

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

RECEIVED-FPSC
13 JAN 10 AM 10:00
COMMISSION
CLERK

DATE: January 10, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Harris, Teitzman) *HT*
Office of Telecommunications (Bates, Salak) *BS*

RE: Docket No. 100021-TP – 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. 100432-TP – Request for emergency relief and complaint of American Dial Tone, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute.

AGENDA: 01/24/13 – Regular Agenda – Motion for Summary Final Order For Issue 2 – Oral Argument Not Requested – Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé (100021-TP)
Balbis (100432-TP)

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100021.RCM.DOC

Case Background

Docket No. 100021-TP (the “LifeConnex Docket”) was opened in January, 2010, when BellSouth Telecommunications, Inc. d/b/a AT&T Florida (“AT&T”) filed a Complaint and Petition for Relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC (“LifeConnex”) for recovery of approximately \$1.4 million in unpaid charges. AT&T petitioned the Commission for

DOCUMENT NUMBER-DATE

00181 JAN 10 2

FPSC-COMMISSION CLERK

an order allowing it to suspend, disconnect, and ultimately terminate service to LifeConnex unless the amounts were promptly paid. After several months of procedural actions, the docket was placed into abeyance on June 18, 2010.¹ Three days later, however, on June 21, 2010, AT&T filed a Notice of Commencement of Treatment Pursuant to Current Interconnection Agreement, whereby AT&T informed the Commission that AT&T had notified LifeConnex that “unless it promptly pays AT&T Florida the past-due balance for services it has purchased from AT&T Florida, AT&T Florida will suspend, discontinue, and/or terminate LifeConnex’s service in Florida.”

LifeConnex responded on July 1, 2010 by filing an Emergency Request seeking to prevent AT&T from taking any of the specified actions pending resolution of the parties’ underlying billing dispute. At the July 13, 2010, Agenda Conference, the Commission determined that in order to avoid disconnection prior to the dispute being resolved, LifeConnex was required to post a security bond in the amount of \$1.4 million.² If LifeConnex failed to post the security, AT&T would have the right to discontinue LifeConnex’s service, pending notification to LifeConnex’s end user customers.³

Subsequent to the Commission’s Order, on July 21, 2010, LifeConnex notified AT&T and the Commission staff that it was unable to post the required bond, and had begun notifying its customers by telephone that their service was to be discontinued. On August 23, 2010, staff became aware that after mailing a July 27, 2010, “Notice of Disconnection” to its customers, LifeConnex sent those same customers a July 28, 2010 letter, without informing AT&T or the Commission of its contents.⁴ This second letter informed customers that LifeConnex “had been able to resolve the situation, and your service with your existing number will not be affected.” As laid out by the parties in their subsequent filings, LifeConnex reached an agreement with its affiliate company,⁵ American Dial Tone, Inc. (“ADT”), whereby ADT would purchase wholesale residential resale lines from AT&T, and ADT would resell those lines to LifeConnex for use in continuing to serve LifeConnex’s end user customers. Staff characterizes this arrangement as ADT reselling AT&T resale lines, and staff had no knowledge of this arrangement until August 23, 2010. As a result, LifeConnex end user customers experienced no change in their service or billing.

On September 3, 2010, AT&T notified ADT by letter that AT&T intended to suspend, discontinue, and terminate service to all 18,000 plus ADT customers for ADT’s failure to comply with terms of the parties’ Interconnection Agreement (“ICA”). AT&T asserted that the ADT-LifeConnex resale arrangement was a clear and unambiguous violation of the terms of the parties’ ICA. AT&T further insisted that due to the nature of the violation, the dispute resolution

¹ Order Holding Dockets In Abeyance, Order No. PSC-10-0402-PCO-TP, Issued June 18, 2010, in Docket Nos. 100021-TP and 100022-TP.

² See Order No. PSC-10-0457-PCO-TP, Issued July 16, 2010 (“LifeConnex Order”).

³ LifeConnex represented it served over 2,400 “low income, residential customers” with lines it resold from AT&T. Staff was particularly concerned about the impact of a sudden service disconnection on LifeConnex’s consumers, who likely faced limited options to obtain alternative telephone service.

⁴ Staff received this information when a customer of LifeConnex contacted the Commission’s call center seeking explanation of the two letters the customer received.

⁵ Both LifeConnex and ADT were owned by Associated Telecommunications Management Service (“ATMS”), which was the subject of a formal investigation and initiation of show cause proceedings in Docket No. 110082-TP.

provisions of the ICA did not apply, and other provisions of the parties' ICA granted AT&T the legal right to immediately suspend, discontinue, and terminate service to ADT unless ADT immediately ended the arrangement with LifeConnex. ADT responded to AT&T by letter dated September 23, 2010;⁶ in its letter, ADT agreed that it was reselling the lines to LifeConnex, but asserted it had the legal right to do so under the terms of the parties' ICA.

On September 30, 2010, ADT filed a Verified Complaint and Emergency Motion for Temporary Restraining Order in Federal District Court in Tampa, which was later converted into a Motion for a Preliminary Injunction. In its District Court filing, ADT sought to enjoin AT&T from disrupting service to ADT pending the resolution of the parties' ICA dispute. On November 3, 2010, the District Court dismissed ADT's Motion without prejudice, ruling that the Commission had primary jurisdiction to resolve the parties' dispute, and the Commission appeared to have authority to fashion relief to protect ADT and its end user customers, in part based on the Commission's action in the LifeConnex docket. On November 4, 2010, ADT filed a Request for Emergency Relief and Complaint to Resolve Interconnection Agreement Dispute ("Request and Complaint").⁷ This Request for Emergency Relief was scheduled for the December 14, 2010, Agenda Conference.

Prior to the Commission considering ADT's Emergency Request, however, the parties negotiated a Memorandum of Understanding,⁸ wherein AT&T agreed not to disconnect ADT's service, in return for ADT placing approximately \$197,000 into a segregated escrow account pending resolution of the ADT Docket.⁹ ADT placed the amount into the escrow account as required. Subsequently, however, ADT ceased doing business in the state of Florida, and has had both its Competitive Local Exchange Certificates cancelled, as well as being administratively dissolved as a Florida corporation. There has been no substantive activity in the LifeConnex Docket since October, 2011, and no substantive activity in the ADT Docket since February, 2011. This Recommendation addresses what actions the Commission should take to resolve and close both dockets.

The Commission has jurisdiction pursuant to Sections 364.01, 364.02(13) and 364.162(1), Florida Statutes ("F.S.").

⁶ See Document No. 09285-10, Exhibit 2, Page 13 of 26, filed in Docket No. 100432-TP.

⁷ ADT's Request and Complaint was assigned Docket No. 100432, and will be referred to as the "ADT Docket."

⁸ Document No. 09712-10, filed in Docket No. 10432-TP.

⁹ This amount represents the difference in price between AT&T's business and residential wholesale lines. See Document No. 09285-10, Exhibit 4, Page 23 of 26, filed in Docket No. 100432-TP.

Discussion of Issues

Issue 1: Should the Commission dismiss the Complaint of AT&T Florida against LifeConnex Telecom, LLC (Docket No. 100021-TP), for failure to prosecute?

Recommendation: Yes. (Harris)

Staff Analysis: Docket No. 100021-TP was opened in 2010. Following the Commission's July, 2010 Order, the parties have not sought to continue with proceedings before the Commission. Further, there has been no substantive activity in the docket since October, 2011.¹⁰ In addition, several attorneys and law firms have filed notices of withdrawal of representation of LifeConnex, which currently has no legal representative identified with the Commission. Finally, LifeConnex had its Competitive Local Exchange Company ("CLEC") certificate cancelled on July 30, 2011¹¹, and it was administratively dissolved as a Florida limited liability corporation for failure to file an annual report in September, 2012.

Given the lack of activity in the docket, on October 29, 2012, staff sent a letter to both AT&T and Mr. Thomas Biddix, the owner of LifeConnex and its registered contact, notifying both parties that due to the non-activity in the docket, the parties needed to either take actions to put this item on a procedural schedule for resolution or staff would file a recommendation that the Commission close the docket for failure to prosecute the case. Neither AT&T nor LifeConnex filed any response to staff's letter.

Staff recommends that the Commission close Docket No. 100021-TP. LifeConnex no longer conducts any business in the State of Florida; its Florida CLEC certificate has been cancelled; and it has no customers in the state of Florida. Further, given that LifeConnex has ceased to exist as a legal entity in Florida, there are no remaining actions to be taken in this docket, and there is no reason why the Commission should hold the docket open. Therefore, since there has been no response from either of the parties requesting that the docket remain open, nor are there any actions that the Commission should take, the docket should be closed for the parties' failure to prosecute the case.

¹⁰ The October 31, 2011 Joint Status Report was in response to a staff inquiry, requesting an update on the Docket and whether further proceedings were contemplated. The parties indicated that they did not anticipate any activity until proceedings involving AT&T and LifeConnex in a number of other states were resolved. No timeframe was indicated.

¹¹ LifeConnex's certificate was cancelled as part of the negotiated settlement between staff and ATMS in Docket No. 110082-TP. See Document No. 05487-11.

Issue 2: Should the Commission enter a default judgment against American Dial Tone, Inc. in favor of AT&T Florida, in Docket No. 100432-TP?

Recommendation: Yes. The Commission should issue a default judgment against American Dial Tone, Inc. in favor of AT&T Florida. (Harris)

Staff Analysis: As referenced in Issue 1, on October 29, 2012, staff sent both AT&T and ADT a letter, requesting the parties notify staff whether they planned to resume Docket Nos. 100021-TP and 100432-TP, or whether the dockets could be closed. While neither party responded in the LifeConnex docket, on November 15, 2012, AT&T filed a Motion for Summary Final Order (Motion) in the ADT docket. ADT failed to respond to either staff's letter or AT&T's Motion.

In its Motion, AT&T states that as of October 31, 2012, it is holding \$197,412.74 in the segregated escrow account established by the AT&T-ADT Memorandum of Understanding. AT&T maintains that it requires an Order of the Commission to disburse these monies from the escrow account. AT&T further alleges that it is entitled to the entire amount, and the Commission should issue an Order finding in its favor, disposing of the Complaint, and closing the docket.

A Summary Final Order, as authorized by Rule 28-106.204(4), Florida Administrative Code ("F.A.C."), is a procedural mechanism whereby a party to a legal proceeding can avoid the expense and delay of trial, by obtaining a judgment in its favor when there is no dispute as to any material fact.¹² In order to be entitled to a Summary Final Order, a party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* AT&T asserts in its Motion that it has satisfied both elements, and is therefore entitled to a Summary Final Order in its favor.

Staff has carefully considered AT&T's Motion. Given that ADT has not responded to either staff's communication nor to AT&T's Motion, staff understands why AT&T believes a Summary Final Order is appropriate in this docket. Staff, however, believes it would be more appropriate for the Commission to issue a default final judgment against ADT. While the end result would be the same, that is, AT&T would obtain a judgment in its favor and entitling it to release of the funds held in escrow, staff believes the default judgment is procedurally superior.

A finding by the Commission that AT&T is entitled to a Summary Final Order is in essence a Commission determination of all of the facts plead in AT&T's Motion, and more importantly, a determination that AT&T is entitled to judgment as a matter of law. The determination of this matter would revolve around the interpretation of specific language contained in the ADT-AT&T Interconnection Agreement. Given that contract language is often general (or "boilerplate"), staff is concerned that a precedential order, such as the Summary Final Order requested by AT&T, would constitute a Commission determination of the meaning of contract language in the future, without the full opportunity for the Commission to determine the potential policy implications contained in such a decision.

¹² See Order No. PSC-00-1540-FOF-TP, Issued August 24, 2000, in Docket No. 991946-TP, In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and request for immediate relief.

A default judgment, in contrast, is merely a finding by the Commission that, in light of ADT's failure to respond to staff's October communication and AT&T's Motion, AT&T is entitled to the relief it seeks.¹³ Thus, a default judgment would entitle AT&T to the entirety of the monies placed in the segregated escrow account, as well as constitute a finding against ADT on the allegations in AT&T's original Complaint, and the docket would be closed. Accordingly, staff recommends that the Commission enter a default judgment against ADT on the original Complaint, filed November 3, 2010, and awarding AT&T the monies held in the escrow account.

¹³ See Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3rd DCA 1994). See also Chapter 9.1 of Florida Civil Practice 2012 Edition by Judge Philip Padavano (West 2012).

Docket Nos. 100021-TP, 100432-TP
Date: January 10, 2013

Issue 3: Should both dockets be closed?

Recommendation: Yes. (Harris)

Staff Analysis: If the Commission agrees with staff's recommendations in Issues 1 and 2, the Complaint by AT&T against LifeConnex should be dismissed for failure to prosecute, and AT&T should be granted a default judgment against American Dial Tone, Inc. In both cases, no further actions remain to be taken in either docket, and after the time for filing an appeal has run, both dockets should be closed.