Steven L. Beshear
Governor

Robert D. Vance, Secretary
Environmental and Public
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Commonwealth of Kentucky
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Mark David Goss
Chairman

John W. Clay
Vice Chairman

Caroline Pitt Clark
Commissioner

February 28, 2008

Joan Coleman
President
AT&T Communications of the South Central States, LLC
601 W. Chestnut Street
Room 408
Louisville, KY 40203

CERTIFICATE OF SERVICE

RE: Case No. 2007-00415
AT&T Communications of the South Central States

I, Beth O'Donnell, Executive Director of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the addressee by U.S. Mail on February 28, 2008.

Executive Director

BOD/rs
Enclosure

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February 28, 2008

Robert S. Strother
1080 Lake Front Dr.
Lexington, KY 40517

CERTIFICATE OF SERVICE

RE: Case No. 2007-00415
AT&T Communications of the South Central States

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ROBERT S. STROTHER COMPLAINANT V. AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. DEFENDANT	))))))))))	CASE NO. 2007-00415

O R D E R

On September 13, 2007, Complainant, Robert S. Strother, filed with the Commission a formal complaint against Defendant, AT&T Communications of the South Central States, Inc. ("AT&T"), alleging that AT&T overcharged his law firm's long-distance telephone service over a 6-year period. Mr. Strother seeks compensatory damages in the amount of $50,000 plus interest. He also seeks punitive damages.

AT&T answered the complaint on November 8, 2007 and, as part of its fifth affirmative defense, moved the Commission to dismiss the complaint. AT&T contends that the complaint fails to state a claim upon which the Commission may grant relief; the complaint is barred by any AT&T tariffs duly filed with and approved by the Commission; and the complaint is time-barred by the applicable AT&T Communications Services Agreement.

On December 5, 2007, Mr. Strother responded to AT&T's motion, stating that AT&T failed to address any of the issues in the case and did not raise any valid defenses as to the elements set out in the complaint. In particular, Mr. Strother asserts that AT&T failed to address the common law doctrine of unjust enrichment by not refunding to Mr. Strother the purported overcharged amount.

BACKGROUND

Based on a review of the record, Mr. Strother first discovered the alleged overcharge of long-distance service by AT&T in early September 2002. Mr. Strother claims that AT&T had been overcharging his law firm for long-distance telephone service for the prior 6 years. Specifically, Mr. Strother alleges that his law firm had been paying a long-distance rate of $0.89 per minute.[1] It was Mr. Strother's understanding that the rate charged by AT&T at that time was $0.075 per minute. He asserts the difference in rates was unconscionable and unjustifiable, causing his firm to overpay long-distance fees in excess of $50,000 over the 6-year period.

The documents contained in the record also revealed that Mr. Strother attempted on several occasions in 2002 and 2003 to obtain some form of reimbursement from AT&T for the alleged overcharges. AT&T rejected Mr. Strother's offer to settle the matter for $15,000. Although AT&T stated that it was against company policy to adjust Mr. Strother's bills for the entire 6-year period, it did agree to re-rate the bills for 6 months and issue a credit. AT&T also advised Mr. Strother that he failed to renew certain discount plans which had expired. Because of such failure, AT&T noted that it was unlawful for it to add programs to a customer's bill without the customer's permission.

[1] A review of Mr. Strother's September 2002 telephone bill indicates that this particular rate applies only to interstate calls.

DISCUSSION

The Commission has jurisdiction over the rates and services of utilities providing service in this state, subject to judicial review.[2] The Commission's jurisdiction extends to the investigation of rates and services of those utilities, with certain exceptions.[3] However, the Commission's jurisdiction can also be preempted by the federal government. Pursuant to 47 U.S.C.S. 152(a),[4] the Federal Communications Commission ("FCC") has jurisdiction over calls originating in Kentucky but terminating outside of Kentucky. Furthermore, the Telecommunications Act of 1934 ("the Act"), by which the FCC was created, divides telephone regulation into two separate components. Under section 1 of the Act,[5] the "FCC is empowered to regulate 'interstate and foreign commerce in wire and radio communication' while section 2(b) [of] 47 U.S.C.S. 152(b), preserves the states' power to regulate intrastate communication service."[6]

Although the Commission has jurisdiction to investigate rates relating to long-distance phone calls made within the state of Kentucky, Mr. Strother's allegations relate only to interstate long-distance rates. To the extent that the purported long-distance

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[2] KRS 278.040(2).

[3] KRS 278.260 and KRS 278.040(2).

[4] 47 U.S.C.S. 152(a) provides, "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received in the United States . . . ." (Emphasis added).

[5] 47 U.S.C.S. 151.

[6] Public Utility Comm'n of Texas v. Federal Communications Comm'n, et al., 886 F.2d 1325, 1329 (C.A.D.C. 1989).

overcharges incurred by Mr. Strother's law firm reflect interstate calls, the Commission is without jurisdiction to review such claims. A review of a September 16, 2002 itemized telephone bill reveals that calls were made from Mr. Strother's law office in Lexington, Kentucky to North Carolina, Illinois, Minnesota, West Virginia, Oklahoma, Ohio, Alabama, Massachusetts, Maryland, Nebraska, Delaware, and Arizona. The September 2002 telephone bill lists 181 of the 218 calls as interstate. Pursuant to 47 U.S.C.S. 152(a), the FCC has jurisdiction over those interstate calls.

The Commission is also without jurisdiction to award compensatory and punitive damages. Pursuant to KRS 278.040, the Commission has jurisdiction of only the "rates" and "services" of utilities as defined by KRS 278.010. Complainant's request for compensatory and punitive damages falls under neither category.

In Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126 (Ky. App. 1983), a customer brought an action in Kenton Circuit Court seeking, among other things, compensatory damages for tortious breach of contract for telephone service. Holding that the Commission had exclusive jurisdiction over the matter, Kenton Circuit Court dismissed the suit. Reversing the circuit court's opinion on this issue, the Court of Appeals said:

> [A]ppellant seeks damages for breach of contract. Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution Sec. 14.[7]

Accordingly, consideration of the requested damages is beyond the Commission's jurisdiction.

[7] Id. at 128.

IT IS THEREFORE ORDERED that the complaint is dismissed for failure to state a claim upon which relief could be granted.

Done at Frankfort, Kentucky, this 28th day of February, 2008.

By the Commission

ATTEST:

Executive Director