificate application I heard an advertisement of theirs that
5 used "Lifeline"?

6 MR. KENNEDY: That's correct.

7 CHAIRMAN JABER: That would be that company?

8 MR. WIGGINS: That would be that company, yes, ma'am.

9 The -- since you mentioned the name "Lifeline," the
10 real interest for the company is they cannot acquiesce in any
11 compromise of their, of their service mark. Now this service
12 mark was registered federally in 1988.

13 I'm trying not to go here, but to have a government
14 agency come in and basically preempt the service mark through a
15 PAA is, is pretty serious. But even if you go beyond -- you
16 may have a right do that, there may be a legitimate interest,
17 but this service mark is being used all over the United States.
18 This is a huge issue for them. So that's why this is so big.

19 But when they looked at their own behavior, they
20 acknowledged that they, that there was miscommunication,
21 misapprehension, but there was no intentional flouting of the
22 Commission's jurisdiction, no flouting of the order and, as far
23 as I can tell, no violation of the order because nothing
24 changed as a result of that order. And under the facts of the
25 case, as I explain in the letter, they never asked for their

1 certificate to be changed. All they did was file a tariff with
2 a d/b/a on it, was informed that's not the way you do it. They
3 go, okay, we've got 35 other states we're dealing with. Let us
4 get those in place, we'll come back. And then sort of Murphy's
5 Law took over.

6 We've offered a \$5,000 settlement because they did,
7 in fact, send out bills under the wrong name and as, as a first
8 offense it seemed to be an appropriate number.

9 With respect to the service mark issue, Chairman
10 Jaber, we suggest in the, in the letter that we would refile or
11 file again a, file for the first time actually a petition to
12 change the name and then all the policy issues could be
13 addressed appropriately, trying to construct the going-forward
14 basis on this.

15 With the Commission's guidance we'd be delighted to
16 sit down with Staff again and perhaps with, even with a
17 mediator from, from within the Commission to try to work this
18 out. This company's not a cowboy, they've been around for a
19 while, they've done a good job, they want to be around for a
20 while longer, and that's why we're here. So I appreciate your
21 time.

22 COMMISSIONER PALECKI: Mr. Wiggins, why hasn't that
23 petition been filed?

24 MR. WIGGINS: To change the name?

25 COMMISSIONER PALECKI: Yes.

1 MR. WIGGINS: Chicken or the egg thing. I was simply
2 trying to figure out the cleanest path here. It was my call,
3 not theirs.

4 COMMISSIONER PALECKI: Because it, it seems that this
5 needs to be resolved and that that's a separate matter. But
6 it, it appears that the problem that the Staff has is that the
7 company continued to use the name "Lifeline" in Florida despite
8 the fact of this Commission's PAA order.

9 MR. WIGGINS: I have a little difficulty with that,
10 difficulty with that characterization. They used the name in
11 advertising. They're primarily an interstate product. They
12 have a perfect right to do that. There's no evidence
13 whatsoever, nor I don't think Staff has suggested that if you
14 called the 800 number, that disclosure that their name and,
15 that their business name and billing in Florida would be under
16 AmeriVision. I think that if you follow their marketing, the
17 marketing through sales process, you would see that they're not
18 selling under the name "Lifeline." That's a service mark.
19 They sell to churches and church groups, so they get pretty
20 well scrubbed through the process. They have, I think, some
21 inward bound 800, but I've walked through this with them on
22 more than one occasion and my understanding is with respect to
23 intrastate services they attempt to, in fact, be clear that,
24 that Lifeline is a service mark, not their business name.

25 COMMISSIONER PALECKI: Is it still being used in

1 Florida?

2 MR. WIGGINS: The service mark, absolutely, and it
3 will be and it will continue to be. They have a federal right
4 to do that, with all due respect. And it's used primarily for
5 interstate product in addition.

6 COMMISSIONER PALECKI: I guess I'd be a lot more
7 comfortable with that argument if you had filed a petition
8 before us asking for a name change --

9 MR. WIGGINS: I --

10 COMMISSIONER PALECKI: -- and had made that argument
11 in a separate docket in which you brought all the relevant law
12 to our attention.

13 MR. WIGGINS: Commissioner Palecki, I, I understand
14 your position. I, I can only say that from 1998, my
15 understanding is 1998 through, excuse me, 1988 through 1990, up
16 until this happened they were using that service mark in
17 Florida without, with the same business name that they have now
18 on the certificate.

19 So, in other words, did the, did the, did the order,
20 the PAA order effect some change in their behavior? And their
21 answer is, no, they did not.

22 CHAIRMAN JABER: Commissioners --

23 COMMISSIONER DEASON: Commissioners, I'm willing to
24 make a motion, at least move this along, and, and I would be
25 very, I would probably be remiss if I didn't indicate to my

1 fellow Commissioners to start with is that I was in the
2 minority in this matter to begin with. I did not think that
3 the use of the term "Lifeline" was somehow anti-consumer or
4 confusing. I just don't see how the government using a term
5 like "Lifeline" to describe one of its programs basically
6 preempts any private company from using that same terminology.
7 I think "Lifeline" is a generally accepted term. I didn't, I
8 did not write this in my dissent, but that was basis for the
9 dissent.

10 So having said that and having that on the record, I
11 would still make my motion is that I would move that we deny
12 Staff, accept the settlement offer. I think it's made in good
13 faith. I think there were some very unique situations here
14 that Mr. Wiggins has been very up front in describing. I think
15 that it is a good faith effort to get this resolved and I think
16 that we will be getting the petition. Is that correct,
17 Mr. Wiggins?

18 MR. WIGGINS: Yes, sir.

19 COMMISSIONER DEASON: And that, I think that to
20 actually cancel this company's certificate, who has been
21 providing service to customers for some time, would be a, a
22 drastic measure to take and that the \$5,000 settlement, I
23 think, would, would be appropriate in this situation. And for
24 those reasons I would move we deny Staff, accept the settlement
25 offer.

1 CHAIRMAN JABER: There's been a motion to deny Staff.
2 Is there a second?

3 COMMISSIONER BAEZ: Can I ask a couple of questions
4 first because I want to understand the settlement.

5 CHAIRMAN JABER: Sure.

6 COMMISSIONER BAEZ: The settlement takes care of the
7 violations portion of it. What I have a problem is the,
8 whatever unintended consequence may flow from accepting a
9 settlement, that, that the company can continue using its
10 service mark as Mr. Wiggins has asserted they will continue to
11 do, I have problems with that and I would like to find some way
12 to accelerate bringing that to the Commission and ensure that
13 it gets brought to the Commission. I mean, I think they're
14 under no -- if, if we, if the company walks away now having a
15 settlement accepted, there is the outside chance that they may
16 not be, feel compelled to bring, to, to bring us an opportunity
17 to discuss the policy implications of the service mark. So I
18 don't know how we work it out, I don't know what kind of
19 guarantees we extract from the company if we do accept the
20 settlement, but that's the conflict that I'm having.

21 I don't have a problem accepting the settlement as to
22 the violation that went before. But to continue to allow a
23 situation to continue that I think we need to discuss -- and
24 I'll say right now I don't, I'm not sure that I agree with
25 Commissioner Deason.

1 COMMISSIONER DEASON: This, this may be a problem
2 because my motion would be, it would be to allow the company to
3 continue to use its service mark until this matter is brought
4 before the Commission, we hear all evidence and we make a
5 decision at that point.

6 COMMISSIONER BAEZ: And, and I'm --

7 CHAIRMAN JABER: Okay. Let's, let's open it up for
8 discussion then.

9 COMMISSIONER BAEZ: Okay.

10 CHAIRMAN JABER: Because, Commissioner Deason, I, I
11 understand what we're trying to accomplish in moving the
12 settlement forward. But I have to tell you philosophically I
13 agree with Commissioner Baez on this and here's why. I heard
14 that advertisement and I heard how the word "Lifeline" was
15 being used. And I have to tell you, it, it enraged me enough
16 to call Staff immediately and to, to get the second docket
17 going, which, which resulted in a second PAA.

18 There was a blatant disregard for a Commission order,
19 recognizing that one Commissioner dissented, but it was one
20 Commissioner dissenting. There was a majority opinion that was
21 codified in an order that your client did not abide by. And
22 there was plenty of discussion, Mr. Wiggins, in the agenda
23 conference, at the agenda conference about our desire not to
24 have that company use the word "Lifeline."

25 And perhaps "Lifeline" is different in my mind, and I

1 don't know if it's because of the joint board or not, but if
2 Lifeline, the program, was well known and customers clearly
3 knew how to take advantage of the program, I may not have such
4 a concern. But when we all as, as decision makers and as it
5 relates to the joint board as policy makers are trying to
6 enhance an increased enrollment in the program, we are
7 concerned by things like telecommunications companies using,
8 misusing the word "Lifeline." I mean, there's a distinction.
9 We are talking about a universal service program that doesn't
10 have a high, as high a percentage rate as it should for Florida
11 perhaps. That's my concern.

12 The second concern is there were two PAA orders that
13 your company, that your client did not protest.

14 MR. WIGGINS: Two?

15 CHAIRMAN JABER: There were two. One was on the name
16 change and one -- they're attached actually to Staff's
17 recommendation, aren't they?

18 MR. KENNEDY: It was, it should be just one, that was
19 on the name change, that PAA. They did protest on the second
20 docket.

21 CHAIRMAN JABER: Okay. Okay.

22 MR. WIGGINS: My blood pressure just went down.

23 CHAIRMAN JABER: On the name change --

24 MR. KENNEDY: Glad to help.

25 CHAIRMAN JABER: On the name change there was plenty

1 of discussion at agenda conference and a PAA order that did not
2 get protested. So to come here and say your client, to say
3 that they didn't understand they weren't supposed to use the
4 name, you know, I know you serve your client well and I don't
5 mean this, Patrick, with you at all, but they knew what the
6 discussion was.

7 So, Commissioners, I understand that there's a motion
8 to accept the settlement. I would lean toward accepting the
9 settlement to move this along. I hate the idea of reopening
10 the name change, but if that's what your pleasure is, I'll go
11 along with it.

12 COMMISSIONER DEASON: Let me say this, too. I
13 wouldn't want my motion to be interpreted that somehow I think
14 it's appropriate for a company to disregard our orders because
15 on the second PAA, which, when there was at least in my opinion
16 a prima facie showing that there had been a disregard for the
17 Commission's order, I voted with the majority to issue that
18 PAA.

19 But I think that there are some unique circumstances
20 here and with the effort of moving this along, that's, that's
21 the basis for our, for the motion.

22 MR. WIGGINS: May I offer something to help perhaps?
23 On a transitional basis with respect to the use of the name,
24 the line that I feel the company cannot have crossed is some
25 sort of permanent abrogation of its right to use the name

1 without protesting. I hope you can understand that. But with
2 respect to working out something on a transition basis for you
3 to address this in an appropriate petition when we file it, I
4 know at the very least that we can provide Staff with all
5 advertising in Florida including, you know, the process and
6 perhaps even work with Staff to, to suspend temporarily. We
7 can work with you. I can't commit exactly, but, but there's
8 no, no intent here to say we don't care, for the company to say
9 we don't care what you think, you know.

10 COMMISSIONER BAEZ: Mr. Wiggins, understand my
11 statements and my feeling on this is it's not, I'm not here to
12 tell you you can't use it yet.

13 MR. WIGGINS: I understand.

14 COMMISSIONER BAEZ: I wish you wouldn't, but I think
15 you need an opportunity, I'm in favor of offering the
16 opportunity to let's all discuss this. I mean, I think you
17 should make your argument that, that we don't have authority to
18 do this. I think all of that has to get discussed. But, you
19 know, again, I'll renew my concerns that I haven't heard any,
20 any lock on getting this forum for discussion.

21 MR. WIGGINS: We'll file the petition by the end of
22 next week.

23 CHAIRMAN JABER: Commissioner Deason, would you
24 consider a friendly amendment to your motion that allows them,
25 that allows AmeriVision to file an application, a new

1 application for a name change?

2 COMMISSIONER DEASON: Yes. I think that's
3 contemplated within the motion.

4 COMMISSIONER BAEZ: If, if that's, if that's the
5 vehicle that will get us to where we're going to be.

6 COMMISSIONER DEASON: Yeah. It needs to be resolved
7 one way or the other.

8 COMMISSIONER PALECKI: And I think I just heard
9 Mr. Wiggins say he'd file it by the end of next week, which --

10 COMMISSIONER BAEZ: You want to make that part of the
11 order?

12 CHAIRMAN JABER: Okay. There's been a motion to deny
13 Staff's recommendation, allow the company leave to file their
14 name change application by the end of next week. And there's a
15 second?

16 COMMISSIONER BAEZ: Second.

17 CHAIRMAN JABER: Motion and a second. All those in
18 favor, say aye. Opposed, nay.

19 (Simultaneous affirmative vote.)

20 CHAIRMAN JABER: Okay. Item Number 9 is resolved.

21 MR. FORDHAM: Commissioner, excuse me. For
22 direction, for Staff's direction, may we assume that further
23 enforcement of that original PAA is held in abeyance at this
24 point? Are, are we to in essence not take any further action
25 for any further violation of that order?

1 CHAIRMAN JABER: I think it's a moot issue,
2 Mr. Fordham. You'll have to correct me, if I'm wrong. But we
3 just approved accepting the \$5,000 settlement that is
4 resolution of the outstanding violations.

5 COMMISSIONER DEASON: Unless there's a subsequent
6 billing violation.

7 CHAIRMAN JABER: Yeah. Now that's different.

8 MR. WIGGINS: That's a whole --

9 MR. FORDHAM: Correct. But on the marketing
10 violations, which, of course, continue even today, marketing,
11 if there are continued marketing, are we to disregard that
12 pending the new action?

13 CHAIRMAN JABER: Mr. Wiggins, has offered to work
14 with you all informally on something in the transition and
15 that's why it's imperative to get the application in by next
16 week so that we can quickly act on the name change application.

17 MR. FORDHAM: Thank you.

18 CHAIRMAN JABER: Thank you. Commissioners, we need
19 to take a break.

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1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)

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6 FPSC Division of Commission Clerk and Administrative Services,
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14 DATED THIS 26TH DAY OF FEBRUARY, 2002.

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