

RECEIVED

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

FEB 13 2020

PUBLIC SERVICE
COMMISSION

In the Matter of:

ASSOCIATES IN DERMATOLOGY, PLLC)
)
COMPLAINANT)
)
V.)
)
BELLSOUTH TELECOMMUNICATIONS, LLC dba)
AT&T KENTUCKY)
)
DEFENDANT)

CASE NO.
2019-00047

Brief Of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky
In Support Of Dismissal For Lack Of Jurisdiction

TABLE OF CONTENTS

	Page
Statement of Facts.....	1-2
Argument	3-13
A. KRS 278.543 Divests The Commission Of Jurisdiction Over AID’s Complaint.....	3-13
1. AID Bears The Burden Of Providing Evidence Sufficient To Establish The Commission’s Exercise Of Jurisdiction Over Its Complaint.....	3
2. The Commission Lacks Jurisdiction Over AID’s Broadband Claims.	3-4
3. KRS 278.543 Divests The Commission Of Jurisdiction Over AID’s Claims Relating To AT&T Kentucky’s VoIP Service, Including Analog Telephone Service Provided As Part Of AT&T Kentucky’s “Business Network Express Bundle.”.....	4-9
(a) KRS 278.541 to KRS 278.544.....	4-6
(b) The AT&T Kentucky Services Purchased By AID Constitute Nonbasic Service.	6-7
(c) The Claimed Billing Errors Do No Provide The Commission With Jurisdiction Over AID’s Claims Under KRS 278.542.....	7-9
4. The Kentucky Commission Lacks Jurisdiction Over AID’s Claims Relating To Service To AID’s New Albany, Indiana Facility.....	10-11
5. AID Agreed To Arbitrate Claims Arising In Connection The Service Provided It Under Its Contracts With AT&T Kentucky, Including AT&T Business Services Agreement, And Hence The Claims Are Not Subject To The Commission’s Jurisdiction.....	11-12
6. The Commission Lacks Jurisdiction To Award Unliquidated Damages Even If It Otherwise Had Subject Matter Jurisdiction To Consider AID’s Claims.	12-13

Statement of Facts

Associates in Dermatology, PLLC (“AID”) seeks an order from the Commission awarding it liquidated and unliquidated damages totaling at least \$164,914.07.¹ Its alleged damages consist of \$149,914.07 in claimed overcharges and at least \$15,000 in legal and consulting fees it claims it incurred in connection with the claims.² AID admits that over one-half (\$76,194.13) of its claimed overcharge damages relate to service provided to its New Albany, Indiana location,³ with the remainder allegedly arising in connection service provided to AID in Kentucky.⁴

AID lists in response to KPSC 1-3 seven telecommunications services it claims it purchased from BellSouth Telecommunications LLC d/b/a AT&T Kentucky (“AT&T Kentucky”). The telecommunications services were, by AID’s admission, provided in connection with “numerous packages, replacement packages, upgrades, and other services to AID that essentially made AID’s phones operate to receive and place telephone calls.”⁵ The seven services in fact comprise three types of telephony: (a) Voice over Internet Protocol

¹ Associates In Dermatology’s Response to KPSC 1-11; Associates in Dermatology’s Response to KPSC 2-3. AID increased the amount of the claimed overcharges from \$134,904.53 to \$149,914.07 in its response to Staff’s second set of data requests. *Id.* In addition, AID is seeking the cancellation of \$24,785.52 of billed but unpaid amounts. Associates in Dermatology’s Response to KPSC 1-11. It would appear that claim is moot in light of AT&T Kentucky’s response to KPSC 2-3(a) in which AT&T Kentucky stated that AID is not indebted to it for any amounts.

² *Id.*

³ Associates in Dermatology’s Response to KPSC 2-3 ($\$149,914.07 - \$73,719.94 = \$76,194.13$).

⁴ *Id.*

⁵ Associates In Dermatology’s Response to KPSC 1-6. *See also* Associates In Dermatology’s Response to KPSC 2-1(b) (service to Indiana provided as “part of a package with other Kentucky telephone services.”)

service;⁶ (b) broadband (internet) service;⁷ and analog telephone service for a limited nine month-period from February 2018 until November 2018.⁸

The parties produced seven agreements relating to AID's claims. Five of the agreements are AT&T Kentucky's "Business Network (ABN) Express Bundle Agreement" for the provision of VoIP service.⁹ The "AT&T Business Services Agreement" produced by AT&T Kentucky¹⁰ contains the terms governing the provision of any stand-alone analog service not purchased as part of a package. Finally, AID produced a 2013 "BellSouth Primary Rate ISDN Service" agreement¹¹ that seemingly predates both AID's claims and the initiation of VoIP service. Each of these seven agreements contains express provisions requiring arbitration of AID's claims and limitation of liability provisions. Indeed, AID concedes that the contracts contain arbitration provisions, although it claims without explanation (or support in law or fact) they are unenforceable.¹²

⁶ Associates In Dermatology's Response to KPSC 1-3 ((1) (23 Channel PRI 50 MB Fiber); (2) (23 Channel PRI); (4) (3 MB MPLS); and (6) and (7) (35 SIP Trunks)).

⁷ Associates In Dermatology's Response to KPSC 1-3 ((3) (100 MB Internet); (7) (100 MB Internet)).

⁸ Associates In Dermatology's Response to KPSC 1-3 (4); AT&T Kentucky Response to KPSC 2-1(a); AT&T Kentucky Response to KPSC 1-3.

⁹ Associates In Dermatology's Response to KPSC 1-3 (B)-(D); Associates In Dermatology's Response to AT&T Kentucky 1-4(a) (AID 3-1); AT&T Kentucky's Response to KPSC 1-5, Attachment 1.

¹⁰ AT&T Kentucky's Response to KPSC 1-5, Attachment 2.

¹¹ Associates In Dermatology's Response to KPSC 1-3 (A).

¹² See Associates In Dermatology's Response to KPSC 2-2; Associates In Dermatology's Response to AT&T Kentucky 1-10(a).

Argument

A. KRS 278.543 Divests The Commission Of Jurisdiction Over AID's Complaint.

1. AID Bears The Burden Of Providing Evidence Sufficient To Establish The Commission's Exercise Of Jurisdiction Over Its Complaint.

AID bears the burden of proving its claims in all respects.¹³ This includes providing evidence sufficient to demonstrate the Commission's subject matter jurisdiction over its claims. Neither the Commission nor AT&T Kentucky should be required to sift through AID's filings in this case to determine which of the three forms of service it identifies in its responses to data requests form the basis of its position that, notwithstanding the provisions of KRS 278.543, the Commission has subject matter jurisdiction over AID's claims. Yet that is exactly the position the Commission and AT&T Kentucky find themselves in at the end of two rounds of discovery.

2. The Commission Lacks Jurisdiction Over AID's Broadband Claims.

The General Assembly enacted KRS 278.546 to KRS 278.5462 in 2004 in recognition that "[c]onsumers in the Commonwealth have many choices in telecommunications services because competition between various telecommunications technologies ... has become commonplace"¹⁴ and that "[c]onsumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical service."¹⁵ Specific to AID's complaint, the General Assembly enacted KRS 278.5462(1) that divested not only the Commission, but all state agencies, of jurisdiction over broadband services:¹⁶ "the provision of broadband services shall be market-based and not subject to administrative

¹³ *Energy Regulatory Comm'n v. Ky. Power Co.*, 605 S.W.2d 46, 50 (1980) ("Applicants before an administrative agency have the burden of proof."); Order, *Coleman v. Ky. Power Co.*, Case No. 2018-00297 (Ky. P.S.C. September 17, 2018).

¹⁴ KRS 278.546(3).

¹⁵ KRS 278.546(4).

¹⁶ The 100 MB internet service that AID identified as comprising a portion of its claim clearly falls within the statutory definition of broadband service. KRS 278.5461(1).

regulation.” Although KRS 278.5462(3) originally reserved to the Commission “jurisdiction to investigate and resolve consumer service complaints” regarding broadband service, that provision was amended in 2015¹⁷ to remove the language granting the Commission jurisdiction to adjudicate consumer complaints. In effect, the Commission is authorized to act as mediator where both parties to the dispute seek its assistance: “the Commission may assist in the resolution of disputes.”¹⁸

It is unclear from AID’s complaint, and the two rounds of discovery AID provided, what portion of its claims relate to the provision of broadband service. What is clear is that the Commission lacks subject matter jurisdiction to adjudicate those claims.

3. KRS 278.543 Divests The Commission Of Jurisdiction Over AID’s Claims Relating To AT&T Kentucky’s VoIP Service, Including Analog Telephone Service Provided As Part Of AT&T Kentucky’s “Business Network Express Bundle.”

- (a) KRS 278.541 to KRS 278.544.

The year following its deregulation of broadband service, the General Assembly took the next step. It first divided telecommunications service rendered in the Commonwealth into two types: basic local exchange service and nonbasic service. Basic local exchange service is narrowly defined by statute to include service that includes three limited groups of features and functionalities.¹⁹ Importantly, basic local exchange service is circumscribed to “retail telecommunications service consisting of a *primary, single, voice-grade line* provided to the premises of residential or business customers”²⁰ Thus, on its face, the statute excludes from the definition of basic local exchange service multi-line service even if that service consists only

¹⁷ 2015 KY. ACTS ch. 2, § 3.

¹⁸ KRS 278.5462(3) (2020).

¹⁹ KRS 278.541(1).

²⁰ *Id.* (emphasis supplied).

of the features and functionalities listed in the statutory definition. Nonbasic service comprises all other telecommunications service provided in the Commonwealth: “all retail telecommunications services provided to a residential or business customer, all arrangements with respect to those services, and all packages of products or services.”²¹ Importantly, service otherwise limited to those features and functionalities listed at KRS 278.541(1), and that otherwise would constitute basic local exchange service, also is subsumed within the definition of “nonbasic service” if the basic local exchange service is part of a nonbasic service package that includes basic local exchange service.²²

The General Assembly next largely deregulated the provision of nonbasic service by divesting the Commission of subject matter jurisdiction as part of the same legislation.²³ Thus, while reserving to the Commission jurisdiction to adjudicate complaints involving basic local exchange service,²⁴ it divests the Commission of jurisdiction over complaints involving nonbasic service. Specifically, KRS 278.543(6) provides in pertinent part: “[e]xcept as set forth in KRS 278.542(1)(a) and (b), an electing utility²⁵ shall be exempt from KRS ... 278.260 ... and administrative regulations promulgated thereunder.” KRS 278.260 is the provision authorizing customers to file and the Commission to adjudicate complaints regarding the rates and service of utilities. The effect of KRS 278.542(5) and KRS 278.543(6) is to divest the Commission of jurisdiction over all complaints involving nonbasic service other than the inter-carrier disputes

²¹ KRS 278.541(5).

²² *Id.* (“nonbasic service includes basic local exchange service only if the customer chooses to purchase a package that includes basic local exchange service as a component of the package.”)

²³ 2006 KY. ACTS ch. 239 (codified at KRS 278.541 to KRS 278.544).

²⁴ KRS 278.543((5).

²⁵ AT&T Kentucky is an electing carrier.

identified in KRS 278.542(1)(a) and KRS 278.542(1)(b). AID does not allege it is a carrier; nor could it.

- (b) The AT&T Kentucky Services Purchased By AID Constitute Nonbasic Service.

The AT&T Business Network ABN Express Bundle purchased by AID offers functionalities and services in addition to those limited services and functionalities comprising basic local exchange service.²⁶ These include AT&T Network-Based Firewall Service, Virtual Private Network/MPLS Service and Wide Area Network (WAN) service, Voice over IP service, and Web Hosting.²⁷ As such, each of these constitute nonbasic service and are outside the Commission's jurisdiction to adjudicate complaints.

The analog telephone service purchased by AID likewise constitutes nonbasic service. First, the service was purchased as part of the nonbasic AT&T Business Network ABN Express Bundle.²⁸ In fact, AID concedes it purchased "packaged service."²⁹ More fundamentally, the analog telephone service did not consist solely of a "primary, *single*, voice grade line" provided

²⁶ Those functionalities and features are statutorily limited to "unlimited calls within the telephone utility's local exchange area," "dual-tone multifrequency dialing," and access to 911 service, "all locally available interexchange companies," "directory assistance," "operator services," "relay services," standard alphabetical directory listing. KRS 278.541(1).

²⁷ AT&T Kentucky's Response to KPSC 1-3; Associates In Dermatology's Response to KPSC 1-3 (listing 23 Channel PRI 50 MB Fiber service, 23 Channel PRI service, 3 MB MPLS service, 35 SIP Trunks, and 100 MB internet service); Associates In Dermatology's Response to KPSC 1-4, Attachment AID-4 (billing statements listing functionalities and services such as "calling name display," "caller identification," "three way calling," and "call forwarding."); AT&T Kentucky's Response to KPSC 2-4(d) (describing the transmission of calls to and from AID using VoIP technology); AT&T Kentucky's Response to KPSC 2-1(c) (billing statements listing functionalities and services such as "three-way calling," "remote activation of call," "forwarding," "Caller-ID Name-Number delivery," and "anonymous call blocking."); Associates in Dermatology's Response to AT&T Kentucky 1-4(b) (listing claims with respect to "managed internet service," "managed router feature," and "managed firewall service"); Associates in Dermatology's Response to AT&T Kentucky 1-5(b) (listing claims with respect to broadband (internet) service and 35 SIP trunks (a form of internet protocol service)).

²⁸ AT&T Kentucky's Response to KPSC 1-3;

²⁹ Associates In Dermatology's Response to KPSC 1-6. *See also* Associates In Dermatology's Response to KPSC 2-1(b) (service to Indiana provided as "part of a package with other Kentucky telephone services"). *See also* KRS 278.541(7) (defining package to mean "combinations of retail products or services offered, whether at a single price or with the availability of the price for one (1) product or service contingent on the purchase of others.")

to AID's premises.³⁰ Indeed, both AID's responses to discovery,³¹ as well as the billing statements³² produced by both AT&T Kentucky and AID indicate that AID purchased multiple business lines. As such, the multiple lines of analog service AID purchased do not constitute local basic exchange service even if not purchased as part of a package.

(c) The Claimed Billing Errors Do No Provide The Commission With Jurisdiction Over AID's Claims Under KRS 278.542.

The Commission's December 3, 2019 order establishing this limited inquiry to determine whether it enjoys jurisdiction over AID's claims indicates that KRS 278.542(1)(e) and KRS 278.542(1)(h) may provide the Commission with jurisdiction to consider AID's claims that it was erroneously billed notwithstanding the express provisions of KRS 278.543(6).³³ Respectfully, the Commission's reading of KRS 278.542(1) appears too broad. In fact, KRS 278.543(6) identifies the only two exceptions to its exclusion of the Commission's jurisdiction over complaints regarding nonbasic service. Specifically, it provides that "except as set forth in KRS 278.542(1)(a) and (b), an electing telephone utility shall be exempt from ... KRS 278.260 [the statute providing for complaints]" These provisions in turn are limited to inter-carrier disputes that are not at issue here. To the extent KRS 278.543(6) conflicts with the provisions of the more general statute, KRS 278.542,³⁴ the more specific provisions of KRS 278.543(6)

³⁰ KRS 278.541(1) (emphasis supplied).

³¹ Associates In Dermatology's Response to KPSC 1-3 ("Services related to Account Number 812-948-1148-447 included *nine Business Phone Lines* for \$622.83 per month") (emphasis supplied).

³² Associates In Dermatology's Response to KPSC 1-4, Attachment AID-4 (billing statements listing at least three lines); AT&T Kentucky's Response to KPSC 2-1(c) (billing statements listing at least three lines).

³³ Order, *In the Matter of: Associates In Dermatology, PLLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2019-00047 at 2-3 (Ky. P.S.C. December 3, 2019).

³⁴ KRS 278.542 deals with KRS 278.541 through KRS 278.544. KRS 278.543(6), by contrast, specifically exempts complaints regarding nonbasic service from the Commission's jurisdiction.

control.³⁵ Likewise, reading KRS 278.542(1) as creating 14 exceptions to KRS 278.543(6), including the two exceptions expressly incorporated in KRS 278.543(6), would render the two express exceptions of KRS 278.543(6) nullities in contravention of accepted principles of statutory construction.³⁶

Even if KRS 278.542(1), and its 14 exceptions, preserve portions of the Commission’s previously existing jurisdiction to adjudicate complaints alleging truth in billing violations by providers of nonbasic services, the Federal Communications Commission and the federal courts have made clear that VoIP service such as provided by AT&T Kentucky to AID constitutes an information service and not a telecommunications service and thus is not subject to truth-in-billing requirements. The Commission itself recognized this point in its December 3, 2019 order: “several courts in other federal circuits have held that interconnected VoIP is not a telecommunications service, and although it has indicated it is revisiting the issue, the FCC previously held that its truth-in-billing regulations do not apply to interconnected VoIP service.”³⁷

Subsequent to the Commission’s December 3, 2019 order yet another federal court³⁸ concluded (examining the question under a different regulatory scheme) that VoIP service constitutes information service and not telecommunications service for purposes of FCC regulation. The *Educare* court first explained the difference between telecommunications service and information service for purposes of the FCC’s regulatory jurisdiction:

³⁵ *Bevin v. Beshear*, 526 S.W.3d 89, 91 n. 6 (Ky. 2017) (“Kentucky follows the rule of statutory construction that the more specific statute controls over the more general statute.”)

³⁶ *Williams v. Commonwealth*, 829 S.W.2d 942, 944-945 (Ky. App. 1992).

³⁷ Order, *In the Matter of: Associates In Dermatology, PLLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2019-00047 at 4 (Ky. P.S.C. December 3, 2019) (citations omitted).

³⁸ *FTC ex rel. Yost v. Educare Ctr. Ser., Inc.*, 2020 U.S. Dist. LEXIS 5665 (W.D. Tex. January 14, 2020).

the FCC’s regulatory framework sorts communications services into two categories: “telecommunications services” and “information services.” Telecommunications service means “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.” Information services means providing “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications. ***Information services are distinguished from telecommunications services, in part, by their inclusion of “protocol conversion,” – the ability to communicate between networks that employ different data transmission formats” – whereas telecommunications services only transmit without alteration.***³⁹

The *Educare* court then concluded that “the Eighth Circuit and several district courts have concluded in thorough opinions, that VoIP services comparable to those of the Globex Defendants are best classified as ‘information services’ ... Those cases hold that the VoIP providers at issue offered information services because protocol conversion ... – a defining attribute of information services – is a necessary feature of their VoIP services.”⁴⁰

AT&T Kentucky’s VoIP service includes just the sort of protocol conversion that is the hallmark of an information service.⁴¹ Under the authority cited by the Commission,⁴² AT&T Kentucky’s VoIP service is not subject to the Federal Communications Commission’s truth-in-billing regulations. As such, AID’s claims would not fall within the terms of KRS 278.242(1)(e) and KRS 278.242(1)(h) even if the provisions otherwise were applicable.

³⁹ *Id.* at * 22 (citations omitted) (emphasis supplied).

⁴⁰ *Id.* at * 24.

⁴¹ AT&T Kentucky’s Response to KPSC 2-4(d); AT&T Kentucky’s Response to KPSC 2-5.

⁴² Order, *In the Matter of: Associates In Dermatology, PLLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2019-00047 at 4 (Ky. P.S.C. December 3, 2019).

4. The Kentucky Commission Lacks Jurisdiction Over AID's Claims Relating To Service To AID's New Albany, Indiana Facility.

AID concedes that over one-half of the alleged dollar value of its claims relate to service provided to its New Albany, Indiana facility.⁴³ Such service, even if it were deemed to originate in Kentucky, constitutes "interstate communication"⁴⁴ and as such is outside the regulatory reach of the Kentucky Commission.⁴⁵

The Kentucky Commission recognized this limitation on its authority in *In the Matter of: The Petition of Some Residents Of Butler And Falmouth In Pendleton County, Kentucky For Extended Area Telephone Service (EAS) To The Exchanges Of Alexandria, And Cincinnati, Ohio*.⁴⁶ There, northern Kentucky residents and customers of Cincinnati Bell petitioned the Kentucky Commission to require Cincinnati Bell to establish extended area service ("EAS") so that they could place calls to Cincinnati, Ohio as local (non-toll) calls.⁴⁷ The Commission rejected their request out of hand despite the fact that Cincinnati Bell otherwise was subject to Commission jurisdiction, and the fact the petitioners would receive the requested service as part of the service provided them in Kentucky: "[s]ince this Commission's jurisdiction does not extend interstate, the subject of EAS with Cincinnati, Ohio, will not be a matter of further discussion in this Order."⁴⁸

⁴³ Associates In Dermatology's Response to KPSC 2-1(a); Associates In Dermatology's Response to KPSC 2-3.

⁴⁴ 47 U.S.C. § 153(28).

⁴⁵ 47 U.S.C. 152(a) (conferring exclusive jurisdiction to Federal Communications Commission over interstate communications). *See also Kentucky Natural Gas Co. v. Pub. Serv. Comm'n*, 28 F.Supp. 509 (E.D. Ky. 1939) *aff'd Public Service Comm'n v. Kentucky Natural Gas Corp.*, 119 F.2d 417 (6th Cir. 1941) (Kentucky Commission lacks jurisdiction over the interstate transmission of natural gas).

⁴⁶ Case No. 8110, 1981 Ky. PUC LEXIS 560 (Ky. P.S.C. June 9, 1981).

⁴⁷ *Id.* at ** 2-3.

⁴⁸ *Id.* at 3.

Respectfully, the Commission lacks subject matter jurisdiction with respect to those portions of the AID's claims relating to service to its New Albany, Indiana facility.

5. AID Agreed To Arbitrate Claims Arising In Connection The Service Provided It Under Its Contracts With AT&T Kentucky, Including AT&T Business Services Agreement, And Hence The Claims Are Not Subject To The Commission's Jurisdiction.

Each of the agreements produced by the parties governing this dispute contains a prominent provision requiring arbitration of disputes.⁴⁹ This includes the AT&T Business Service Agreement, which governs the "stand-alone" analog telecommunications service, if any, provided by AT&T Kentucky to AID.⁵⁰ These agreements require AID to arbitrate its claims in a forum other than this Commission.

Kentucky law long has favored the enforcement of arbitration agreements:

in Kentucky, unlike most jurisdictions, arbitration enjoys the imprimatur of our state Constitution. Section 250 of the Kentucky Constitution provides "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." ... "Arbitration has always been favored by the courts."⁵¹

Under KRS 417.050, Kentucky's Uniform Arbitration Act, an arbitrable dispute is subject to compulsory arbitration except where the agreement may be avoided upon such grounds as exist at law or in equity for the revocation of any contract. Although AID suggests that the arbitration provisions "do not bind" the Commission,⁵² it offers no basis for its contention. Nor could it

⁴⁹ Associates In Dermatology's Response to KPSC 1-3, AID-3 (A)-(D); Associates In Dermatology's Response to AT&T Kentucky 1-4(a) (AID 3-1); AT&T Kentucky's Response to KPSC 1-5, Attachment 1; AT&T Kentucky's Response to KPSC 1-5, Attachment 2.

⁵⁰ AT&T Kentucky's Response to KPSC 1-5, Attachment 2.

⁵¹ *Schnuerle v. Insight Communs. Co., L.P.*, 376 S.W3d 561, 574 (Ky. 2012).

⁵² Associates In Dermatology's Response to KPSC 2-2.

given the agreements themselves⁵³ and AID's concession each agreement contained a provision requiring arbitration.⁵⁴ Such, prima facie evidence of an arbitration provision creates a statutory presumption of its validity and hence enforceability under Kentucky's Uniform Arbitration Act.⁵⁵

Arbitration is a reasonable – and required – method for resolving AID's claims with AT&T Kentucky. The Commission should dismiss AID's complaint to allow it to pursue its claims in the appropriate forum.

6. The Commission Lacks Jurisdiction To Award Unliquidated Damages Even If It Otherwise Had Subject Matter Jurisdiction To Consider AID's Claims.

AID concedes its complaint seeks both liquidated and unliquidated damages.⁵⁶ Kentucky law is clear that the Commission lacks jurisdiction to award unliquidated damages:

Nowhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would be it reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution § 14.⁵⁷

The Commission lacks jurisdiction over AID's claims for unliquidated damages.

Moreover, although not strictly a matter of jurisdiction, AID's claims for damages, whether liquidated or unliquidated are further limited by the Limitation of Liability provisions of the agreements.

⁵³ Associates In Dermatology's Response to KPSC 1-3 (B)-(D); Associates In Dermatology's Response to AT&T Kentucky 1-4(a) (AID 3-1); AT&T Kentucky's Response to KPSC 1-5, Attachment 1; AT&T Kentucky's Response to KPSC 1-5, Attachment 2.

⁵⁴ See e.g. Associates In Dermatology's Response to KPSC 2-2; Associates In Dermatology's Response to AT&T Kentucky 1-10(a).

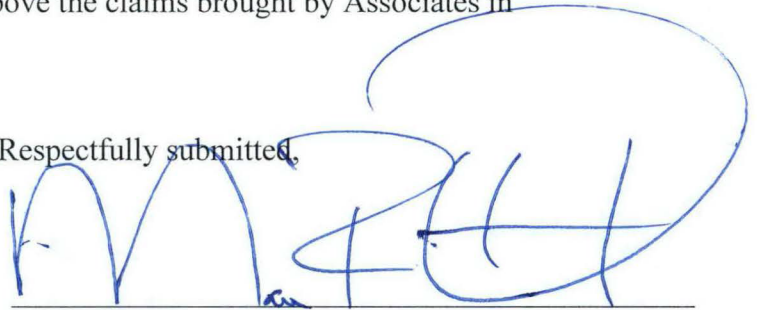
⁵⁵ See *Valley Construction Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990).

⁵⁶ Associates In Dermatology's Response to AT&T Kentucky 1-6(d).

⁵⁷ *Carr v. Cincinnati Bell Tel. Co.*, 651 S.W.2d 126, 128 (Ky. App. 1983). See also, *In the Matter of Rule v. Duke Energy Kentucky, Inc.*, Case No. 2017-00403 (Ky. P.S.C. November 2, 2017) ("The Commission's jurisdiction does not encompass monetary damage arising out of utility service. Claims for monetary damages that exceed the direct costs for gas and electric service are beyond the scope of the Commission's authority to grant.")

Wherefore, BellSouth Telecommunications, LLC d/b/a respectfully requests that the Commission dismiss for the reasons stated above the claims brought by Associates in Dermatology, PLLC in this action.

Respectfully submitted,



Dated: February 13, 2020

Mark R. Overstreet
Katie M. Glass
STITES & HARBISON, PLLC
421 W. Main St.
P.O. Box 634
Frankfort, KY 40602-0634
Telephone: (502) 779-8349
moverstreet@stites.com
kglass@stites.com

Counsel for BellSouth Telecommunications, LLC

Certificate of Service

I certify that a true copy of the foregoing responses was served by first class mail, postage prepaid, and by e-mail transmission on the following this 13th day of February 2020:

Paul Schurman
Avery & Schurman, PLC
115 N. Watterson Tr.
Louisville, KY 40243
paul@louisvillelaw.com

Kenyon R. Meyer
Caroline L. Perioni
Dinsmore & Shohl
101 S. Fifth Street
Suite 2500 PNC Tower
Louisville, KY 40202
kenyon.meyer@dinsmore.com
caroline.pieroni@dinsmore.com



Mark R. Overstreet