

Dorothy Menasco

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Thursday, December 29, 2011 2:12 PM
To: Filings@psc.state.fl.us
Subject: 110306-TP AT&T Florida's Response in Opposition to FLATEL's Motion to Reinstate

Importance: High

Attachments: Document.pdf



Document.pdf
(3 MB)

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

C. BellSouth Telecommunications, LLC d/b/a AT&T Florida
on behalf of Tracy W. Hatch

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

E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response in Opposition to FLATEL's
Motion to Reinstate

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December 29, 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.: 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**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's
Response in Opposition to FLATEL'S Motion to Reinstate, 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,

Tracy W. Hatch

cc: All Parties of Record
Jerry D. Hendrix
Gregory R. Follensbee
Suzanne L. Montgomery

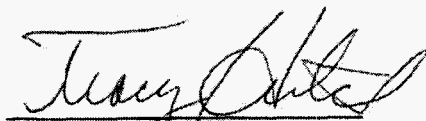
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CERTIFICATE OF SERVICE
Docket No. 110306-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and First Class U.S. Mail this 29thth day of December, 2011 to the
following:

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Tracy W. Hatch

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Emergency Relief) Docket No. 110306-TP
and Complaint of FLATEL, Inc.)
Against BellSouth Telecommunications,)
Inc. d/b/a AT&T Florida to Resolve)
Interconnection Agreement Dispute) Filed: December 29, 2011

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO
FLATEL'S MOTION TO REINSTATE**

BellSouth Telecommunications, LLC¹ d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response in Opposition to the Motion to Reinstate filed by FLATEL, Inc. ("FLATEL"). The Commission does not have jurisdiction to grant FLATEL the injunctive relief it seeks and, regardless, FLATEL has not established that it is entitled to such extraordinary relief. For the reasons discussed herein and in AT&T Florida's Motion to Dismiss, the Commission should deny FLATEL's Motion to Reinstate and dismiss its Letter Complaint in its entirety.

I. INTRODUCTION

The letter FLATEL filed on November 4, 2011 (which the Commission docketed as a Complaint on November 7) is vague as to the relief it is requesting from the Commission. Recognizing that FLATEL might be seeking an Order from the Commission requiring AT&T Florida to restore its service, AT&T Florida included within its November 28 Motion to Dismiss and Response to FLATEL's Complaint ("Motion to Dismiss") legal arguments explaining both that the Commission does not have jurisdiction to grant such relief and that FLATEL has not met the standard for receiving such extraordinary relief. Through its most recent filing, styled "FLATEL's Motion to Reinstate and Response to BellSouth's Filings," FLATEL clarified that it

¹ Effective July 1, 2011, BellSouth Telecommunications, Inc. was converted to BellSouth Telecommunications, LLC by operation of Georgia law.

is seeking reinstatement of its resale service, yet it fails to refute the legal arguments AT&T Florida made in its Motion to Dismiss and fails to provide any legal basis for the Commission to grant such relief. Nor does FLATEL offer to cure its contract breach and pay its outstanding balance. Accordingly, the Commission should deny FLATEL's Motion to Reinstate and, instead, grant AT&T Florida's Motion to Dismiss.

II. ARGUMENT

A. The Commission Does Not Have Authority to Issue an Injunction

FLATEL has asked the Commission to order AT&T Florida to "reinstate[]" FLATEL's "Florida Resale Account," (Motion to Reinstate at 3), which is effectively a request that the Commission require AT&T Florida to undo its proper exercise of its rights under the plain language of the parties' Commission-approved interconnection agreement (the "Agreement") and is thus a request for an injunction. *See First Nat'l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 423 (Fla. 2d DCA 1963) (An injunction "commands that acts be done or undone."). FLATEL failed to cite any legal authority to support its position that the Commission has the statutory authority to grant this extraordinary relief. AT&T Florida respectfully submits that the Commission does not. *See In re: Complaint and Petition of Cynwyd Invs. Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210, at 9 (February 21, 1994) ("We agree that this Commission does not have subject matter jurisdiction to issue injunctions . . ."); *see also Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 892 n.3 (Fla. 3d DCA 2005) (The Commission "concedes that it lacks the authority to issue injunctive relief.").

The Commission's lack of jurisdiction to grant injunctive relief is settled law in Florida, and FLATEL has cited no legal authority to overcome this controlling law. Because FLATEL

seeks a remedy that the Commission has no statutory authority to provide, the Commission should deny its Motion to Reinstate. *See, e.g., In re: Petition by AT&T Commc'ns of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecomms., Inc. for structural separation of BellSouth Telecoms., Inc. into two distinct wholesale and retail corporate subsidiaries*, Docket No. 010345-TP, PSC-01-2178-FOF-TP, at 6 (Nov. 6, 2001) (recognizing that Commission must deny request that seeks relief it is not authorized to grant).

B. FLATEL Has Not Demonstrated That it is Entitled to Injunctive Relief

Even if Florida statutes authorized the Commission to issue injunctions (and they do not), FLATEL has not demonstrated, and cannot demonstrate, that it is entitled to the extraordinary injunctive relief it seeks. As AT&T Florida discussed more fully in its Motion to Dismiss, FLATEL would be entitled to injunctive relief only if it presented, among other things, “clear, definite, and unequivocally sufficient fact[s]” showing that it has a “substantial likelihood of success on the merits.” *Tom v. Russ*, 752 So. 2d 1250, 1251 (Fla. 1st DCA 2000) (citation omitted). Neither FLATEL’s Motion to Reinstate nor any of its other filings even come close to meeting this standard.

FLATEL argues that it “reached an agreement with BellSouth/AT&T” in 2007 in which AT&T Florida supposedly agreed to credit its account to bring its past due balance to zero. (Motion to Reinstate at 1.) Even if this were true, this argument does not help FLATEL here because the unpaid amounts for which AT&T Florida sought payment through its September 2011 collection letter were for services provided by AT&T Florida *after 2007*. (See Motion to Dismiss, Exhibit C (reflecting past due-balances for services AT&T Florida provided to FLATEL in 2009, 2010 and 2011).)

FLATEL's next claim -- that it is "not asking the Commission to alter the terms of its Agreement," and instead is "merely asking the Commission to do what is right," (Motion to Reinstate at 2) -- is meritless. FLATEL admits that it is "short-pay[ing] promotional credits." (*Id.*) It does not and cannot deny that the plain and unambiguous terms of its Agreement requires it to pay its bills in full, regardless of any disputes:

Payment Responsibility. Payment of *all* charges will be the responsibility of FLATEL. . . . FLATEL shall make payment to [AT&T Florida] for all services billed *including disputed amounts*. . . .²

Payment Due. Payment for services provided by [AT&T Florida], *including disputed charges*, is due on or before the next bill date. . . .³

FLATEL, therefore, clearly is asking the Commission to re-write the terms of the Agreement so they do not include this plain obligation to which FLATEL agreed. That, however, is something the Commission simply cannot do. *See Medical Ctr. 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 of a voluntary contract.") (citation omitted)

Next, FLATEL argues that it is not withholding payment because of "disputes," but instead, because of "promotional claims" and that the Agreement somehow allows it to withhold payment of amounts associated with these "claims." This argument flies in the face of common sense and the plain language of the Agreement. AT&T Florida sent FLATEL bills for services rendered and FLATEL disagrees with the amounts AT&T Florida has billed for those services. FLATEL is allowed to have its disagreements heard and resolved in accordance with the terms of the Agreement, but the Agreement makes clear that in the meantime, FLATEL must pay all amounts billed regardless of the reason for its disagreement -- whether it be a claim for a

² Agreement, Attachment 7, § 1.4 (emphasis added).

³ *Id.* § 1.4.1.

promotional credit, a dispute over service quality, a scrivener's error in billing, or any other reason. Again, FLATEL is asking the Commission to re-write its contract, and the Commission simply cannot do so.

FLATEL repeats its argument that the Agreement was "non-negotiable, one sided" and references emails that it attached to its Letter Complaint.⁴ (Motion to Reinstate at 2-3.) This argument does not support its request for reinstatement. The emails are from 2010, long after FLATEL entered the Agreement and voluntarily extended it, and the Agreement and extension were approved by the Commission. *See generally* Docket Nos. 050492-TP, 090028-TP. Beyond that, if FLATEL disagreed with AT&T Florida's position on any matter addressed in the Agreement, it had the right under federal law to either mediate the provision with the assistance of the Commission or present the disagreement to the Commission and to have the Commission determine what language the parties would include in the Agreement before entering the Agreement. *See generally* 47 U.S.C. § 252(a), (b). FLATEL's decision not to invoke its legal rights then does not allow it to ask the Commission to re-write its Agreement now.

FLATEL further supports its request to reinstate service by arguing that the method by which AT&T Florida processes FLATEL's promotion claims is somehow unfair because it is different from how AT&T Florida processes promotional offerings for its retail customers. Again, FLATEL is wrong. When an AT&T Florida retail customer orders services included in a promotional offering, AT&T Florida can determine in real time whether the retail customer qualifies for the promotion. In contrast, AT&T Florida cannot tell in real time whether an end

⁴ FLATEL makes a blanket and unsupported assertion that "[i]n recent years BellSouth/AT&T has manipulated their ICA by completely changing the verbiage to be unfair and to their advantage." (Motion to Reinstate at 2). This unsubstantiated claim is simply not true. FLATEL's Agreement was first entered in 2005, more than 6 years ago. As AT&T Florida described in more detail in its Motion to Dismiss, if FLATEL did not believe that the provisions were appropriate, it had many opportunities to seek review and assistance from the Commission. It chose not to do so.

user of a reseller like FLATEL qualifies for the promotion. AT&T Florida, therefore, reviews a reseller's request for promotional credit and, for those that qualify, AT&T Florida appropriately discounts the effective price decrease associated with the promotion by the Commission-established resale discount rate and passes that discounted amount along to the reseller. This appropriate and non-discriminatory review process is necessary to allow AT&T Florida the opportunity to assess the legitimacy of the thousands of promotional credit requests it receives from resellers.⁵

FLATEL's claim that AT&T Florida's process does not allow it to compete because it cannot offer "the same instant offer" to its end users as AT&T Florida offers, (Letter Complaint at 2), is baseless. AT&T Florida stands ready to refute the meritless claim at the appropriate stage of these proceedings to the extent necessary. At this stage, however, this argument has nothing to do with whether FLATEL breached its agreement (it did) or with whether the Commission can or should re-write the Agreement that FLATEL signed and the Commission approved (it cannot and should not). It is telling that the process FLATEL attacks has been in place for years without FLATEL having presented such a claim to this or any other Commission and that FLATEL makes this claim only after having its services disconnected for its blatant breach of the interconnection agreement.

Significantly, FLATEL is asking to be excused from violating the same contractual obligations that this Commission has enforced on its competitors. For example, in *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-

⁵ FLATEL's argument that AT&T Florida's affiliated companies in "the SBC and Ameritech region" might do things differently and accept claims on the front end of the ordering process, (Motion to Reinstate at 3), is irrelevant to this proceeding. The process AT&T Florida has consistently used for years is appropriate, non-discriminatory, and necessary to allow AT&T Florida the opportunity to assess the legitimacy of the thousands of promotional credit requests it receives from resellers.

0457-PCO-TP, at 8-9 (July 16, 2010), the Commission enforced the plain language of the reseller's interconnection agreement and held that if it wanted to retain its service from AT&T Florida, it must post a bond for the past due amounts and pay its bills in full going forward. FLATEL has made no offer to cure its admitted breach and has all but said that if its service was reinstated, it would continue to breach the Agreement. The Commission should not reward this blatant and admitted contract breach.

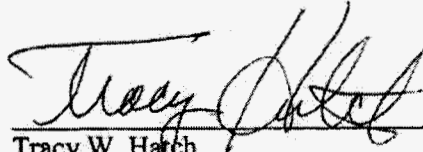
Finally, to the extent disconnection of FLATEL's resale services may impact its end users, that is not a basis to grant an injunction requiring AT&T Florida to reinstate service while FLATEL is in breach of its Agreement. While they may no longer receive service from FLATEL, there are a number of other carriers in Florida, including other prepay resellers, from whom FLATEL's end users can receive service.

III. CONCLUSION

FLATEL is asking for extraordinary relief that the Commission is not statutorily authorized to grant. At bottom, FLATEL's position is that it should not have to pay its bills in full because it has promotional claims and that AT&T Florida is somehow obligated to either grant those claims up front or hold off on pursuing collection until FLATEL's disputes over those claims have run their course. That position, however, flatly contradicts the plain language of the Agreement that FLATEL signed and this Commission approved, which clearly requires FLATEL to pay all amounts billed, whether it disputes those amounts of now. Clearly, FLATEL's Motion to Reinstate Service does not have any (much less a substantial) likelihood of success on the merits. AT&T Florida, therefore, respectfully requests that the Commission deny FLATEL's Motion to Reinstate and grant AT&T Florida's Motion to Dismiss in its entirety.

Respectfully submitted this 29th day of December, 2011.

AT&T FLORIDA

A handwritten signature in black ink, appearing to read "Tracy Hatch", written over a horizontal line.

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