

Caroline L. Pieroni
502-540-2324
caroline.pieroni@dinsmore.com

RECEIVED

FEB 21 2020

PUBLIC SERVICE
COMMISSION

February 21, 2020

Via Hand Delivery

Hon. Gwen R. Pinson
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

***In the Matter of Associates in Dermatology, PLLC v. Bellsouth
Telecommunications, LLC d/b/a AT&T Kentucky, Case No. 2019-00047***

Dear Ms. Pinson:

Enclosed for filing are one (1) original and ten (10) copies of Associates in Dermatology, PLLC's Brief in regard to the above matter.

Thank you and if you have any questions, please call me.

Sincerely,

DINSMORE & SHOHL LLP



Caroline L. Pieroni

CLP/kwi

Enclosures

RECEIVED

FEB 21 2020

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ASSOCIATES IN DERMATOLOGY, PLLC)	
)	
COMPLAINANT)	
)	CASE NO. 2019-00047
V.)	
)	
BELLSOUTH TELECOMMUNICATIONS, LLC)	
dba AT&T KENTUCKY)	
)	
DEFENDANT)	

BRIEF OF ASSOCIATES IN DERMATOLOGY

INTRODUCTION

For years, Bellsouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T”) has engaged in a pattern and practice of fraudulent billing, charging for services not provided, and incentivizing its sales people to treat “upgrades” as “new” business, resulting in greater commission to its sales staff (who earn greater incentives for new business) and more profit to AT&T (via double billing because its systems do not discontinue billing for the previous service). After multiple complaints, failed service, upgrades, charges for services not provided, and a multitude of hours trying to resolve intentionally vague and opaque bills (sometimes ten per month), Associates in Dermatology, PLLC (“AID”) in February 2019 filed this Complaint with the Public Service Commission (“Commission”), the entity tasked with protecting consumers from unfair practices by the utilities operating in the Commonwealth. AID then canceled its contract with AT&T, only to continue to receive bills and collection threats for another year.

AT&T wants the Commission to look the other way. It argues that the Commission should get lost in the myriad of federal truth-in-billing cases rather than look to its own statutes, it argues that the Commission should rest its decision on the argument that AT&T did not provide “basic local exchange service” when its own verified responses say it did, and it asserts AID chose the basic local exchange service as part of a package (making it a non-basic service) even though the documents prove otherwise. Finally, AT&T would like for the Commission to give up its oversight for good, in favor of private arbitrators, since AT&T has included an arbitration provision in all of its consumer contracts (that it believes it can enforce against the Commission).

These positions are designed to minimize the role of regulation so that AT&T can continue to take advantage of consumers. But the arguments fail. The Commission has jurisdiction over AID's Complaint because it has jurisdiction over claims of fraudulent billing, regardless of whether the services provided were considered "basic local exchange service" or "non-basic" service under KRS 278.541. Specifically, KRS 278.542(1) says "[n]othing in **KRS 278.541 to 278.544 shall affect the commission's jurisdiction** with respect to ... (h) **billing of telecommunications services not ordered** by or on behalf of the consumer... ." KRS 278.542(1)(h)(emphasis added). The Commission can stop here, since this statute answers the question about jurisdiction. To the extent the Commission desires to consider the provisions of KRS 278.541(1) and (5), AT&T's own admissions and documents show that the service provided was basic local exchange service that was not chosen by AID as part of a package.

AT&T's brief focuses on the services AID complains about that may not be within the Commission's jurisdiction, such as fraud that occurred in Indiana, but sweeps under the rug the nearly \$75,000 AT&T overcharged AID *in Kentucky*. Even if the Commission takes the narrowest view of its authority, the Commission's jurisdiction arises as a result of the fraudulent billing from February to November 2018 when AT&T admits it provided basic local exchange service, and AID has identified thousands of dollars of overcharges.

The Commission is tasked with protecting the public from unfair and fraudulent practices of utilities, such as those perpetrated by AT&T in this case. For that reason and all of the others described herein, the Commission should rule that it has jurisdiction over AID's Complaint.

STATEMENT OF FACTS

A. AID Alleges That AT&T Billed For Services Not Provided or Used.

AID initiated this Complaint on January 28, 2019, to bring to the attention of the Commission a pattern and practice of fraudulent billing by AT&T. Specifically, AID Financial Manager Charlie McCall reported that “[f]or years AID was billed for services no longer in use, and has been persuaded into new agreements for updated service when old services were never terminated by AT&T.”¹

After the Commission ordered AT&T to Answer the Complaint in May, and again in August, it finally filed an Answer on August 12, 2019, challenging the Commission’s jurisdiction by stating “AT&T Kentucky provided non-basic service (business VoIP) to plaintiff. KRS 278.544 divests the Commission of subject matter jurisdiction in whole or part over the allegations of the complaint.”² As later became clear, this response was, at best, incomplete.

B. AT&T Admits It Provided Basic Local Exchange Service to AID.

In response to the Commission’s December 3, 2020 Data Requests, AT&T Kentucky admitted that it has provided five different kinds of services to AID in the last three years. The first four kinds of service – a firewall service, VPN Value Bundle Express, Voice Over IP, and web hosting – all ended, by AT&T’s admission, in February 2018.³ The final service, per AT&T’s admission, was “analog telephone service (POTS)” and it was provided from February through November 2018.⁴ **AT&T admits this was “basic local exchange service” as used in**

¹ AID Complaint, p. 1.

² AID Answer, p. 1.

³ AT&T Response to the Commission’s Data Request 3.

⁴ AT&T Response to the Commission’s 12/3/19 Data Request 7.

KRS 278.541(1).⁵ No other services were provided during that time and, as such, no other non-analog services were bundled or packaged with the analog service.⁶

C. AID Did Not Enter Into A Contract For Analog or Basic Local Exchange Service.

Although AT&T produced two “contracts,”⁷ neither document (nor any contract produced by AID) identifies analog telephone service or basic local exchange service as one of the provided services. The only signed contract produced by AT&T was dated December 31, 2016.⁸ The “Services” AID chose in that contract were VPN Express Service (Managed Router), IP Flexible Reach, firewall service, Business in a Box, wireless data backup and cloud security.⁹ Neither analog nor basic local exchange services were chosen by AID or included in the contract (though analog / basic local exchange services were provided later when AT&T’s other services failed). Although the contract contains an arbitration provision, it does not require AID to arbitrate claims related to uncontracted-for services such as analog or basic local exchange.¹⁰

The other document AT&T calls a contract is an undated, unsigned document not specific to AID that starts with the headline “Please Read This Important Message.”¹¹ It is labeled “AT&T Business Services Agreement,” and in its brief, AT&T asserts that this is the contract that governs “the provision of any **stand-alone analog service not purchased as part of a package**”¹² which suggests AT&T believes it provided such a service. Although the unsigned document contain an arbitration provision, AID never signed that agreement or any agreement in which it agreed to arbitrate disputes about analog service or basic local exchange service.

⁵ AT&T Response to the Commission’s 12/3/19 Data Request 6.

⁶ See AT&T Response to the Commission’s 12/3/19 Data Requests 3 and 7, showing that the only service provided between February and November 2018 was the analog service.

⁷ AT&T Response to the Commission’s 12/3/19 Data Request 5, Attachments 1 (signed contract) and 2 (unsigned document).

⁸ AT&T Response to Commission’s 12/3/19 Data Request 5, Attachment 1.

⁹ *Id.* at 1.

¹⁰ Even if it did, it is AID’s position that it was fraudulently induced into this contract.

¹¹ AT&T Response to the Commission’s 12/3/19 Data Request 5, Attachment 2.

¹² AT&T Brief, p. 2.

D. AID’s Allegations Relate to Billing for Services Not Provided And Deceptive Billing And They Include Disputed Charges from February to November 2018.

AID has produced hundreds of pages of disputed bills in this case,¹³ along with hundreds of pages of correspondence that show AT&T’s failure to properly respond.¹⁴ All of these documents go to show a pattern and practice of vague and misleading billing, charges for services not rendered, and deceptive or fraudulent practices by AT&T (in Kentucky and beyond). AID was forced to hire a consultant to help identify the services AID was paying for that were not actually being provided by AT&T,¹⁵ and the consultant discovered overcharges related to Kentucky accounts that total nearly \$75,000, and roughly that same amount in Indiana.¹⁶ AT&T has inexplicably continued to bill for services through the end of 2019,¹⁷ even though it asserts it did not provide services beyond November 2018.

Although AT&T focuses its brief on bills, such as the Indiana bills, that it argues is beyond the Commission’s jurisdiction, **AID has specifically identified the bills *during the period of time that AT&T was offering only analog service (February to November 2018)*¹⁸ as some of the bills that are in dispute.** See AID 2-1, Tab 2 (showing that bills from the period of February to November 2018 include overcharges)¹⁹; AID 2-1, Tab 3 (showing bills from November 2018 are disputed).

ARGUMENT

The Commission was established to “regulate utilities and enforce the provisions” of KRS Chapter 278 and “has exclusive jurisdiction over the regulation of rates and services of

¹³ AID 1-2, AID 1-6, AID 3-3

¹⁴ AID 1-1, AID 1-7, AID 3-2.

¹⁵ See consultant calculations, AID 1-5 and 2-1.

¹⁶ See consultant calculations, AID 2-1 and AID Response 3 to the Commission’s 1/21/20 Data Requests.

¹⁷ AID 1-1, Tabs A and B; AID 3-3 including threatening letters from the AT&T “Credit and Collections Department” in December 2019 regarding “Outstanding Plus New Charges.”

¹⁸ AT&T Response to the Commission’s 12/3/19 Data Request 7, filed 1/10/20.

¹⁹ The bills identified in Tab 1 of AT&T Response to Commission’s 1/21/20 Data Requests, make up part of the disputed charges.

utilities.” KRS 278.040(1)-(2). The Commission is further charged with “*investigat[ing] the methods and practices of utilities to require them to conform to the laws* of this state, and to all reasonable rules, regulations and orders of the commission not contrary to law.” KRS 278.040(3) (emphasis added). KRS 278.542 gives the Commission broad jurisdiction with respect to matters such as consumer complaints about quality and “billing of telecommunications services not ordered by or on behalf of the consumer.” KRS 278.542(c),(h).

Specifically, the Commission has jurisdiction over allegations that a utility has engaged in “systematic, fraudulent billing practices.” *Bulldog’s Enters. v. Duke Energy*, 412 S.W.3d 210, 212 (Ky. Ct. App. 2013). In this case, AT&T fraudulently billed AID for services that were no longer in use, fraudulently induced AID into new agreements for updated services when old services were never terminated, and began providing and billing for services that AID never requested. It is the duty of the Commission to protect AID, and other consumers affected by these systemic practices, from such fraudulent and unfair behavior. The Commission’s refusal to do so would frustrate the legislature’s intent that the Commission be responsible for investigating improper and unfair conduct by utilities like AT&T that benefit from their operations within the Commonwealth.²⁰

I. KRS 278.542(1)(h) Establishes the Commission’s Jurisdiction Over the Billing of Telecommunication Services Not Ordered By or on Behalf Of a Consumer.

In accordance with the purposes of the Commission, including the protection of consumers, the provisions of KRS 278 make it clear that the Commission has jurisdiction over AID’s complaint regarding the fraudulent billing practices of AT&T. KRS 278.542(1)(h) states

²⁰ Although AT&T asserts in page 3 of its Brief that AID has the “burden of proving its claims” at this stage, that statement is untrue and AT&T’s cited authority does not support it. AID has the burden of setting forth allegations in a Complaint sufficient to show that the Commission has jurisdiction over its complaints. The case cited by AT&T on burden of proof relates to the burden where a Complainant seeks to “set aside” a previous determination of the Commission. *See* KRS 278.430; *Energy Regulatory Com. V. Kentucky Power Co.*, 605 S.W.2d 46, 50 (1980). That is not the procedural posture here, and, as such, AT&T’s cited sources are inapplicable.

[n]othing in KRS 278.541 to 278.544 shall affect the commission's jurisdiction with respect to ... *(h) Billing of telecommunications services not ordered by or on behalf of the consumer* or cramming to the extent that such services do not comply with the truth-in-billing regulations prescribed by the Federal Communications Commission...

KRS 278.542(1)(h) (emphasis added). As a result, the Commission has exclusive jurisdiction over AID's claims involving AT&T's billing for services which were (1) not provided to AID, and (2) not properly terminated as requested by AID.

AT&T argues the provisions in KRS 278.543(6) divests the Commission of jurisdiction because it is an "electing carrier,"²¹ but electing carriers are only "exempt from" review as it pertains to a specific set of statutes, of which KRS 278.542 is not one.²² While an electing carrier may be exempt from "complaints as to rates or services" of a utility under KRS 278.260, AID's Complaint is related to AT&T's fraudulent billing, *not* the rates or services actually provided. Furthermore, KRS 278.542 provides "[n]othing in KRS 278.541 to 278.544," which would include KRS 278.543, "*shall affect the commission's jurisdiction with respect to ... billing of telecommunications not ordered.*" KRS 278.542(1)(h). Accordingly, the Commission has jurisdiction over AID's Complaint regarding AT&T's fraudulent billing of services it did not provide to AID.

A. The Provisions of KRS 278.542(1)(h) Govern Over KRS 278.543(6) Because The Latter Statute is Inapplicable.

AT&T next argues that the principles of statutory construction render KRS 278.542(1)(h) inapplicable to AT&T because of the language of KRS 278.543(6) is more specific and should govern. However, the aforementioned statutes address two different issues within

²¹ AT&T Brief, p. 5.

²² KRS § 278.543 provides an "electing telephone utility shall be exempt from KRS 278.190, 278.192, 278.200, 278.230(3), 278.255, 278.260, 278.270, 278.280, 278.290, and 278.300 and administrative regulations promulgated thereunder."

telecommunications. KRS 278.542(1) is about the commission's jurisdiction broadly, and subpart (h) definitively grants the Commission jurisdiction over issues regarding *billing of services not ordered* by a consumer. In contrast, KRS 278.543(6) is exclusive to "[a]n electing utility's *rates, charges, earnings, and revenues*" and its "retention or filing of financial reports, classifications, depreciation or other schedules." See KRS 278.543(6) (*emphasis added*). AID is *not* making claims in regards to the rates of AT&T's "provided" services, or any other issues listed within KRS 278.543(6). Instead, AID's underlying claims refer to AT&T's fraudulent billing for services it did not provide. KRS 278.542(1)(h) expressly authorizes the Commission's jurisdiction over such claims and the Commission should be adjudicate them in accordance with Kentucky law in order to protect consumers.

B. To The Extent KRS 278.543(6) Applies, It Requires AT&T's Rates to Be Fair, Just, and Reasonable *For the Services Provided*.

Should the Commission intend to rely on KRS 278.543(6)'s provision related to rates, it is bound by the first sentence, saying that the electing utility's rates shall be just and reasonable under KRS 278.030. The first section of that statute says that a utility is entitled to demand "fair just and reasonable rates *for the services rendered*..." Here, AID has presented a claim that the rates were unfair, unjust, and unreasonable, based on the services rendered (because the charged-for services were *not* rendered). KRS 278.030(1). As such, the Commission has jurisdiction to decide whether AID's Complaint has merit.

II. The Distinction Between Basic and Non-basic Services is Irrelevant in Reference to AID's Complaint Against AT&T, But Even if it Was Relevant, AT&T's Own Admissions and Documents Show it Provided Non-Basic Service.

AT&T spends the majority of its brief asserting that the Commission's jurisdiction is dependent on whether or not it provided basic services or non-basic services to AID. However, the Defendant's provision of basic or non-basic service is not an issue in determining whether

the Commission has jurisdiction of this claim. AT&T continually fails to recognize that AID's Complaint is based on AT&T's fraudulent billing practices – which the Commission has jurisdiction over notwithstanding anything in KRS 278.541. *See* KRS 278.542(1) (“Nothing in KRS 278.541 to 278.544 shall affect the commission’s jurisdiction with respect to...”). Therefore, AT&T’s argument regarding basic and non-basic service is misplaced.

However, even if the kind of service AT&T provided is relevant to its jurisdiction over fraudulent billing disputes, it is important to note that AT&T has admitted providing analog²³ service and “basic local exchange service to AID as that term is used in KRS 278.541(1).”²⁴ AT&T asserts that the Commission still does not have jurisdiction over it because the “basic local exchange services” were provided as part of a package, making it non-basic service under KRS 278.541(5). But AT&T has not provided any document showing that AID purchased basic local exchange service or analog service *as part of a package*. The only signed contract AT&T produced is dated December 31, 2016, and the analog service did not start until February 2018. The December 31, 2016 contract lists its services, and neither analog nor basic local exchange service are included in the list of services.²⁵ The other “contract” AT&T identified in its response to the data requests is an unsigned, undated document that is not specific to AID, and also does not show that AID purchased a discounted package of services to include analog or basic local exchange services.²⁶ None of the contracts produced by AID show either analog or basic local exchange, either. To the extent AT&T would assert that it slipped the basic local exchange services into AID’s package without mentioning them in the December 31, 2016 contract, AT&T fails to meet the statutory requirement in KRS 278.541(5) that the “customer **chooses to**

²³ AT&T Response to the Commission’s 12/3/19 Data Request 3, 7.

²⁴ AT&T Response to the Commission’s 12/3/19 Data Request 6 (emphasis added).

²⁵ AT&T Response to the Commission’s 12/3/19 Data Request 5, Attachment 1.

²⁶ AT&T Response to the Commission’s 12/3/19 Data Request 5, Attachment 1.

purchase a package that includes basic local exchange service as a component of the package.”

Id. (Emphasis added.) AID was aware that AT&T’s failing systems required it to switch to analog in 2018, but AID did not *choose* analog as a part of the package it bought in December 31, 2016; AT&T was forced to use it because its other services did not work.²⁷

AT&T attempts to make one last throwaway argument related to KRS 278.541 – that it provided more than one primary, single, telephone line, and thus the service does not meet the definition of “basic local exchange service” in KRS 278.541. This argument ignores AT&T’s flat assertion to the contrary in its verified response to the Commissions Dec. 3, 2019 Data Request 6, in which it admits “AT&T Kentucky provided ‘basic local exchange service’ to Associates in Dermatology as that term is used in KRS 278.541(1).”²⁸ Even if AT&T had not made this binding admission in its verified responses, any single telephone line that meets the statutory criteria provides the Commission with jurisdiction under KRS 278.541(1). It is nonsensical to argue that the existence of other lines then divests the Commission of jurisdiction over the first. Accordingly, the Commission retains jurisdiction over these claims because AT&T provided basic local exchange service to AID that does not meet the criteria of “non-basic.”

III. There is No Support for AT&T’s Interpretation that KRS 278.5462(3) Divests the Commission of Jurisdiction to Adjudicate Broadband Complaints.

AT&T fails to cite any authority for its incorrect assertion that KRS 278.5462(3) only authorizes the Commission, in regard to consumer complaints, to “act as a mediator where both parties to the dispute seek its assistance.”²⁹ KRS 278.5462(1) does limit the Commission’s jurisdiction as to facilities, equipment, rates, terms and conditions, but it does not go so far as to limit jurisdiction as to disputes about billing or allegations of fraud. Rather, subpart (3)

²⁷ Making such a change without a contract or AID’s choice also provides a basis for the Commission to investigate whether the rates were “fair, just and reasonable ... for the services rendered” under KRS 278.030(1).

²⁸ AT&T Response to the Commission’s 12/3/19 Data Request 6 (emphasis added).

²⁹ AT&T Brief at 4.

specifically states “[t]he commission *may* assist in the resolution of consumer service complaints.” (*emphasis added*). Importantly, all statutes are required to be construed “liberally . . . with a view to promote their objects and carry out the intent of the legislature” KRS 446.080(1). Furthermore, “[a]ll words and phrases . . . according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.” KRS 446.080(4). To determine a statute’s meaning, the precise language used in the statute must be examined “*without reading into it words that are not there*” or “guessing what the General Assembly might have intended to say but did not.” *Commonwealth v. Saint Joseph Health Sys., Inc.*, 398 S.W.3d 446, 453 (Ky. Ct. App. 2013) (*emphasis added*).

In looking precisely at the language of KRS 278.5462(3), nothing in the statute requires, or even suggests, that both parties must consent to the Commission’s investigation, or that it can only act as a “mediator” in a claim. Instead, it specifically provides that the Commission “may” assist in the resolution of consumer service complaints. *See* KRS 278.5462(3). The word “may” indicates the Commission is not required, but is nevertheless allowed, to consider consumer service complaints. As such, the Commission should exercise jurisdiction over AID’s complaint regarding AT&T’s fraudulent broadband billing because AID’s complaint qualifies as a consumer service complaint, and the Commission has jurisdiction over other claims.

IV. AID Never Agreed to Arbitrate Claims Over Basic Local Exchange or Analog Services, and Even if it Did, a Contract Between Private Parties Cannot Alter the Commission’s Jurisdiction.

AT&T argues the arbitration provisions in its contracts with AID alters the Commission’s jurisdiction over AID’s Complaint. AT&T cites no authority, nor does an authority exist, for its proposition that a provision in a contract between two private parties, such as AID and AT&T,

can alter the jurisdiction of the Commission. In considering the exact issue of whether an arbitration provision in a private contract can divest a state utility of jurisdiction, the court in *Board of Education v. William Dohrman, Inc.*, held that “the Commission ha[s] the right and duty to regulate rates and services, ***no matter what a contract provide[s]***.” 620 S.W.2d 328, 329 (Ky. App. 1981) (*emphasis added*). Accordingly, ***regardless of whether a contract includes an arbitration provision***, if the Commission has jurisdiction over a Complaint, it is entitled to make a determination in a case. *See id.*

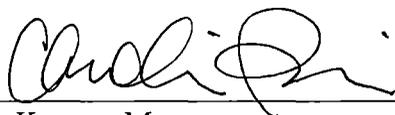
AT&T’s arguments about arbitration fail for other reasons as well. To start, AID had a right to pursue the Commission’s action before filing for arbitration because “[w]hen administrative remedies exist, they must be exhausted before further relief may be sought.” *Bulldog’s Enters v. Duke Energy*, 412 S.W.3d 210, 212 (Ky. App. 2013). As to the specific argument that analog or basic local exchange service disputes should be arbitrated, AT&T fails to point to any contract that provides for those services. As such, AID was provided those services outside of its contracts, and cannot be held to any remedy provided in contracts for different services. AT&T’s filed tariff, which must reflect the “terms and conditions” for non-basic service, say nothing about arbitration. *See* KRS. 278.544. Finally, if the Commission was to interpret the arbitration provision in this case to divest it of its jurisdiction over AID’s fraudulent billing claims, a dangerous precedent would be set in the state of Kentucky in which utilities could avoid Commission oversight by simply including an arbitration provision in its contracts with consumers. For all of these reasons, the Commission is the appropriate entity to handle AID’s complaints and it should rule on its own jurisdiction before arbitration or litigation is commenced.

CONCLUSION

For the aforementioned reasons, the Commission has jurisdiction over AID's claims regarding AT&T's fraudulent billing practices and should adjudicate this action.

Respectfully submitted,

DINSMORE & SHOHL LLP



R. Kenyon Meyer
Caroline L. Pieroni
101 South Fifth Street, Suite 2500
Louisville, KY 40202
E-mail: Kenyon.meyer@dinsmore.com
E-mail: caroline.pieroni@dinsmore.com
Phone: (502) 540-2300

and

Paul Schurman
115 N. Watterson Trail
Louisville, KY 40243
E-mail: paul@louisvillelaw.com
Phone: (502) 244-8099
Attorneys for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served on the following, via e-mail and U.S. Mail on this the 21st day of February, 2020, as indicated below:

Mark R. Overstreet
STITES & HARBISON
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
moverstreet@stites.com

Bellsouth Telecommunications, LLC d/b/a AT&T
Meidinger Tower
462 S. 4th Street, Suite 2400
Louisville, KY 40202
hood.harris@att.com

Hood Harris
President, AT&T Communications of the South Central
601 W. Chestnut Street
Room 408
Louisville, KY 40203
Hood.harris@att.com



Attorneys for Complainants