

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-

DATE: July 1, 2009

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy)
Division of Regulatory Compliance (King)

RE: Docket No. 080631-TP – Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.

AGENDA: 07/14/09 – Regular Agenda – Partial Motion to Dismiss – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080631.RCM.DOC

Case Background

On October 9, 2008, DSL Internet Corporation (“DSLi”) filed its Petition for the Florida Public Service Commission (“Commission”) to Intervene, Investigate and Mediate (“Petition”)¹ in which DSLi asks the Commission to enjoin BellSouth Telecommunications, Inc. [d/b/a AT&T Florida] (“AT&T”) from suspending the services of DSLi, to deny AT&T the true-up of rates, and to provide “any such other and further relief as the Commission deems necessary to protect the Florida consumer.”

¹ Although filed on October 9, 2008, the Petition is dated October 8, 2008.

On November 3, 2008, AT&T filed its Partial Motion to Dismiss and Answer and Affirmative Defenses to DSLi's Petition ("Partial Motion to Dismiss"). DSLi did not file a response to the AT&T Partial Motion to Dismiss.

The parties have been in settlement negotiations since October 2008. Staff held a conference call with the parties on October 14, 2008, and has received periodic updates on the negotiations since that time. On May 7, 2009, AT&T sent DSLi a confidential settlement offer. On June 9, 2009, AT&T notified the Commission staff that DSLi had not responded to its May 7, 2009, settlement offer and that AT&T would begin collection procedures. On June 10, 2009, staff requested an update from the parties on the status of settlement negotiations. AT&T reiterated its June 9, 2009, statements; DSLi reported that it was still evaluating the settlement offer and formulating a counter proposal.

AT&T has asked that the Commission move forward to address the outstanding Partial Motion to Dismiss. Although the parties still appear to be talking, in light of AT&T's notice that it intends to begin collection procedures, staff believes that the Commission should issue a ruling on the AT&T Partial Motion to Dismiss, which addresses the Commission's authority to provide the injunctive relief requested by DSLi.

This recommendation addresses only the AT&T Partial Motion to Dismiss; unless resolved by the parties, the underlying dispute may need to be scheduled for hearing.

The Commission has jurisdiction over interconnection agreements pursuant to Sections 120.80(13)(d), 364.012(2), and 364.012(13), Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant AT&T's Partial Motion to Dismiss?

Recommendation: Yes. The Commission should grant AT&T's Partial Motion to Dismiss. (Murphy)

Staff Analysis:

DSL_i Petition

DSL_i presents the following as facts:

- DSL_i is a competitive local exchange company;
- on February 12, 2007, DSL_i and AT&T executed an interconnection agreement ("ICA") that was prepared by AT&T;
- on May 28, 2008, AT&T sent DSL_i an invoice for \$188,820.59 for "true-ups" to special access rates going back to March of 2005;
- on July 17, 2008, DSL_i submitted a dispute of the true-ups to AT&T;
- on September 26, 2008, DSL_i submitted another dispute of the true-ups to AT&T;
- on September 26, 2008, AT&T rejected DSL_i's dispute without discussion; and,
- on October 7, 2008, AT&T advised DSL_i that if payment was not received by October 8, 2008, AT&T would suspend service to DSL_i.

DSL_i contends that the ICA carefully lays out the billing, dispute resolution, and true-up procedures the parties must follow. Specifically, DSL_i argues that Section 28 of the ICA titled "Rate True-Up" requires, in pertinent part, that rates be true-up, based upon final prices determined either by agreement between the parties, or by a final and effective order of the Commission. If a Commission order is the basis of a true-up, it must be based upon cost studies submitted by either or both parties and shall be binding upon AT&T and DSL_i specifically, or upon all carriers generally (such as a generic cost proceeding). DSL_i argues that the parties have not agreed to any amounts nor has DSL_i had the opportunity to submit or review any cost studies as they believe the agreement requires. DSL_i also argues that the general billing and collection procedures section of the ICA does not apply to rate true-ups.

As a remedy, DSL_i asks the Commission to enjoin AT&T from suspending the services of DSL_i, to deny the AT&T true-up of rates requested against DSL_i, and to provide "any such other and further relief as the Commission deems necessary to protect the Florida consumer."

AT&T Partial Motion to Dismiss

Relying on *Varnes v. Dawkins*, 624 So. 2d 349 (Fla. 1st DCA 1993) and various Commission orders, AT&T sets forth the standard for a motion to dismiss as follows: a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law; in disposing of a motion to dismiss, the Commission must assume all of the allegations in the complaint as true; and, to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as correct, the petition still fails to state a cause of action for which relief can be granted.

AT&T asserts that the Commission cannot grant DSLi's request for the Commission to enjoin AT&T from suspending the services of DSLi for the following reasons: the Commission has only powers granted by the Legislature and has no common law or inherent powers;² any authority granted by necessary implication must be derived from fair implication and intent incident to any express authority;³ and, any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.⁴

AT&T then quotes Commission orders acknowledging the Commission's lack of authority to issue injunctions. AT&T concludes that "[b]ecause DSLi's Petition seeks a remedy that the Commission has no authority to provide, the portion of the Petition seeking injunctive relief should be dismissed." AT&T asks that the Commission enter an order denying DSLi the relief sought.

Conclusion

AT&T has provided citations to several cases in which the Commission has acknowledged its lack of authority to provide injunctive relief.⁵ Having reviewed the referenced Commission orders, and judicial opinion, staff believes that the Commission does not have the authority to provide injunctive relief to DSLi. Thus, assuming all of DSLi's allegations as true, staff recommends that DSLi has failed to state a cause of action for which injunctive relief can be granted by the Commission. As such, staff recommends that the Commission grant the AT&T Partial Motion to Dismiss and thereby dismiss the portion of the Petition in which DSLi requests injunctive relief. Staff recommends that the remainder of the DSLi Petition should not be dismissed.

² *State v Mayo*, 354 So. 2d 359 (Fla. 1977); *City of Cape Coral v GAC Utility*, 281 So. 2d 493 (Fla. 1973).

³ *Atlantic Coast R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909).

⁴ *State v. Mayo*, 354 S0.2d 359, 361 (Fla. 1977).

⁵ 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-FOF-WS (February 21, 1994); In re: Petition to Investigate, Claim for Damages, Complaint and Other Statements Against Respondents Evercon 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 (April 16, 2007); *Florida Power and Light Company v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 892 n.3 (Fla. 3d DCA 2005).

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Issue 2: Should this docket be closed?

Recommendation: No. This docket should not be closed. **(Murphy)**

Staff Analysis: Although staff has recommended that the Commission does not have authority to provide injunctive relief, staff recommends that the docket remain open to address the substantive issues raised in the DSLi Petition over which the Commission has jurisdiction.