

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION OF TELECOMMUNICATIONS)
SERVICES BY AMERICALL DIAL-O)
SERVICES, INC.)
) CASE NO.
) 90-001
)

ALLEGED VIOLATIONS OF KRS CHAPTER 278)

O R D E R

This investigation was initiated by the Commission on January 8, 1990 where the Commission found that a prima facie showing has been established that AmeriCall Dial-O Services, Inc. ("Dial-O") is operating as a utility in violation of the provisions of KRS Chapter 278. The Order required Dial-O to appear and show cause why it should not be penalized under KRS 278.990 for violating provisions of KRS Chapter 278 including, but not limited to, KRS 278.160. Dial-O was also required to be prepared at the hearing to demonstrate a plan for refunding or crediting customer accounts for any unauthorized amounts collected. A hearing was held on February 21, 1990. On March 20, 1990, Dial-O filed its post-hearing brief, and on April 9, 1990, South Central Bell Telephone Company ("South Central Bell") filed its brief. AmeriCall filed a reply brief on May 15, 1990.

The issues presented are:

1. Whether Dial-O is a utility as defined by KRS 278.010(3).

2. If Dial-O is a utility and in violation of provisions of KRS Chapter 278, whether it should be penalized pursuant to KRS 278.990 and/or whether it should be required to refund any unauthorized amounts collected by it.

FACTS

Dial-O's predecessor, VeriCall Services, Inc. ("VeriCall")¹ filed an application for authority to provide intrastate operator-assisted resale and telecommunications services on February 11, 1988. On September 19, 1988, VeriCall filed a motion to dismiss its application based on VeriCall's assertion that it was not a utility within the meaning of KRS Chapter 278 because VeriCall merely "enhanced the AmeriCall network." The Commission granted VeriCall's motion. Based on the facts presented, the Commission accepted VeriCall's argument that the regulation of VeriCall, as a utility, would result in a duplication of the Commission's efforts and that the Commission could adequately protect Kentucky ratepayers through the regulation of AmeriCall. The Commission also found that the provision of operator services to AmeriCall, under contract, did not require Commission approval based on the facts as then presented.

On March 9, 1989, VeriCall merged into Dial-O. Based on the operations of Dial-O and its relationship to AmeriCall as presented in this proceeding, the Commission concludes that Dial-O

¹ Case No. 10162, Application of VeriCall Services, Inc. for the Issuance of a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the Commonwealth of Kentucky.

is not merely "enhancing the AmeriCall network" but is operating as a utility within the meaning of KRS Chapter 278. Unlike the facts developed in Case No. 10162, this case reveals that Dial-O is contracting in its own name with the public to provide telecommunications services including operator services, that Dial-O is contracting in its own name with billing agents to obtain billing services from billing agent, and that Dial-O is contracting in its own name for the provision of operator services.

Dial-O is a Kentucky corporation which is a separate legal entity from the partnership, AmeriCall Systems of Louisville ("AmeriCall"). In Case No. 9706,² AmeriCall was authorized by the Commission to provide WATS resale in Kentucky. AmeriCall presently has a tariff on file with the Commission which sets forth its rates for the provision of WATS resale and operator services. Presently, the AmeriCall partners and the shareholders of Dial-O are not identical although the controlling shareholders

² On December 11, 1986 in Case No. 9706, Joint Application of Multi-Com Systems, Inc., and AmeriCall Systems of Louisville to Transfer the Certificate of Public Convenience and Necessity of Multi-Com Systems, Inc., to AmeriCall Systems of Louisville Pursuant to KRS 278.020 and for Approval of the Assumption of Indebtedness Pursuant to KRS 278.300, the Commission authorized the transfer of Multi-Com's Certificate of Public Convenience and Necessity granted in Case No. 8972, The Application of Multi-Com Systems, Inc. for Certificate of Public Convenience and Necessity to Provide Resale of Telecommunications Services and Facilities Within Kentucky to AmeriCall.

are the same as the partners that control AmeriCall. AmeriCall and Dial-O reside in the same office building.

Dial-O has entered into numerous contracts with various entities, including but not limited to jails, hospitals, and universities. These contracts grant Dial-O the sole and exclusive right to provide telecommunications services including operator services to those entities. The contracts are owned outright by Dial-O.³

The evidence of record indicates that Dial-O has entered into a contract with an operator services entity to provide operator services to Dial-O.⁴ The operator services agreement that Dial-O entered into provides service to Dial-O's contract holders as well as all presubscribing customers of AmeriCall that receive operator services and AmeriCall's one contract customer. AmeriCall itself has no contract to secure the provision of operator services to the customers that have presubscribed for services with AmeriCall. Apparently, its customers receive the benefit of operator services through the Dial-O contract via an unwritten agreement between AmeriCall and Dial-O.

Additionally, on October 27, 1989, in Case No. 89-132, AmeriCall provided a Billing Services Agreement as Exhibit III in

³ Transcript of Evidence ("T.E.") at 83.

⁴ Case No. 89-132, The Provision of Operator Services by AmeriCall Systems of Louisville. See Response 3a filed June 5, 1989 and Responses 3a and Supplemental Response 3 filed June 21, 1989.

a response to a request to provide any and all such agreements it had. The agreement dated July 31, 1989, is between Dial-O and Integretel, a billing agent, to provide billing service to Dial-O. There is no mention of AmeriCall in the billing services agreement.⁵ The agreement states that Dial-O is "engaged in the business of providing telecommunication services, including operator services."⁶

Prior to its contract with Integretel, Dial-O utilized another billing agent, OAN, for billing services.⁷ This billing service agreement that Dial-O has provides billing service for not only the entities that Dial-O has specific written contracts with, but also all end-users who use operator services provided by AmeriCall.⁸

All end-users, whether they have contracted with Dial-O or presubscribed to AmeriCall or contracted with AmeriCall, receive the operator services contracted for and provided to Dial-O and pay the charges for this service to the local exchange companies based upon the billing service agreement with Dial-O.⁹ The local exchange carriers take a percentage of the money collected as a fee for the collection service via an agreement with the billing

⁵ T.E. at 77.

⁶ T.E. at 74-76.

⁷ Response to Hearing Request #10 filed October 27, 1989.

⁸ T.E. at 77-78.

⁹ T.E. at 77-78.

agent. Pursuant to the terms of the billing contract, the billing agent takes its fee and then remits the remaining funds to Dial-O.¹⁰ Dial-O then provides approximately 20 percent of its gross revenues to AmeriCall for AmeriCall's role in providing underlying transmission services to Dial-O's customers.¹¹ Dial-O pays the operator service entity for its services. After Dial-O pays its other expenses, the remaining balance is Dial-O's profit, not AmeriCall's. There is no written contract between AmeriCall and Dial-O that provides for this arrangement, i.e., the provision for the use of AmeriCall's facilities or the payment of money from Dial-O to AmeriCall.¹²

AmeriCall has entered into only one contract under its own name to provide operator services. Even in this one instance, the money paid for the services contracted by AmeriCall is collected under Dial-O's billing and collection contracts and by Dial-O.

Aside from the arrangement which Dial-O has with AmeriCall regarding transmission of messages, Dial-O has no other ownership in any fiber-optics, microwave towers, telephone lines, or transmission facilities. AmeriCall has an access customer name abbreviation for purchase of long-distance access and a carrier identification code for purchase of access to local telephone companies, both of which are used in the provision of the

¹⁰ T.E. at 43.

¹¹ T.E. at 49.

¹² T.E. at 30.

telecommunications services that Dial-O has contracted to provide and the operator services which are provided by Dial-O. Dial-O does not have an access customer name abbreviation or a carrier identification code in its own name. Dial-O uses AmeriCall's carrier identification code when contracting for access service.

DISCUSSION

KRS 278.010(3)(e), states that:

Utility means any person except a city, who owns, controls or operates or manages any facility used or to be used for or in connection with [t]he transmission or conveyance over wire, in air or otherwise, or any message by telephone or telegraph for the public, for compensation.

KRS 278.010(9) states that, "facility includes all property, means and instrumentalities owned, operated, leased, licensed, used, furnished or supplied for, by, or in connection with the business of any utility."

Dial-O's position is that it does not satisfy this statutory definition of a utility because it does not control or manage any transmission facilities nor does it receive compensation for the transmission of messages. Dial-O states that it has not invested in plant, property or equipment to provide operator service. Dial-O argues that it is merely providing marketing, billing and collection, operators, and contracts with traffic aggregators for AmeriCall.¹³ Dial-O also claims that it is not a reseller because it has no switch, does not employ its own technicians to engineer

¹³ T.E. at 14-16.

its network, and that it does not own or lease any of the facilities. In its reply brief, Dial-O compares its relationship with AmeriCall to that of the relationship between South Central Bell and BellSouth services. However, as is discussed herein, the facts contained in this record clearly establish significant distinctions.

South Central Bell contends that Dial-O does meet the statutory definition of a utility. South Central Bell argues that Dial-O operates no differently than a reseller and that Dial-O, in fact, does manage the facilities that are used to transmit or to convey the telephone messages for the public that it services by the facilities leased by AmeriCall and used by Dial-O. South Central Bell also argues that Dial-O is the mere alter ego of AmeriCall and that the Commission may "pierce the corporate veil" and actively regulate Dial-O through AmeriCall.

The evidence of record clearly establishes that Dial-O owns, controls, operates, or manages the facilities that are used for, and in connection with, the transmission of message by telephone for the persons who have contracted with Dial-O for telecommunications services and for the persons who have subscribed with AmeriCall for operator services. The Commission rejects Dial-O's argument that it does not control, operate, or manage any of the transmission facilities because it does not own a switch or have an access customer name abbreviation for purchase of long-distance access, or a carrier identification code necessary for purchase of access to local telephone companies.

Dial-O clearly has the unrestricted use of AmeriCall's access customer name abbreviation and carrier identification code. Dial-O has used these abbreviations and codes as necessary for the entry into contracts. It is also uncontroverted that Dial-O pays approximately 20 percent of its gross revenues to AmeriCall for the provision of the underlying transmission services to Dial-O's customers and to AmeriCall's subscribers receiving operator services.¹⁴ The payment of this money clearly establishes that Dial-O has the authority to "manage and control" the use of these facilities for which payment is made, and in fact, does so. The non-existence of a written contract between Dial-O and AmeriCall for this "management, control, and use" does not alter the actual existence of the management, control, and use. The definition of facility includes all property "owned, operated, leased, licensed, used, furnished, or supplied." An entity cannot escape the statutory definition by simply failing to memorialize in writing the leasing agreement that factually exists absent a written document.

Dial-O is bound by contract to provide telecommunications services to certain entities for compensation. Additionally, the contracts to provide operator services and billing services are with Dial-O, not AmeriCall. Dial-O, not AmeriCall, has the legal contract right to instruct Integretel pursuant to the contract how to charge AmeriCall's and Dial-O's contract customers and

¹⁴ T.E. at 49 and 92.

AmeriCall's customers receiving operator services. Dial-O may, at present, be instructing Integretel to charge AmeriCall's tariffed charges, but there is nothing, short of PSC jurisdiction and regulation, to ensure what rates will be charged in the future. Moreover, if the operators on contract to provide operator service do not perform consistently with Commission Orders and regulation of service, it is Dial-O, not AmeriCall, that has the legal privity of contract to instruct the Mattoon, Illinois Operator Services Center how to perform. If a customer has been overcharged, it is Dial-O that refunds, not AmeriCall.¹⁵

Dial-O is a separate corporate entity from AmeriCall. It may be operating comfortably with its arrangement with AmeriCall today, but there are numerous occurrences that could change the present arrangement and there is nothing in existence to allow any effective oversight of the arrangement. If AmeriCall were to dissolve the partnership, Dial-O is still responsible to provide telecommunications service, including operator service, to at least its contract customers, and could do so by simply entering into a "lease" arrangement with any other entity.

All of this amply demonstrates that Dial-O is a utility as defined by KRS 278.010. Dial-O does not have on file with the Commission a schedule for rates and conditions of service. KRS 278.160 mandates that:

[E]ach utility shall file with the Commission, . . . schedules showing all rates

¹⁵ T.E. at 58-59.

and conditions for service established by it
and collected or enforced. . . .

. . . .

(2) No utility shall charge, demand, collect
or receive from any person a greater or less
compensation for any service rendered or to be
rendered than that prescribed in its filed
schedules. . . .

Therefore, Dial-O is in violation of KRS 278.160 by charging and
collecting rates that are not in its filed schedule for all of
AmeriCall's and Dial-O's contracts and all of AmeriCall's
subscribers receiving operator services.

Dial-O has collected these charges monthly through its
billing agent, Integretel, (previously OAN). In a response to an
information request filed in Case No. 89-132 on June 21, 1989,
AmeriCall filed a list of 270 customer accounts which it
designated as a complete list of its "O+ only customer accounts."
Based on the analysis contained herein, the Commission finds that
these accounts are actually customers of the utility Dial-O and
not AmeriCall. Additionally, an exhibit to the February 21, 1990
hearing contains 14 contracts between Dial-O and its customers
which were supplied in response to a Commission request in Case
No. 89-132. Of these 14 contracts, three were duplicates from the
June 21, 1989 list of 270 customer accounts. Also, Dial-O has
collected unauthorized charges from the sole contract that
AmeriCall has entered into. Dial-O filed on March 21, 1990, in
response to a request at the hearing, 11 subsequent contracts it
has entered into since its earlier response to the Commission.

These contracts and customer accounts were entered into with members of the public to provide service to the public.

Dial-O has, therefore, violated KRS 278.160 by charging unauthorized rates to the public involving at least 293 customer accounts or contracts. KRS 278.990 provides that:

[A]ny such utility that is a private corporation violates any of the provisions of this chapter, or does any act therein prohibited, or fails to perform any duty imposed upon it under those sections for which no penalty has been provided by law, or fails to obey any lawful requirement or order of the public service commission, the utility shall for each offense forfeit and pay to the state treasurer, to be credited to the general fund, a sum not less than twenty-five dollars (\$25) nor more than one thousand dollars (\$1,000). (emphasis added).

The statute imposes a penalty for every act of violation of the statutory mandate in KRS 278.160 (i.e. every charge, collection or receipt of compensation for service rendered that is not prescribed in its filed schedule). The record establishes that Dial-O has charged and collected compensation, which is not prescribed in any filed schedule, from at least 293 persons; each being a separate offense of KRS 278.160.¹⁶ Accordingly, for the 293 offenses of KRS 278.160, the Commission finds that Dial-O

¹⁶ Each and every separate charge to each separate account could reasonably constitute a separate offense.

should be penalized \$500 for each offense totalling \$146,500. Although the Commission could also order refunds,¹⁷ it chooses not to do so as the cumulative penalties imposed herein will suffice.

IT IS THEREFORE ORDERED that:

1. Dial-O is a utility as defined by KRS 278.010(3)(e) and (9).

2. Dial-O shall, within 20 days from the date of this Order, comply with Alternate A or B as set out below:

A. File tariffs setting forth Dial-O's rates and conditions of service in conformity with Commission policy, including but not limited to KRS 278.010 and Commission Orders in Administrative Case No. 330. Calls should be branded with Dial-O's name, not AmeriCall's.

B. Cease all operations and assign all its contracts including its contracts for billing services and operator services to AmeriCall. Dial-O shall file all such assignments with the Commission within 20 days from the date of this Order.

3. Dial-O has committed at least 293 offenses in violation of KRS 278.160. Pursuant to KRS 278.990, Dial-O shall pay a fine of \$500 for each offense totalling \$146,500 within 20 days from

¹⁷ The Commission rejects Dial-O's argument that the Commission has no statutory power to order refunds.

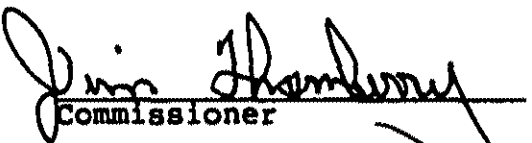
the date of this Order by certified or cashier's check made payable to "Treasurer, Commonwealth of Kentucky." Said check shall be delivered to Office of General Counsel, Public Service Commission of Kentucky, P. O. Box 615, Frankfort, Kentucky 40602.

Done at Frankfort, Kentucky, this 25th day of May, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director