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July 14, 2010

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

RECEIVED

JUL 15 2010

PUBLIC SERVICE
COMMISSION

*RE: BellSouth Telecommunications, Inc. d/b/a Southeast d/b/a AT&T KY
v. LifeConnex Telecom, Inc.
Case No. 2010-00026*

Dear Mr. DeRouen:

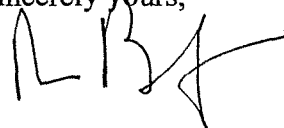
In further support of LifeConnex Telecom, Inc.'s (f/k/a Swiftel, LLC) ("LifeConnex") EMERGENCY Motion to Prevent Suspension of Service in the Commonwealth of Kentucky, enclosed for filing are copies of:

1. the July 12, 2010 Order of the North Carolina Utilities Commission requiring AT&T not to suspend service to LifeConnex pending further order of the Commission.
2. the recommendation of the Staff of the Florida Public Service Commission re: LifeConnex' similar motion for emergency relief in Florida, recommending that that the Florida Commission grant LifeConnex' request for emergency relief with conditions, *i.e.*, (1) that LifeConnex fully comply with all terms of the parties' ICA from July 13, 2010, onward, and (2) in the event of LifeConnex' non-compliance and suspension or termination of service by AT&T, that LifeConnex take certain actions to provide its customers notice sufficient to allow those customers to find alternative service. Significantly, the Florida Staff says, "Staff does not believe AT&T's position in agreeing to hold determination of the disputed amount in abeyance, and then insisting on payment of a balance that took several years to accrue be paid within 30 days, to be fair, just, or reasonable, and recommends that the Commission grant LifeConnex's requested relief, with specific conditions." (p. 10).

Jeffrey DeRouen
July 14, 2010
Page 2

Please indicate receipt of this filing by placing your file stamp on the extra copy and returning to me in the enclosed self-addressed, stamped envelope.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'DFB', with a long horizontal stroke extending to the right.

Douglas F. Brent

DFB:ec

Enclosures

cc: Mary M. Keyer
Henry M. Walker

WHEREUPON, the Chairman concludes that good cause exists to require AT&T not to suspend service to Lifeconnex or to EveryCall pending further Order issued after and in response to the filings made by AT&T and the Public Staff.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of July, 2010.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

D1071210.02

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1817
DOCKET NO. P-55, SUB 1818

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1817)	
)	
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)	ORDER CONCERNING
)	MOTION NOT TO SUSPEND
DOCKET NO. P-55, SUB 1818)	
)	
In the Matter of)	
Disconnection of Everycall Communications)	
Inc. by BellSouth Telecommunications, Inc.)	
d/b/a AT&T Southeast, d/b/a AT&T North)	
Carolina)	

BY THE CHAIRMAN: On June 23, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T Southeast d/b/a AT&T North Carolina (AT&T) filed Notices of Disconnection with respect to Lifeconnex, Inc. f/k/a Swiftel, LLC (Lifeconnex) and EveryCall Communications, Inc. (EveryCall) respectively. In addition to disconnection, AT&T also threatened suspension of service to these companies. On July 6, 2010, both Lifeconnex and EveryCall filed Petitions for Temporary Emergency Relief to Prevent Suspension or Termination of Service. On July 8, 2010, an Order Seeking Comments from AT&T and the Public Staff regarding the Petitions of LifeConnex and EveryCall. The due date for such comments was July 20, 2010.

On July 12, 2010, Lifeconnex filed a Motion for Clarification of Order Seeking Comments from AT&T and the Public Staff. Lifeconnex represented that its counsel has been informed by AT&T that it will consider itself free to suspend service to Lifeconnex after July 13, 2010.¹ LifeConnex understands that AT&T may still seek to suspend service on July 20, 2010; but, if AT&T is allowed to do so before that time, the July 8, 2010 Order "will have been a vain act."

¹ Lifeconnex stated that "Suspend" is defined in its ICA, Sec. 1.5.1.1 as "the temporary restriction of the billed Party's access to the ordering systems and/or access to the billed Party's ability to initiate PIC related changes. In addition, during Suspension, pending orders may not be completed and orders for new service or changes to existing service may not be accepted."

WHEREUPON, the Chairman concludes that good cause exists to require AT&T not to suspend service to Lifeconnex or to EveryCall pending further Order issued after and in response to the filings made by AT&T and the Public Staff.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of July, 2010.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

D1071210.02

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 12, 2010

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy, Teitzman)
Division of Regulatory Analysis (Curry, Bates, Watts)

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.

AGENDA: 07/13/10 – Regular Agenda – Interim Procedural Order - Oral Argument Requested – Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: New Commissioner 2

CRITICAL DATES: Emergency Motion – Discontinuance/Termination on July 21, 2010

SPECIAL INSTRUCTIONS: None

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

Case Background

On January 8, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Florida (“AT&T”) filed a Complaint and Petition for Relief (“Complaint”) against LifeConnex Telecom, LLC, f/k/a Swiftel, LLC (“LifeConnex”) seeking resolution of billing disputes between LifeConnex and AT&T; determination of the amount LifeConnex owes AT&T under the parties’ Interconnection Agreement (“ICA”), and requiring LifeConnex to pay that amount to AT&T. In summary, AT&T alleges that LifeConnex purchases telecommunications services from AT&T for resale to end use consumers. Under the terms of the ICA and federal law, LifeConnex is authorized to

Docket No. 100021-TP

Date: July 12, 2010

apply certain discounts or promotional credits which AT&T applies to its own customers. AT&T alleges that LifeConnex improperly calculates the amount of discounts or credits it is entitled to. AT&T also alleges that LifeConnex fails to pay disputed amounts owed to AT&T, as required by the ICA, and rather deducts the amounts in dispute from its payments, in violation of the terms of the ICA.

On February 25, 2010, LifeConnex filed its Answer, Affirmative Defenses, and Counterclaims ("Answer") to AT&T's Complaint. In its Answer, LifeConnex alleges that it is entitled under federal law to the same discounts and promotional credits AT&T offers its own retail customers, and as a result, AT&T in fact owes significant sums to LifeConnex, which sums AT&T refuses to pay. LifeConnex raises a number of affirmative defenses and counterclaims. In its Answer, LifeConnex also suggests that this matter should either be dismissed or held in abeyance by the Commission pending the results of similar lawsuits pending in Federal court and a Petition pending at the Federal Communications Commission.

After a number of procedural motions, on May 13, 2010, the parties filed a Joint Motion on Procedural Issues, which was followed on June 15, 2010, by a Joint Motion on Procedural Schedule (the "Joint Motions"). In the Joint Motions, the parties requested this matter be held in abeyance pending the outcomes of similar suits proceeding to hearing in Alabama, Louisiana, North Carolina, and South Carolina. The Joint Motions were granted by Order No. PSC-10-0402-PCO-TP, issued June 18, 2010, ("Abeyance Order"), which stated in part:

Having reviewed the Joint Motions, I will hold these two Dockets in abeyance pending either resolution of the cases in the states set forth above or the filing of a persuasive motion to resume the dockets. Upon resumption of the dockets, I will consider motions from the parties which take into account intervening events and address both the appropriate scope of the proceedings and the appropriate posture of the proceedings with respect to consolidation. Upon resumption of the Dockets, the parties will be expected to withdraw all moot or superseded motions that are currently pending before this Commission but held in abeyance pursuant to this Order.

On June 21, 2010, AT&T filed a "Notice of Commencement of Treatment Pursuant to Current Interconnection Agreement" ("Notice of Commencement of Treatment"), wherein AT&T notified the Commission that it had sent LifeConnex a letter, informing LifeConnex that unless it paid AT&T all past due balances (the balances at issue in this docket), "AT&T would suspend, discontinue, and/or terminate LifeConnex's service in Florida...." In the letter to LifeConnex, AT&T stated that if a partial payment was not made by July 6, 2010, AT&T would suspend LifeConnex's ability to order new services or make changes to existing lines; and if all past due balances were not paid by July 21, 2010, AT&T would take further action, including discontinuance of service to LifeConnex (and therefore to LifeConnex's end user customers) and/or termination of the ICA with LifeConnex. In the Notice of Commencement of Treatment, AT&T states that suspension, discontinuance, and/or termination are actions authorized by the parties' ICA, and that specific language in Section 1.4 of Attachment 7 to the ICA states "LifeConnex shall make payment to AT&T for all services billed including disputed amounts."

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Date: July 12, 2010

AT&T subsequently informed the Commission that it had extended the July 6, 2010, suspension date to July 13, 2010.

On July 1, 2010, LifeConnex filed a Request for Emergency Relief ("Emergency Request"), seeking an Order from the Commission "prohibiting AT&T from suspending, discontinuing, terminating, or otherwise disrupting LifeConnex's service in Florida pending resolution of the disputed matters in this docket." In the Emergency Request, LifeConnex alleges that it is currently providing telecommunications service to over 2,500 Florida customers, the majority of whom are low income, residential customers, through resale of AT&T's facilities. LifeConnex asserts that it is entitled to receive from AT&T the same credits and promotional discounts that AT&T gives to its own retail customers, and that LifeConnex has hired a private firm, Lost Key Telecom, Inc., to keep track of the credits. LifeConnex asserts that it disputes AT&T's claims in AT&T's Complaint filed in this docket, and has agreed with AT&T to the Joint Motions on Procedure and Scheduling.

In the Emergency Request, LifeConnex asks the Commission to prevent AT&T from disrupting LifeConnex's service, including the ordering of new services. LifeConnex states that the parties agreed, and the Commission ordered, that this proceeding would be held in abeyance until proceedings in other states are resolved, at which time the instant Florida proceeding may be revived and the matters in dispute resolved. LifeConnex asserts that AT&T's Notice of Commencement of Treatment is contrary to the letter and spirit of the parties' agreement and the Order. Contemporaneously with the filing of the Emergency Request, LifeConnex filed a Request for Oral Argument, and asked that the Emergency Request be considered by a panel of Commissioners at an Agenda Conference or by one or more Commissioners following a hearing.

In its Response in Opposition to LifeConnex's Request for Emergency Relief ("Response in Opposition"), filed July 6, 2010, AT&T states that the ICA was approved by operation of law on December 27, 2007, and that the terms of the ICA thus constitute a binding contract between the parties, which the Commission is obligated to enforce under state and federal law. AT&T states that Sections 1.4 and 1.4.1 of Attachment 7 to the ICA require LifeConnex to make payments of all amounts billed, including disputed amounts, on or before the billing due date. AT&T denies that it will owe LifeConnex any amounts at the conclusion of this case. AT&T further alleges that the plain language of the Joint Motions and the Abeyance Order make clear AT&T's Notice of Commencement of Treatment is not barred in any way, and in fact support AT&T's position that LifeConnex must comply with the ICA during the pendency of this dispute. AT&T further argues that AT&T's past conduct in allowing LifeConnex to deduct disputed amounts before paying its bills in no way constitutes a waiver of AT&T's right to enforce the terms of the ICA at this point in time. Finally, AT&T argues that the Commission is without authority to issue injunctive relief, and even were it to have such authority, the facts in this case would not support such extraordinary relief. AT&T filed simultaneously with its Response in Opposition a Response to LifeConnex's Request for Oral Argument.

Upon receipt of LifeConnex's July 1, 2010, Emergency Request, on July 2, 2010, staff counsel made contact with both AT&T and LifeConnex. Staff counsel specifically requested AT&T extend the disconnect date from July 21, 2010 to August 3, 2010, to enable staff to bring a recommendation before the Commission prior to AT&T taking action. Staff reiterated this

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request the following week. After receiving no commitment from AT&T, staff scheduled a status meeting/conference call on July 9, 2010, with all parties participating. Staff specifically asked both parties about the status of negotiations between the parties to continue service to LifeConnex after the July 21, 2010, date; the parties' plans for LifeConnex's end use customers if the parties could not reach an agreement and AT&T discontinued service to LifeConnex; and whether AT&T would agree to extend the discontinuance date until August 3, 2010, in order to allow the Commission to hear and consider the Emergency Request at a regularly scheduled Agenda Conference. Staff was informed that the parties, while continuing to negotiate, do not appear to be close to any kind of agreement regarding continued service to LifeConnex. AT&T's attorneys participating in the status call indicated they have not been authorized to extend the discontinuance deadline until August 3, 2010. Finally, AT&T further indicated that LifeConnex's end-use customers were LifeConnex's, and it was the responsibility of LifeConnex to notify its customers regarding the potential discontinuance of service and assist its customers in finding alternative telecommunications services.¹

As a result of the failure of the parties to indicate any firm commitment to LifeConnex's end user customers; the apparently negative outlook for a successful resolution to this dispute prior to the July 21, 2010, discontinuance deadline; and the possibly severe effects that discontinuance could have on over 2,500 mostly lifeline pre-paid consumers in this state, staff believes the Commission should address LifeConnex's Emergency Request prior to the July 21, 2010, discontinuance deadline. Therefore, staff has filed this Emergency Recommendation for the July 13, 2010, regularly scheduled Agenda Conference. This Emergency Recommendation addresses LifeConnex's Request for Emergency Relief and its Request for Oral Argument.

The Commission has jurisdiction pursuant to 47 U.S.C. Section 252 of the Telecommunications Act of 1996 (the Act), Sections 120.80(13)(d) and (e), 364.01 and 364.161, Florida Statutes (F.S.) and Rules 25-22.036 and 28-106.201, Florida Administrative Code (F.A.C.).

¹ AT&T did point out that the discontinuance would result in the access lines remaining "warm;" that is, LifeConnex customers would still have access to 911 emergency service calls even though their phones have no dial-tone.

Discussion of Issues

Issue 1: Should LifeConnex Telecom, LLC's Request for Oral Argument be granted?

Recommendation: Yes, LifeConnex Telecom, LLC's Request for Oral Argument should be granted. Staff recommends allowing each side ten minutes to address the Commission on this matter. (Teitzman)

Staff Analysis: Pursuant to Rule 25-22.0022(1), F.A.C., LifeConnex filed its Request for Oral Argument concurrently with its Request for Emergency Relief. The parties' respective arguments are summarized below.

LifeConnex's Request for Oral Argument

LifeConnex believes that oral argument will aid the Commission's understanding and evaluation of the Request for Emergency Relief. LifeConnex asserts that this matter involves unique circumstances, not only of the underlying dispute, but one party's claim to a right to take action during a period of abeyance, and implicates a number of questions regarding Commission practice and the public interest. If oral argument is granted, LifeConnex suggests 15 minutes per side would be sufficient.

AT&T's Response to Request

AT&T maintains the parties' pleadings adequately explain the parties' respective positions and that the ICA is clear. AT&T thus states its belief that oral argument is not needed. AT&T requests, however, that should the Commission grant oral argument, AT&T be afforded the opportunity to respond to LifeConnex's arguments.

Analysis

The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying matter. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

Staff believes that the Commissioners would benefit from oral argument on LifeConnex's Request for Emergency Relief and AT&T's Response in Opposition. Accordingly, staff recommends that the Commission grant LifeConnex's Request for Oral Argument. Because this Emergency Recommendation was filed approximately 24 hours before the Agenda Conference, staff recommends that if the Commission decides to hear oral argument, LifeConnex and AT&T should each be allowed 10 minutes to address the Commission on this matter.

Docket No. 100021-TP

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Issue 2: Should the Commission grant LifeConnex Telecom, LLC's Request for Emergency Relief?

Recommendation: Yes, with conditions. The Commission should grant LifeConnex Telecom, LLC's Request for Emergency Relief, with the following specific conditions: LifeConnex Telecom, LLC shall fully comply with all terms of the parties' Interconnection Agreement from July 13, 2010, onward; and in the event of non-compliance, LifeConnex Telecom, LLC shall take certain actions to provide notice of discontinuance to its customers sufficient to allow them to find alternative service. Any amounts currently in dispute should be resolved through the hearing process. (Teitzman)

Staff Analysis: In its Request for Emergency Relief, LifeConnex "asks that the Commission order AT&T to take no actions to suspend or otherwise interfere with LifeConnex's service to its customers pending a final determination by the Commission in the Consolidated Phase of this Docket."

LifeConnex argues three bases for its requested relief: the Commission's general authority to protect the public interest, ensure fair competition, and prevent anti-competitive behavior under Section 364.01, F.S.; the Order holding the docket in abeyance; and the terms of the parties' Interconnection Agreement itself.

First, LifeConnex asserts that the Commission should take action to prevent AT&T from suspending, discontinuing and/or terminating LifeConnex under its general jurisdiction contained in Section 364.01, F.S.² Staff does not believe Section 364.01, F.S., should be interpreted as authority to grant the specific relief requested by LifeConnex under these facts.

Staff agrees that the PSC has authority to promote competition and to prevent anti-competitive behavior. But, staff believes this authority goes both ways. In this fact pattern, the parties' conduct is governed by an ICA with clear terms. The Federal and Florida statutory schemes regarding telecommunications services allow parties to enter into binding contracts, and expect to have the terms of those contracts enforced bilaterally. Staff does not believe the Commission's authority under Section 364.01, F.S., is intended to provide emergency relief when one party seeks to be relieved of its obligations under a negotiated contract in the absence of extraordinary and compelling circumstances.

Staff notes that if LifeConnex's fundamental concern in this docket is AT&T's delay in processing discounts and promotional credits, the ICA provides LifeConnex options for relief – to file a complaint/petition before this Commission to determine the treatment of disputed amounts. LifeConnex did not avail itself of this remedy, instead resorting to self help. A

² LifeConnex does not cite a specific subsection to Section 364.01 in support of its argument. Upon review, staff believes the following three subsections would be implicated in this matter: the Commission's jurisdiction to "[p]rotect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices" 364.01(4)(a); "[e]ncourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services" 364.01(4)(b); and "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint" 364.01(4)(g).

Petition to determine the correct treatment of discounts and credits is now pending before the Commission, and whenever the parties seek to reinstate the proceeding, the Commission will determine these matters, as it should, through the hearing process. Given this fact pattern, staff does not see how allowing AT&T to take action clearly contemplated by the ICA rises to the level of "anti-competitive" activity or denies "fair competition" sufficient to invoke the Commission's general authority under Section 364.01, F.S.

Second, staff does not believe the Order Holding Dockets In Abeyance bars this action, and language contained in the Joint Motions themselves supports AT&T's position that the Notice of Commencement of Treatment may proceed independently of the underlying dispute. In the Joint Motion on Issues, the parties specifically included the following language:

5. Nothing in this Joint Motion is intended, or shall be construed, as a waiver of any Party's pending motions, claims, counterclaims or defenses or any Party's right to amend and supplement its claims, counterclaims, or other pleadings, or to pursue any issue, claim, or counterclaim that is not addressed in the Consolidated Phase in each Party's respective docket, either concurrent with or following the Consolidated Phase, or to seek such other relief as a change in circumstances may warrant.

Staff believes the plain language of the parties' Joint Motion makes clear that the abeyance does not serve as any type of bar to AT&T's Notice of Commencement of Treatment. LifeConnex was a signatory to the Joint Motion, and should not be allowed to argue that its agreed upon language should somehow not be applied, and should instead be either ignored or re-interpreted as a bar to further actions. Staff therefore believes that the terms of the Joint Motion and the Order are controlling, and mean what they say – that the Joint Motions and the Order Granting Abeyance clearly contemplated that neither party was precluded from seeking additional relief.

In addition, staff believes that the purpose of the underlying "dispute docket" held in abeyance is fundamentally retroactive; that is, it deals with past due sums currently in dispute. Staff acknowledges that, absent any additional actions, the Commission's final decision on the dispute will impact the parties' future relationship, but the majority of the docket deals with prior billings.

On the other hand, the instant Notice of Commencement of Treatment is fundamentally prospective in nature: staff believes AT&T is attempting to limit on-going exposure to what could possibly turn out to be unpaid bills for actual services rendered.³ Staff believes this is reasonable on AT&T's part. Otherwise, unpaid sums, if any, could continue to accrue for months, and in the event the Commission finds against LifeConnex, the pleadings reveal no clear evidence that LifeConnex could or would make good on those bills.

³ Staff wishes to reiterate that this belief is based solely on the pleadings to date. It is clear that there is a dispute about whether any sums are due to either party and the amount of those sums. This dispute will only be resolved following an evidentiary hearing and the Commission's determination based on the final record. As such, staff's current beliefs about the terms of the ICA and the parties' responsibilities may change substantially as the record is developed.

As a third basis for its requested emergency relief, LifeConnex invokes the parties' Interconnection Agreement. Both parties and staff agree that the Commission has authority under state and federal law to enforce the terms of the Interconnection Agreement. The parties and staff also agree that the terms of the ICA control the relationship between the parties. Staff does not agree, however, that the plain language in the ICA entitles LifeConnex to the relief it seeks. To the contrary, staff believes 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 that AT&T has not waived its right to take such action.

As noted by AT&T, sections 1.4 and 1.4.1 of Attachment 7 to the parties' Commission-approved ICA state:

1.4 Payment Responsibility. Payment of all charges will be the responsibility of Swiftel, LLC. Swiftel, LLC shall pay invoices by utilizing wire transfer services or automatic clearing house services. Swiftel, LLC shall make payment to AT&T for all services billed **including disputed amounts**. AT&T will not become involved in billing disputes that may arise between Swiftel, LLC and Swiftel, LLC's customer. (Emphasis added.)

1.4.1 Payment Due. Payment for services provided by AT&T, **including disputed charges**, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify AT&T of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by AT&T. If the Remittance Information is not received with payment, AT&T will be unable to apply amounts paid to Swiftel, LLC's accounts. In such event, AT&T shall hold such funds until the Remittance Information is received. If AT&T does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply. (Emphasis added.)

Staff believes the plain language of these provisions is clear that while LifeConnex can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA, subject to resolution through the ICA's dispute provisions, or ultimately, determination by the Commission. As a result of this language, staff believes the ICA does not support LifeConnex's Emergency Request.

Exclusive of LifeConnex's arguments regarding the effect of the Joint Motions and Abeyance Order, as well as LifeConnex's waiver argument, discussed below, staff also believes the plain language of the ICA supports AT&T's right to take the type of action outlined in the Notice of Commencement of Treatment. The language of Sections 1.5 through 1.5.5 of Attachment 7 to the parties' ICA clearly lays out the procedures AT&T is entitled to take in the event of LifeConnex's non-compliance with the ICA, including billing provisions. Given staff's belief (based on the pleadings to date and not offering an opinion regarding facts that may be developed at hearing) that LifeConnex is not currently complying with the terms of the ICA, and the ICA's language setting forth AT&T's rights, staff sees no reason to conclude the language of the ICA prohibits the actions set forth in AT&T's Notice of Commencement of Treatment.

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LifeConnex's final argument is that AT&T's apparent prior practice of allowing LifeConnex to deduct disputed amounts from payments constitutes a waiver by AT&T of the suspension/discontinuance/termination provisions of the ICA. Staff does not believe this to be the case. As pointed out by AT&T in its Response in Opposition, Section 17 of the ICA's General Terms and Conditions states:

17 Non-Waiver A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

Staff believes this "boilerplate" contract term appears unambiguous, and clearly allows AT&T the right to fail to enforce provisions in the ICA on a flexible basis, without then being required to waive enforcement of those provisions in the future.

Furthermore, in addition to the plain language of the non-waiver provision, staff does not believe the general legal concept of "waiver" is implicated on these facts. As stated in one legal treatise:

[i]n the case of a true waiver implied in fact from conduct, the intent to waive must be clearly manifested or the conduct must be such that an intent to waive may reasonably be inferred...rather, in the absence of an express declaration manifesting the intent not to claim the right allegedly waived, there must be a clear, unequivocal, and decisive act of the party who is claimed to have waived its rights, so consistent with an intention to waive that no other reasonable explanation is possible. 13 Williston on Contracts Section 39:28 (4th edition.)

Under these facts, staff cannot recommend that AT&T's conduct in failing to strictly enforce the terms of the ICA with respect to billing is so unequivocal or decisive that it can be decided that AT&T, contrary to the ICA's non-waiver language, clearly demonstrated the intent to permanently waive those provisions.

Staff is also aware of the legal concept of "equitable estoppel," which is so similar to the legal concept of waiver that staff believes it should be discussed, despite not being raised by either of the parties' pleadings. As stated by this Commission in Order No. PSC-01-2515-FOF-EI, issued December 24, 2001, in Docket No. 950379-EI, Re: Tampa Electric Company:

In order to demonstrate equitable estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a position asserted later; 2) reliance on that representation; and 3) a detrimental change in position to the party claiming estoppel caused by reliance on the representation. State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). See also United Contractors Inc. v. United Construction Corp., 187 So. 2d 695 (Fla. 2d DCA 1966).

Estoppel operates to prevent the benefitting party from repudiating the accompanying or resulting obligation. *Doyle v. Tutan*, 110 So. 2d 42, 47 (Fla. 3d DCA 1959).

Staff believes that LifeConnex has not demonstrated that AT&T either made a representation as to a material fact contrary to a later position, nor that LifeConnex changed its position to its detriment. In fact, staff believes that if anything, LifeConnex has been consistent in its conduct of not promptly paying its bills as required by the ICA, but rather acted contrary to those terms, and in fact benefited from its conduct, to the extent that there is now over \$1.4 Million in dispute in Florida. Staff therefore recommends that LifeConnex's arguments regarding waiver fail.

Staff is, however, troubled by AT&T's insistence on strictly enforcing the terms of the ICA at this point in time. Staff believes that the facts developed to date indicate that AT&T has allowed LifeConnex to continue service for several years, despite the fact that LifeConnex did not follow the terms of sections 1.4 and 1.4.1 of Attachment 7 to the ICA, and that this failure has directly contributed to the accrual of approximately \$1.4 Million in disputed payments over the previous years. As a condition of providing future service, AT&T is attempting to insist on payment of the entire amount in dispute (the underlying amounts in this docket, which AT&T agreed in the Joint Motion to hold in Abeyance) in order to continue to provide ongoing service. Staff does not believe AT&T's position in agreeing to hold determination of the disputed amount in abeyance, and then insisting on payment of a balance that took several years to accrue be paid within 30 days, to be fair, just, or reasonable, and recommends that the Commission grant LifeConnex's requested relief, with specific conditions.

Staff believes that the \$1.4 Million in dispute, as discussed above, is fundamentally retroactive in character, and the proceeding currently held in Abeyance is the most efficient means of resolving that dispute. Staff also strongly believes that AT&T has the right to protect itself on a going-forward basis, pending the resolution of the dispute. To this end, staff is recommending that AT&T be allowed to insist on strict compliance with the payment terms of the ICA from July, 2010, onwards, and that should the Commission agree with staff's recommendations, should include in its Order language to that effect. Staff believes this is fair to AT&T and LifeConnex. Staff therefore recommends that the Commission should determine that from the date of the decision, July 13, 2010, the terms of the Interconnection Agreement regarding billing and payment shall be followed, such that, upon receiving a bill from AT&T for service, LifeConnex shall pay such bill, including disputed amounts, within the time period prescribed in the ICA. Staff recommends that if LifeConnex fails to comply with the billing provisions, AT&T may take action as authorized by the ICA, including suspension, disconnection, and/or termination of service to LifeConnex.

In order to protect LifeConnex's end user customers, staff further recommends that in the event LifeConnex fails to comply with the terms of the ICA and AT&T initiates action to suspend, discontinue, or terminate LifeConnex's service, LifeConnex should be required to provide notice to its end use customers, within 14 days of the receipt of written notice by AT&T that AT&T is initiating suspension, discontinuance and/or termination proceedings, that the customer's service may be cut off, and that the customer may wish to immediately begin seeking alternative telecommunications services in order to avoid lapse of service. Staff further

recommends that LifeConnex should provide a copy of this notice to staff for prior approval, and keep staff fully advised of the status of its end use customers until those proceedings are resolved.

In recommending the Commission grant LifeConnex relief with the above conditions, staff is not suggesting the Commission is granting equitable relief, nor is the Commission granting an injunction as characterized by AT&T. Instead, staff is recommending the Commission has authority to issue an interim procedural order under its clear jurisdiction to enforce the terms of the ICA and to resolve matters in dispute. AT&T filed a complaint, seeking Commission resolution, after allowing an unpaid balance to accumulate over an extended period of time.⁴ With both parties having affirmatively invoked the jurisdiction of the Commission under both Federal and State law to interpret and enforce the ICA, and to adjudicate this dispute in particular, staff recommends the Commission take interim action to protect both parties while their dispute is pending before the Commission.

Based on the foregoing, staff recommends the Commission should grant LifeConnex Telecom, LLC's Request for Emergency Relief, with the following specific conditions: LifeConnex Telecom, LLC shall fully comply with all terms of the parties' Interconnection Agreement from July 13, 2010, onward; and in the event of non-compliance, LifeConnex Telecom, LLC shall take certain actions to provide notice of discontinuance to its customers sufficient to allow those customers to find alternative service. Any amounts currently in dispute should be resolved through the hearing process.

⁴ Staff notes that AT&T could have sought to suspend, discontinue, and/or terminate LifeConnex at anytime during the extended period of non-payment of disputed amounts. Rather, AT&T chose to continue providing service and seek the Commission's resolution of this dispute. Staff does not believe that now that the dispute is pending before the Commission, AT&T should be allowed to subvert the judicial process by taking such sudden and detrimental action.

Docket No. 100021-TP
Date: July 12, 2010

Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open pending the resolution of AT&T's underlying Complaint and Petition for Relief. (Teitzman)

Staff Analysis: This docket should remain open pending the resolution of AT&T's underlying Complaint and Petition for Relief.