

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

COMPLAINT PURSUANT TO KRS 278.260 AND)	
EMERGENCY MOTION FOR AN INVESTIGATION)	CASE NO.
OF BUZZ TELECOM, CORP. WITH A HEARING)	2007-00068
TO REVOKE THE CERTIFICATE OF PUBLIC)	
CONVENIENCE AND NECESSITY TO)	
PROVIDE TELEPHONY SERVICES OF)	
BUZZ TELECOM, CORP. AND TO IMPOSE)	
CIVIL PENALTIES PURSUANT TO KRS 278.990)	

ORDER

On February 2, 2007, the Attorney General of the Commonwealth of Kentucky ("Attorney General") filed with the Commission a complaint in which he moved the Commission to: (1) investigate the activities of Buzz Telecom, Corp. ("Buzz"); (2) revoke Buzz's Certificate of Public Convenience and Necessity; and (3) impose civil penalties pursuant to KRS 278.990. By Order entered March 6, 2007 ("March 6 Order"), the Commission found that the complaint failed to state a claim upon which relief could be based and allowed the Attorney General an opportunity to respond to the order and attempt to state a prima facie case. The Attorney General has responded to the Commission's March 6 Order, and, once again, the Attorney General fails to state a prima facie case. Accordingly, the Commission finds that this complaint shall be dismissed.

BACKGROUND

In the March 6 Order dismissing the complaint, we found that relief could not be granted because: (1) Buzz was exempted from the certificate requirements of KRS 278.020;¹ (2) KRS 278.544(4) prevented the Commission from exercising jurisdiction over allegations of insufficient, inadequate, or unreasonable service offered by Buzz;² and (3) upon investigation, the conduct alleged did not constitute slamming, the unauthorized switching of a telecommunications service provider.³ The Commission also noted that telecommunications utilities had been, over the past decade, regulated differently than other industries, citing to various administrative cases and statutes. The Commission provided the Attorney General with an opportunity to respond to its Order.

In response, the Attorney General argues that: (1) the Commission failed to address the fact that KRS 278.543 requires a telecommunications utility to adopt price regulation; (2) the Commission retains jurisdiction over slamming and should investigate the slamming allegations; (3) in order to fulfill its statutory duty pursuant to KRS 278.040, the Commission must investigate Buzz; and (4) if the Commission's argument regarding jurisdiction is correct, then any telecommunications utility can commit illegal acts and then avoid Commission jurisdiction by withdrawing its tariff.

The Attorney General's response not only fails to state a prima facie case, but it also ignores the Commission's role in regulating telecommunications in light of the

¹ March 6, 2007 Order at 3.

² Id. at 4-5.

³ Id. at 6.

passage of House Bill 337 during the 2006 Regular Session of the Kentucky General Assembly. We will address each of the Attorney General's arguments in turn.

DISCUSSION

As a preliminary matter, the Commission never stated or found that it lacked jurisdiction over "slamming" or lacked the necessary power to punish violations of KRS 278.535. To the contrary, our March 6 Order found that, after reviewing the evidence, slamming had not occurred.⁴ It was for that reason that the Commission could not pursue the Attorney General's allegations of slamming, not for lack of jurisdiction.⁵

The Attorney General also misapplies KRS 278.543 and KRS 278.544, apparently arguing that in order for Buzz to be "deregulated," it must formally elect the price regulation plan in KRS 278.543.⁶ KRS 278.543 is applicable only if Buzz offered basic service, which it did not. Moreover, as noted in the March 6 Order, the Commission has not reviewed the rates of non-dominant telephone utilities, unless upon complaint.⁷ Whether or not Buzz elected under KRS 278.543 does not affect the

⁴ Order at 7.

⁵ At no point in this proceeding has the Commission stated, explicitly or implicitly, that it lacked jurisdiction to punish violations of KRS 278.535. Jurisdiction over complaints for slamming was specifically and clearly reserved to the Commission in HB 337, which is codified as KRS 278.542(1)(g). The Commission's jurisdiction to enforce the provisions of KRS 278.535 is as it was prior to the enactment of House Bill 337.

⁶ Response at 2.

⁷ Order at 3, citing Administrative Case No. 359, Exemptions of Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones (Ky. PSC June 21, 1996).

Commission's analysis regarding the application of KRS 278.544(4) to the Attorney General's complaint. KRS 278.544 provides, in relevant part, that:

The following provisions of this section **shall apply and be enforced equally to all telephone utilities**, unless otherwise specifically stated in this section. . .(4) Notwithstanding any provision of the law to the contrary, nonbasic services offered pursuant to the provisions of this section shall be set by the marketplace and are not governed by **KRS 278.030** and administrative regulations promulgated thereunder. The nonbasic services are exempt from action or review by the commission under KRS 278.160, 278.170, 278.180, 278.190, 278.192, 278.200, 278.230(3), 278.250, 278.255, **278.260**, 278.270, 278.280, 278.290 and 278.300 and administrative regulations promulgated thereunder, except as specifically stated in KRS 278.541 to KRS 278.544. (emphasis added.)

It is clear from the foregoing language that the exemptions set forth in KRS 278.544(4) apply to all telephone utilities; no election or adoption is necessary. Buzz's practices and services, which are quite plainly "nonbasic"⁸ in nature, are exempt from Commission review under KRS 278.030 and the other statutes exempted in KRS 278.544(4).

The Commission is a "creature of statute and has only such powers as granted by the General Assembly."⁹ While KRS 278.040 grants to the Commission jurisdiction over utilities in the state, the General Assembly has narrowed the jurisdiction by the enactment of KRS 278.541 through KRS 278.544.¹⁰ The language of KRS 278.541 through KRS 278.544 articulates what is the Commission's to regulate and what is not.

⁸ As defined in KRS 278.541(5).

⁹ PSC v. Jackson County Rural Elec. Coop., Inc., 50 S.W.3d 764, 767 (Ky. App. 2000).

¹⁰ Also, as noted in the March 6 Order, the General Assembly granted the Commission the discretionary authority to limit its oversight of telephone utilities through administrative cases pursuant to KRS 278.512.

The Attorney General points to no statutory language that would negate this language in order to support his argument. The Commission is merely exercising the powers “granted by the General Assembly.”¹¹ The Commission would be in violation of the law if it exceeded that mandate.

The Attorney General’s argument that any utility may avoid punishment by merely requesting that its certificate be cancelled or its tariff removed is fallacious and is, in fact, immaterial to his complaint. The Commission still retains authority over violations of subject matter within the jurisdiction conferred on the Commission in KRS Chapter 278 even if a utility, after committing those violations, ceases to operate in Kentucky by either removal of its tariff, revocation of its certificate, or Commission Order. The punishment, however, must be for violations of statutes and regulations over which the Commission has jurisdiction.

The Attorney General has failed to show that Buzz has violated any law over which the Commission has jurisdiction. Our review reveals that no illegal switching of telecommunications providers occurred, and, thus, that there is no violation of KRS 278.535. Rather, it appears that Buzz was sending bills for services it never rendered, to people who had never been its customers. This appears to be a fraudulent billing practice, squarely within the Attorney General’s jurisdiction, not the Commission’s, and, according to the Attorney General, he has taken action in the Fayette Circuit Court to stop this practice.¹²

¹¹ Id.

¹² Response at 3.

CONCLUSION

Contrary to the Attorney General's arguments, the Commission is not abdicating any of the powers granted to it by the General Assembly. KRS 278.544 exempts Buzz's actions from review under KRS 278.030, of which the Attorney General alleges violations. The Commission's jurisdiction for violations of KRS 278.535 is unaffected by the General Assembly's recent actions. In this instance, however, no violation of KRS 278.535 has been demonstrated, and, thus, there are no grounds for pursuing the Attorney General's complaint.

The Commission, pursuant to 807 KAR 5:001, Section 12(4)(a), reviews a formal complaint to determine if it states a prima facie case, and if it finds that it does not, may allow the complainant an opportunity to amend the complaint to state a prima facie case. The Commission, in its March 6 Order, found that the Attorney General's complaint did not state a prima facie case and allowed the Attorney General an opportunity to amend his complaint. The Attorney General's response has again failed to demonstrate a prima facie case. Accordingly, the complaint shall be dismissed.

IT IS THEREFORE ORDERED that:

1. This complaint is dismissed.
2. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 1st day of June, 2007.

By the Commission

ATTEST:



Executive Director