

Marguerite McLean

110071-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Friday, March 25, 2011 3:28 PM
To: Filings@psc.state.fl.us
Subject: 110071-TP AT&T Florida's Response in Opposition to Express Phone's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo

Importance: High

Attachments: Untitled.pdf

A. Vickie Woods

BellSouth Telecommunications, Inc. d/b/a AT&T Florida

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B. Docket No.: 110071-TP: Emergency Complaint of Express Phone Service, Inc. against

BellSouth Telecommunications, Inc. d/b/a AT&T Florida Regarding Interpretation of the Parties'

Interconnection Agreement

C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida

on behalf of Manuel A. Gurdian

D. 10 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Express

Phone's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo

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March 25, 2011

Ann Cole, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 110071-TP: Emergency Complaint of Express Phone Service, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida Regarding Interpretation of the Parties' Interconnection Agreement

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Express Phone's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All Parties of Record
Jerry D. Hendrix
Gregory R. Follensbee
E. Earl Edenfield, Jr.

CERTIFICATE OF SERVICE
Docket No. 110071-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

First Class U.S. Mail this 25th day of March, 2011 to the following:

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Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency Complaint of) Docket No. 110071-TP
Express Phone Service, Inc.)
against BellSouth Telecommunications,)
Inc. d/b/a AT&T Florida regarding)
Interpretation of the Parties')
Interconnection Agreement) Filed: March 25, 2011

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO EXPRESS PHONE'S MOTION
FOR EMERGENCY CONSIDERATION BY THE PREHEARING OFFICER
TO MAINTAIN STATUS QUO**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response in Opposition to the Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo ("Motion") filed by Express Phone Service, Inc. ("Express Phone"). As will be explained herein, the Prehearing Officer is without authority to grant the injunctive relief sought by Express Phone and, even if the Prehearing Officer had such authority, Express Phone is not entitled to the injunctive relief it seeks. Accordingly, the Prehearing Officer should issue an Order denying Express Phone's Motion.

1. Express Phone's Motion was filed three days after it filed its Emergency¹ Complaint, Request for Emergency Relief to Avoid Customer Disconnection, Request to Hold Docket in Abeyance and Request for Mediation ("Complaint"). The Motion is premised on the same factual basis as is in the Complaint² and essentially asks the Prehearing Officer to grant the same relief as Express Phone seeks from the Commission, *i.e.*, injunctive relief that prevents AT&T Florida from exercising its rights to terminate service due to Express Phone's failure to

¹ To the extent there is arguably any sort of "emergency," it is one of Express Phone's own making, as it is Express Phone that has violated the express provisions of its Resale Agreement ("Agreement") with AT&T Florida by its failure to fully and timely pay amounts due.

² AT&T Florida's Response to the Complaint is forthcoming and is not due until April 4, 2011.

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pay its bills in accordance with the clear and unambiguous terms of the Commission-approved Agreement.

2. As noted in Express Phone's Motion, AT&T Florida has demanded that Express Phone comply with its Agreement and pay AT&T Florida \$1,268,490 for past amounts due and owing for services provided to Express Phone in Florida³. The parties' Commission-approved Agreement requires Express Phone to pay all amounts it is billed, even if it disputes those amounts:

Payment of *all* charges will be the responsibility of Express Phone.⁴

Express Phone shall make payment to [AT&T Florida] for all services billed *including disputed amounts*.⁵

Payment for services provided by [AT&T Florida], *including disputed charges*, is due on or before the next bill date.⁶

Express Phone does not contend that its Agreement provides for anything other than what is stated above.

3. The language quoted above is unambiguous, and the Commission-approved Agreement is a valid contract. The Commission, therefore, is required by law to enforce the Agreement as written because Florida law is clear that "an **unambiguous** agreement must be enforced in accordance with its terms." *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963). *See also, Brooks v. Green*, 993 So. 2d 58 (Fla. 1st DCA 2008)("It is established law in this state that a contract must be applied as written, absent an ambiguity or some illegality."); *Medical Center Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990)("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms

³ See Motion p. 2, ¶ 2.

⁴ Agreement, Attachment 3, p. 6, § 1.4.

⁵ *Id.*

⁶ *Id.* at § 1.4.1.

of a voluntary contract. *Nat'l Health Laboratories, Inc. v. Bailmar, Inc.*, 444 So.2d 1078, 1080 (Fla. 3d DCA 1984).”). Moreover, “[i]t is a fundamental rule of contract interpretation that a contract which is clear, complete, and unambiguous does not require judicial construction,” *Jenkins v. Eckerd Corp.*, 913 So.2d 43 (Fla. 1st DCA 2005), and “[i]t is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party.” *Stack v. State Farm Mut. Auto Ins. Co.*, 507 So.2d 617, 619 (Fla. 3d DCA 1987).⁷

4. The parties’ Agreement is not only a binding contract but also “the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act,” *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003), and once a carrier enters “into an interconnection agreement in accordance with section 252, ... it is then regulated directly by the interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom; Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also, Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control” and parties are “governed by the interconnection agreement” instead, and “the general duties of [the 1996 Act] no longer apply”). Moreover, “[t]he Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement.” *In re: Petition of Supra Telecommunications & Information Systems for generic proceeding to*

⁷ These principles apply even when contractual terms bind a party to a seemingly harsh or out of the ordinary bargain. *See Barakat v. Broward County Hous. Auth.*, 771 So.2d 1193, 1195 (Fla. 4th DCA 2000) (“Contracts are to be construed in accordance with the plain meaning of the words contained therein...It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be bad bargain....A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain.”). *See also, Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So.2d 1194 (Fla. 3d DCA 2008) (“where an agreement is unambiguous... we enforce the contract as written, no matter how disadvantageous the language might later prove to be.”).

arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or, in the alternative, petition for arbitration of interconnection agreement, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (March 31, 1998).

5. Additionally, in a docket involving ICA language that is identical to what is quoted above, the Commission found “that AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment” and “the plain language of these provisions is clear that while [the CLEC] can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA”. *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, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, p.6 (Issued July 16, 2010).*⁸

6. Notwithstanding the clear and unambiguous terms of its Agreement, Express Phone continues to dispute certain amounts and withhold those amounts from payment to AT&T Florida in direct contravention of the contractual provisions noted above.

7. To perpetuate its blatant violation of its Agreement in the face of AT&T Florida’s demand for compliance, Express Phone seeks to have the Prehearing Officer “enter an emergency order directing AT&T to take no action to suspend or otherwise interfere with Express Phone’s service to its customers pending a determination by the Commission in this

⁸ Commissions in Kentucky, North Carolina and Alabama have all reached similar conclusions regarding ICA language that is identical to the above quoted Agreement provisions. *See, In the Matter of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC, Case No. 2010-00026; In the Matter of Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina, Docket No. P-55, Sub 1817; and Petition of LifeConnex Telecom, LLC, f/k/a Swiftel, LLC Concerning Implementation of its Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Alabama or AT&T Southeast and Motion for Temporary Emergency Relief to Prevent Suspension of Service, Docket No. 31450.*

docket.”⁹ In short, Express Phone seeks nothing more than a temporary injunction – a power the Commission itself does not have let alone the Prehearing Officer.

8. The sole authority cited by Express Phone in support of its request is Rule 28-106.305, Florida Administrative Code. Express Phone’s reliance on this is misplaced. Rule 28-106.305 is simply a procedural rule providing for the issuance of procedural orders for the orderly conduct of a proceeding. By its terms, this rule is inapplicable. The authority conveyed by this rule is limited to the efficient procedural administration of cases, including discovery and scheduling. This rule does not grant substantive authority to issue injunctions, temporary or otherwise. Moreover, Express Phone cites no other authority that would ascribe substantive injunctive authority to this procedural rule.

9. The “emergency relief” Express Phone seeks is for the Prehearing Officer and subsequently, the Commission, to order AT&T Florida “to take no action to suspend or otherwise interfere with Express Phone’s services to its customers....”¹⁰ That relief is an injunction, notwithstanding Express Phone’s obvious care in avoiding the term. *See First Nat’l Bank in St. Petersburg v. Ferris*, 156 So.2d 421 (Fla. 2d DCA 1963)(An injunction “commands that acts be done or undone.”). However, neither the Prehearing Office nor the Commission has the authority to grant the relief requested because the Commission lacks the authority to issue injunctions.¹¹ *See In re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210 at p. 9 (February 21, 1994) (“We agree that this Commission does not have subject matter jurisdiction to issue injunctions”); see also *Florida Power & Light Company v. Albert Litter Studios*,

⁹ See Motion p. 3.

¹⁰ See Motion at p. 3 and Complaint at p. 8, ¶22 and p.11.

¹¹ Pursuant to Sections 364.015 and 364.285, Florida Statutes, the Commission may seek to enforce its orders in circuit court via a request for an injunction.

Inc., 896 So.2d 891, 892 n.3 (Fla. 3d DCA 2005) (The Commission “concedes that it lacks the authority to issue injunctive relief.”); *In re: Petition to investigate, claim for damages, complaint and other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (Issued April 16, 2007) (“We find it appropriate to grant BellSouth’s Partial Motion to Dismiss. The Petition/Complaint shall be dismissed in part because we do not have judicial power required to... (b) issue injunctions”) and *In re: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.*, Docket No. 080631-TP, Order No. PSC- 09-0515-PCO-TP (Issued July 21, 2009) (“we find that this Commission does not have the authority to provide injunctive relief to [Petitioner]. Thus, assuming all of [Petitioner]’s allegations as true, we find that [Petitioner] has failed to state a cause of action for which injunctive relief can be granted. As such, we shall grant the AT&T Partial Motion to Dismiss and thereby dismiss the portion of the Petition in which [Petitioner] requests injunctive relief.”).

10. Even if the Commission had authority to issue injunctions (which it does not),¹² Express Phone has not demonstrated, and cannot demonstrate, that it is entitled to the extraordinary injunctive relief it seeks. The test, which Express Phone cannot meet, consists of a showing of satisfaction of the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of public interest. *See Tom v. Russ*, 752 So.2d 1250 (Fla. 1st DCA 2000) citing *Spradley v. Old Harmony Baptist Church*, 721 So.2d 735, 737 (Fla. 1st DCA 1998). In order for an injunction to be entered a court must specify the reasons for entry, and “clear,

¹² Pursuant to Section 364.015, Florida Statutes, the Commission may seek to enforce its orders in circuit court via a request for an injunction.

definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction.” *Id.*

11. In light of the plain language of the Agreement discussed above, Express Phone cannot prove that it has a right to refuse to pay its bills or that it has a substantial likelihood of success on the merits of that position – to the contrary, it admits that the Agreement does “not allow for disputed amounts to be withheld from its monthly payments to AT&T”.¹³ Further, if Express Phone has the money to pay its bills as it committed to do in the Agreement, it will suffer no harm whatsoever – if its disputes are invalid, it merely will have paid amounts it was obligated to pay anyway (and there is no “harm” in that), and if its disputes are valid, there is nothing to suggest that AT&T Florida cannot provide it bill credits or payments in accordance with the Commission’s rulings in this Docket. In contrast, if Express Phone does not have the money to pay its bills (which apparently is the case), then the harm of requiring AT&T Florida to provide even more service for which it will not be paid clearly outweighs any purported “harm” to Express Phone. And while Express Phone claims that “irreparable harm” will result if its end users are disconnected,¹⁴ that claim goes too far. While they may no longer receive service from Express Phone, there are a number of other carriers in Florida, including other prepay resellers, from whom Express Phone’s current end users can receive service.


12. Because Express Phone’s Motion seeks a remedy that the Prehearing Officer has no authority to provide, an injunction, Express Phone’s requested relief should be summarily denied.

¹³ See Complaint, p. 6, ¶ 15. Moreover, Express Phone acknowledges that the Agreement provides that “Express Phone shall make payment to BellSouth for all services billed including disputed amounts” and “Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date.” Complaint, p. 6, footnote 2.

¹⁴ See Complaint, p. 9, ¶25.

WHEREFORE, for the reasons set forth above, AT&T Florida respectfully requests that Express Phone's Motion be denied.

Respectfully submitted this 25th day of March, 2011.



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