

Marguerite McLean100021-TP
100022-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Friday, April 09, 2010 2:57 PM
To: Filings@psc.state.fl.us
Subject: 100021/100022-TP AT&T Florida's Motion to Dismiss or Sever Certain Counterclaims
Importance: High
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BellSouth Telecommunications, Inc. d/b/a AT&T Florida
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- B. Docket No.: 100021-TP: Complaint of BellSouth Telecommunications,
Inc. d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC
Docket No. 100022-TP: Complaint of BellSouth Telecommunications,
Inc. d/b/a AT&T Florida Against Image Access, Inc. d/b/a New Phone
- C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida
on behalf of Manuel A. Gurdian
- D. 16 pages total (includes letter, pleading, certificate of service and Exhibits A and B)
- E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss or Sever Certain Counterclaims
.pdf
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DOCUMENT NUMBER-DATE

02694 APR-9 2010

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4/9/2010



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April 9, 2010

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

Docket No.: 100021-TP: Complaint of BellSouth Telecommunications, Inc. d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC

Docket No. 100022-TP: Complaint of BellSouth Telecommunications, Inc. d/b/a AT&T Florida Against Image Access, Inc. d/b/a New Phone

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss or Sever Certain Counterclaims, which we ask that you file in the captioned dockets.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

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

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of BellSouth)	
Telecommunications, Inc. d/b/a AT&T)	Docket No. 100021-TP
Florida Against LifeConnex Telecom,)	
LLC f/k/a Swiftel, LLC)	
In re: Complaint of BellSouth)	Docket No. 100022-TP
Telecommunications, Inc. d/b/a AT&T)	
Florida Against Image Access, Inc. d/b/a)	
New Phone)	Filed: April 9, 2010

**AT&T FLORIDA'S MOTION TO DISMISS OR SEVER
CERTAIN COUNTERCLAIMS**

BellSouth Telecommunications Inc. d/b/a AT&T Southeast d/b/a AT&T Florida ("AT&T Florida") respectfully moves the Florida Public Service Commission ("the Commission") to dismiss the counterclaims identified in this Motion without prejudice or, in the alternative, to sever them for consideration in their own dockets, separate and apart from the claims presented in AT&T Florida's Complaint.

**I.
INTRODUCTION**

AT&T Florida's Complaints in Docket Nos. 100021 and 100022-TP are straightforward – they seek to have Image Access, Inc. d/b/a New Phone ("NewPhone") and LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex") pay bills AT&T Florida has previously rendered to them for telecommunications services AT&T Florida has already provided to them pursuant to their respective interconnection agreements, but which the resellers have not paid. In each case, the resellers have either failed to dispute the billed amounts, or have submitted disputes that AT&T Florida has denied because they are invalid.

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In addition to filing various Motions addressing AT&T's Complaint,¹ LifeConnex has asserted a variety of purported "counterclaims." LifeConnex's counterclaims ask the Commission to issue sweeping declaratory rulings regarding resale promotional pricing practices that have nothing to do with the issues presented in AT&T Florida's Complaints: how much money LifeConnex owes AT&T Florida for bills previously rendered under the parties' existing interconnection agreements. As explained below, the three counterclaims should be dismissed because LifeConnex has not alleged (and cannot allege) that it has disputed any billing addressed in AT&T's Complaint on the grounds alleged in the three common counterclaims; as a result, there is no "live" dispute between LifeConnex and AT&T Florida with respect to the issues purportedly presented in the three counterclaims. It is not surprising, therefore, that the three counterclaims look nothing like the detailed factual allegations and claims for relief that one would expect to see in a true counterclaim. Instead, they look like statements of policy issues a party might ask the Commission to address in an arbitration under Section 251 or 252 of the federal Telecommunications Act of 1996 (the "1996 Act") or in a generic docket. Clearly, they do not belong in proceedings like these, that addresses specific complaints for past due amounts under existing interconnection agreements.

In the alternative, if the Commission does not dismiss the counterclaims outright, it should at a minimum sever them for consideration in separate dockets, because the issues raised in the counterclaims have nothing to do with the matters at issue in AT&T Florida's Complaints, and it thus appears that the counterclaims have been asserted for only one purpose: to improperly delay resolution of AT&T Florida's collection claims.

¹ AT&T Florida addresses these Motions in a separate Response that is being filed contemporaneously with this Motion.

II.
THE COMMISSION SHOULD DISMISS
THE THREE COUNTERCLAIMS

AT&T Florida seeks dismissal of the three counterclaims asserted by LifeConnex.² This Motion refers to these counterclaims as the “line connection charge waiver” counterclaim, the “bundled offering” counterclaim, and the “new methodology” counterclaim. In this section, AT&T Florida describes each of the three counterclaims and then explains why each should be dismissed without prejudice.

A. The “Line Connection Charge Waiver” Counterclaim.

Some of AT&T Florida’s retail promotional offerings waive the line connection charge for qualifying end users. When a reseller buys the telecommunications services associated with those offerings, AT&T Florida initially bills the reseller the retail charge for the line connection less the applicable wholesale discount. For example, assuming a retail line connection charge of \$40 and applying the wholesale discount of 21.83%³ established by the parties’ interconnection agreement, AT&T Florida initially bills the reseller \$31.27.

If the reseller timely submits a request for a promotional credit and otherwise satisfies the qualifications of a specific retail promotional offering, AT&T Florida then credits the reseller’s bill in the same amount it initially billed the reseller for the line connection charge. In the example above, AT&T Florida would credit the reseller’s bill

² NewPhone does not assert the same counterclaims as LifeConnex. NewPhone, however, asserts a sweeping claim that AT&T Florida has violated the resale provisions of the 1996 Act, certain FCC regulations thereunder, and the parties’ ICA, by “failing to provide NewPhone with the appropriate resale promotion credit and/or refund,” by imposing “unreasonable and discriminatory restrictions on resale,” and by failing to obtain Commission approval before implementing these so-called restrictions. See NewPhone Answer/Counterclaim at p. 8, ¶ 2. As discussed below, AT&T Florida does not seek dismissal of NewPhone’s counterclaim to the extent it challenges the cashback or marketing referral issues identified in Section IV of AT&T Florida’s complaints. However, to the extent it asks this Commission to decide issues relating to the Counterclaims asserted by LifeConnex, this counterclaim, too, should be dismissed.

³ See Commission Order No. PSC-96-1579-FOF-TP.

in the amount of \$31.27. As a result, the reseller, like the qualifying retail customer, would pay \$0 for the line connection.

LifeConnex, however, has filed a counterclaim suggesting that it is entitled to more.⁴ To use the example above, they contend that, instead of crediting the reseller's bill in the amount of \$31.27 (so the qualifying reseller, like the qualifying retail customer, pays nothing for the line connection), AT&T Florida should credit the reseller's bill in the amount of \$40 (so AT&T Florida winds up *paying* the reseller \$8.73 for a service the reseller has ordered from AT&T Florida).

Setting aside the obvious absurdity of the LifeConnex's position, to AT&T Florida's knowledge, LifeConnex has not disputed any amount AT&T Florida seeks in its Complaint on the grounds set forth in the "line connection charge waiver" counterclaim, and LifeConnex does not allege that it has done so.

B. The "Bundled Offering" Counterclaims.

LifeConnex in addition to filing the "line connection charge waiver" counterclaim has also filed a "bundled offering" counterclaim that alleges, in its entirety:

AT&T offers discounted telephone service bundled with other, non-regulated services such as cable television and internet services. AT&T, however, refuses to offer its telephone service for resale at a comparable discounted rate. Respondent asks the Commission to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. §51.613(b).⁵

To AT&T Florida's knowledge, LifeConnex has not disputed any amount AT&T Florida seeks in its Complaint on the grounds set forth in the "bundled offering" counterclaim, and LifeConnex does not allege that it has done so.

⁴ See Lifeconnex Answer/Counterclaims at p. 10-11, ¶ 1.

⁵ See Lifeconnex Answer/Counterclaims at p. 11, ¶3.

C. The "New Methodology" Counterclaims.

LifeConnex, in addition to asserting the "line connection charge" and "bundled offering" counterclaims, also asserts a "new methodology" counterclaim that alleges, in its entirety:

AT&T has recently informed Respondent that AT&T intends to reduce from approximately \$40 to 6.07 the amount paid to resellers under AT&T's "\$50 cash back" rebate offer. Respondent asks the Commission to declare that AT&T cannot impose this condition on resale unless and until AT&T "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. §51.613(b).⁶

The first sentence of this counterclaim refers to Accessible Letter No. CLECSE09-100, issued by AT&T Florida on July 1, 2009, a copy of which is attached to this Motion as Exhibit A. That Accessible Letter, along with Accessible Letter No. CLECSE09-105, issued July 1, 2009 (attached as Exhibit B), announced that AT&T Florida planned to change, effective September 1, 2009, the manner in which it calculated the credits available to CLECs that purchase certain retail cash-back promotional offers that are available for resale.

To AT&T Florida's knowledge, LifeConnex has not disputed any amount AT&T Florida seeks in its Complaint on the grounds set forth in the "bundled offering" counterclaim, and LifeConnex does not allege that it has done so. This is hardly surprising, because AT&T Florida emphasizes on the first page of its Complaints that *"AT&T Florida is not seeking any amounts billed under this new methodology in this Docket."* Moreover, AT&T Florida is not currently applying the new methodology to any CLEC, including LifeConnex or NewPhone, and AT&T Florida commits that it will not bill any reseller, including without limitation the Defendants in these proceedings, in

⁶ See Lifeconnex Answer/Counterclaims at p. 11, ¶4.

the future for any amounts calculated under this new methodology without providing the requisite notice in the form of an Accessible Letter.

D. The Commission should dismiss each of the three counterclaims.

As noted above, AT&T Florida is unaware of LifeConnex having disputed any amount AT&T Florida seeks in its Complaint on the grounds set forth in any of the three counterclaims, and LifeConnex does not allege that it has done so. Accordingly, LifeConnex has failed to allege any cause of action for which relief can be granted with regard to amounts AT&T Florida has billed them. See, e.g., *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (“The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action”); *Okaloosa Island Leaseholders Association, Inc. v. Okaloosa Island Authority*, 308 So.2d 120, 122 (Fla. 1st DCA 1975) (a request for declaratory judgment is insufficient unless there is a “bona fide dispute between contending parties as to a present, justiciable issue” and “to withstand a motion to dismiss, a complaint for declaratory relief must allege facts showing that there is a bona fide, actual, present, and practical need for a declaration.”). Moreover, LifeConnex’s counterclaims do not meet the “immediacy” requirement under the standing test enunciated in *Agrico Chemical Co. v. DER*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981)⁷ in that as they are speculative and conjectural. See *In re: Complaint of J. Christopher Robbins against BellSouth Telecommunications, Inc. for violation of Rule 25-4.073(1)(c), F.A.C., Answering Time*, Docket No. 020595-TL, Order No. PSC-02-1344-FOF-TL (Issued October 3, 2002) (“The first prong of the test, the “immediacy” requirement, has been held to preclude participation based on stated concerns that are

⁷ Under the standards set forth in *Agrico*, in order to have standing, a person must demonstrate that 1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing and 2) his substantial injury is of a type or nature which the proceeding is designed to protect.

speculative or conjectural.”) and *Village Park Mobile Home Association, Inc. v. State Dept. of Business Regulation*, 506 So.2d 426, 434 (Fla. 1st DCA 1987)(speculations on the possible occurrence of injurious events is too remote to warrant inclusion in the administrative review process).

To be sure, the issues LifeConnex improperly seeks to inject into this proceeding by way of the “line connection charge waiver” counterclaim, the bundled offering counterclaim, and the new methodology counterclaim could be presented for resolution in an appropriate proceeding (for instance, a generic docket to consider policy issues that apply industry-wide, or an arbitration under Section 252 of the 1996 Act). But *this* Docket is not the appropriate forum to address those broad policy issues, especially since, as explained in AT&T Florida’s Response to NewPhone’s Motion to Dismiss and/or Stay⁸ (filed herewith), any delay in resolving AT&T Florida’s Complaints will only harm AT&T Florida and benefit LifeConnex and NewPhone.. AT&T Florida therefore respectfully requests that the Commission dismiss the three counterclaims without prejudice to the resellers’ right to raise the issues in an appropriate proceeding.

III.
**THE COMMISSION SHOULD DISMISS NEWPHONE’S “RESALE
PROMOTION CREDITS” COUNTERCLAIM TO THE EXTENT IT
ADDRESSES ISSUES NOT REFERENCED
IN SECTION IV OF THE COMPLAINT.**

In addition to seeking dismissal of LifeConnex’s three counterclaims, AT&T Florida seeks dismissal of NewPhone’s counterclaim described below to the extent NewPhone has not disputed any amount AT&T Florida seeks in its Complaint on the grounds set forth in that counterclaim.

⁸ LifeConnex has filed a notice of Joinder in NewPhone’s Motion to Dismiss and/or Stay.

NewPhone does not assert the three counterclaims discussed above. Instead, NewPhone asserts as broad “resale promotion credits” counterclaim that alleges:

AT&T has violated 47 U.S.C. §251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) and breached the Parties’ 2002 and/or 2006 Interconnection Agreement by (a) failing to provide NewPhone with the appropriate resale promotion credit and/or refund, (b) imposing unreasonable and discriminatory restrictions on resale, and (c) failing to obtain necessary and prior approval from the Commission, pursuant to 47 C.F.R. 51.613(b), prior to imposing a restriction on resale. AT&T’s actions are unlawfully discriminatory and anticompetitive and caused financial harm to NewPhone. AT&T owes NewPhone for all amounts wrongfully withheld and/or not properly credited or refunded to NewPhone.⁹

NewPhone’s counterclaim includes additional allegations specific to cashback offerings.¹⁰ AT&T Florida does not ask the Commission to dismiss or sever this counterclaim to the extent that it relates to amounts New Phone has disputed or withheld on the basis of the cashback or marketing referral issues identified in Section IV of AT&T Florida’s Complaints.

However, NewPhone does not allege that it has disputed and failed to pay any amounts other than those relating to the cashback or marketing referral promotions that are the subject of AT&T Florida’s collection claims. Accordingly, to the extent NewPhone’s counterclaim purports to address issues other than those described in Section IV. of AT&T Florida’s Complaint, it – like LifeConnex’s three counterclaims – is overly-broad and fails to state a claim upon which relief can be granted and should be dismissed for all the reasons set forth above with respect to LifeConnex’s three counterclaims.

⁹ See NewPhone’s Answer/Counterclaim at p. 8-9, ¶ 2.

¹⁰ See New Phone Answer/Counterclaim at pp. 9-10, ¶¶ 3-5.

**IV. IF THE COMMISSION DOES NOT DISMISS THE COUNTERCLAIMS
ADDRESSED ABOVE, IT SHOULD AT A MINIMUM
SEVER THEM FROM THIS DOCKET.**

If the Commission permits any of the disputed counterclaims to go forward as pleaded, it should do so for the sole purpose of deciding those issues on a prospective basis (because, as explained above, AT&T Florida is unaware of LifeConnex or NewPhone having disputed any amount AT&T Florida seeks in its Complaints on the grounds set forth in the disputed counterclaims, and neither LifeConnex or NewPhone allege that they have done so) and in one or more proceedings separate and apart from these dockets. LifeConnex's three counterclaims have nothing to do with the issues raised in AT&T Florida's complaint; nor does NewPhone's resale promotions credits counterclaim, to the extent it goes beyond the cashback or marketing referral issues identified in Section IV of AT&T Florida's Complaints. It thus appears that these "counterclaims" have been interposed for the sole – and improper – purpose of delay: having already moved to stay this Docket to await rulings in other proceedings, LifeConnex and NewPhone are now trying to inject irrelevant issues into this Docket to complicate an otherwise straightforward collections case and delay its resolution. The Commission should not permit this.

CONCLUSION

For the reasons set forth above, the disputed counterclaims should be dismissed without prejudice or severed from these proceedings.

WHEREFORE, AT&T Florida respectfully requests that the Commission enter an Order dismissing or severing all of LifeConnex and NewPhone's Counterclaims, and granting such further relief as the Commission deems appropriate.

Respectfully submitted on this the 9th day of April, 2010.

AT&T FLORIDA



E. Earl Edenfield, Jr.

Tracy W. Hatch

Manuel A. Gurdian

c/o Gregory R. Follensbee

150 South Monroe Street

Suite 400

Tallahassee, Florida 32301

(305) 347-5558

799299

CERTIFICATE OF SERVICE
Docket Nos. 100021-TP and 100022-TP

I HEREBY CERTIFY that a true and correct copy was served via
Electronic Mail and First Class U. S. Mail this 9th of April, 2010 to the following:

Charles Murphy
Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
cmurphy@psc.state.fl.us

LifeConnex Telecom, LLC
Mr. Edward Heard
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Pensacola, FL 32507-7475
Tel. No. (877) 450-5544
Fax No. (850) 895-3019
eheard@lifeconnex.net

NewPhone, Inc.
Mr. Jim R. Dry
5555 Hilton Avenue, Suite 415
Baton Rouge, LA 70808
Tel. No. (225) 214-4412
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jjmdry@razorline.com

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Manuel A. Gurdian

EXHIBIT A



Accessible

Date: **July 1, 2009**

Number: **CLECSE09-100**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee**

Issuing AT&T ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to, for purposes of this Accessible Letter, as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T Southeast Region is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T Southeast Region will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

<https://clec.att.com/clec/hb/index.cfm>

AT&T Southeast Region reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T Southeast Region will send additional notification at the time of cancellation. AT&T Southeast Region will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

EXHIBIT B



Accessible

Date: **July 1, 2009**

Number: **CLECSE09-105**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Revision to Win-back Cash Back Promotion - FL**

Related Letters: **CLECSE09-100**

Attachment: **NA**

States Impacted: **Florida**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of \$6.07 using the methodology announced in **CLECSE09-100**, dated July 1, 2009.

AT&T Florida reserves the right to modify or cancel the above information. Should any such action be taken, it will be reflected in a subsequent letter to CLECs. AT&T Florida will incur no liability for the foregoing.