

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KIPLEY J. MCNALLY, PLC	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO.
	)	2022-00323
BELL SOUTH TELECOMMUNICATIONS, INC.	)	
D/B/A AT&T KENTUCKY	)	
	)	
DEFENDANT	)	

ORDER

Kipley J. McNally, PLC (McNally) tendered a formal complaint, by counsel, on September 6, 2022, alleging that Bell South Telecommunications, Inc. d/b/a AT&T Kentucky (AT&T Kentucky) had overbilled for services either not provided or for features that were not functional. Specifically, McNally alleged that AT&T Kentucky had overbilled for (1) voicemail that did not work;<sup>1</sup> (2) three-way calling that did not work;<sup>2</sup> (3) a \$13 per month DNS security advance feature that McNally either did not contract for or receive;<sup>3</sup> (4) a \$15 per month fee for managed Internet backup that McNally did not request;<sup>4</sup> and (5) unnecessary services (three-way calling, call forwarding, caller ID, and anonymous

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<sup>1</sup> Complaint at 4, paragraph 24(a).

<sup>2</sup> Complaint at 5, paragraph 24(b).

<sup>3</sup> Complaint at 5, paragraph 25(B).

<sup>4</sup> Complaint at 6, paragraph 32.

caller blocking) for McNally's dedicated fax line.<sup>5</sup> To resolve these issues McNally asked the Commission to order AT&T Kentucky to restore its analog telephone service and set its agreed-upon rate at \$208 per month, plus applicable taxes and regulatory fees.<sup>6</sup>

### BACKGROUND

McNally explained that it has been a business customer of AT&T Kentucky since May of 2005.<sup>7</sup> At that time, McNally received analog landline phone service from AT&T Kentucky, including voicemail and rollover calling.<sup>8</sup> McNally stated that, in 2017, AT&T Kentucky proposed that McNally switch to AT&T Kentucky's newer, internet-based phone service for its three phone lines.<sup>9</sup> McNally further stated that it agreed to switch to AT&T Kentucky's internet-based phone service, but after the voicemail and rollover calling features did not function properly, AT&T Kentucky restored McNally's older landline system at an agreed-upon rate at McNally's request.<sup>10</sup>

McNally stated that it continued to use AT&T Kentucky's analog landline system from 2017 until the events leading up to this complaint. McNally asserted that AT&T Kentucky began sending marketing materials to McNally in May 2022 to renew the contract.<sup>11</sup> McNally stated that it renewed the contract in accordance with AT&T

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<sup>5</sup> Complaint at 6, paragraph 34.

<sup>6</sup> Complaint at 7.

<sup>7</sup> Complaint at 2, paragraph 7.

<sup>8</sup> Complaint at 2, paragraph 8.

<sup>9</sup> Complaint at 2, paragraphs 9–10.

<sup>10</sup> Complaint at 2-3, paragraphs 10–14.

<sup>11</sup> Complaint at 3, paragraph 15.

Kentucky's marketing materials on July 7, 2022.<sup>12</sup> McNally claimed that around the same time, AT&T Kentucky began calling and stating that the service would be disconnected if McNally did not switch service from analog to Voice over Internet Protocol (VoIP) service.<sup>13</sup> Mr. McNally claimed he returned AT&T Kentucky's phone calls, but did not hear back from either of the two individuals contacted.<sup>14</sup>

On July 25, 2022, McNally spoke with Eric Kirby with AT&T Kentucky and agreed to a hybrid proposal that would allow McNally to retain one analog telephone line and the existing fiber optic internet service.<sup>15</sup> According to McNally, AT&T Kentucky would switch McNally's remaining two lines to digital service.<sup>16</sup> McNally stated that it paid the bill due on August 5, 2022, in full after the installation of the new telephone service.<sup>17</sup>

McNally asserted that, shortly thereafter, McNally's issues with AT&T Kentucky's service began. McNally claimed it did not have access to voicemail or three-way calling.<sup>18</sup> McNally also alleged that AT&T Kentucky overbilled for services that it did not provide. For example, AT&T Kentucky charged McNally \$13 for "DNS Security Advance," a feature that McNally claimed it neither requested nor received.<sup>19</sup> McNally claimed it made

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<sup>12</sup> Complaint at 3, paragraph 16.

<sup>13</sup> Complaint at 3, paragraph 18.

<sup>14</sup> Complaint at 3-4, paragraphs 19-20.

<sup>15</sup> Complaint at 4, paragraph 22.

<sup>16</sup> Complaint at 4, paragraph 22.

<sup>17</sup> Complaint at 4, paragraph 22.

<sup>18</sup> Complaint at 4-5, paragraph 24.

<sup>19</sup> Complaint at 5, paragraph 25(B).

multiple inquiries to AT&T Kentucky to repair or restore McNally's service, and that AT&T Kentucky has not responded to the inquired, per McNally's complaint.<sup>20</sup>

McNally cited KRS 278.030, KRS 278.040, and KRS 278.280 as authority for the Commission exercising its jurisdiction in this case.<sup>21</sup> McNally further argued for the Commission to extend its jurisdiction over AT&T Kentucky pursuant to the holding of *Simpson County Water District v. City of Franklin*,<sup>22</sup> recognizing that, by statute, the Commission ordinarily may not exercise jurisdiction over telecommunications companies. McNally argued that because AT&T Kentucky induced McNally to switch from strictly analog telephone service to a hybrid, analog and VoIP telephone service, the Commission should extend its jurisdiction to regulate AT&T Kentucky's rates and services. More specifically, McNally requested that the Commission order AT&T Kentucky to restore McNally's analog services, with the exception of "unneeded and unused services" for its dedicated fax line, at the total rate of \$208 per month.<sup>23</sup> This total included the following services:

<u>Description</u>	<u>Monthly cost</u>
Analog line 6133	\$90.00
Digital line 6134 with voicemail access	\$24.00
Dedicated fax line 1974	\$24.00
Unlimited long distance	\$7.00
Voicemail and other services	\$23.00
<u>Retaining existing fiber optic Internet</u>	<u>\$40.00</u>
TOTAL	\$208.00

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<sup>20</sup> Complaint at 5, paragraphs 26-27.

<sup>21</sup> KRS 278.030 mandates that "[e]very utility shall furnish adequate, efficient and reasonable service." KRS 278.040 grants the Commission jurisdiction over "the regulation of rates and service of utilities." KRS 278.280 allows the Commission, upon filing of a complaint, to "prescribe rules for the performance of any service" provided by a utility.

<sup>22</sup> Complaint at 6, paragraph 31, *citing* 872 S.W.2d 460 (Ky. 1994).

<sup>23</sup> Complaint at 7.

## LEGAL STANDARD

Pursuant to KRS 278.260, the Commission has jurisdiction over complaints regarding utility rates or service. Commission regulation 807 KAR 5:001, Section 20(4)(a), requires the Commission to examine the complaint to ascertain if the complaint establishes a *prima facie* case that the utility has violated a statute, regulation, tariff, or order for which the Commission may grant relief.<sup>24</sup> A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if uncontroverted by other evidence, would entitle the complainant to the relief requested. If the Commission determines that the complaint does not establish a *prima facie* case, then the Commission affords the complainant the opportunity to amend the complaint within a specified time.

Relevant here, and as discussed in greater detail below, the Commission's jurisdiction over telecommunication service is limited by statute. KRS 278.541(1) and (5) define "[b]asic local exchange service" and "[n]onbasic service":

(1) "Basic local exchange service" means a retail telecommunications service consisting of a primary, single, voice-grade line provided to the premises of residential or business customers with the following features and functions only:

- (a) Unlimited calls within the telephone utility's local exchange area;
- (b) Dual-tone multifrequency dialing; and
- (c) Access to the following:
  - 1. 911 emergency service;
  - 2. All locally available interexchange companies;
  - 3. Directory assistance;
  - 4. Operator services;
  - 5. Relay services; and
  - 6. A standard alphabetical directory listing that includes names, addresses, and telephone numbers at no additional charge. With respect

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<sup>24</sup> 807 KAR 5:001, Section 20(4)(a).

to local exchange carriers, basic local exchange service also shall include any mandatory extended area service routes accessible as a local call within that exchange area on or before July 12, 2006. Basic local exchange service does not include any features or functions other than those listed in this subsection, nor any other communications service, even if such service should include features and functions listed herein;

[...]

(5) "Nonbasic service" means 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; provided, however, 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[.]

In 2006, the General Assembly passed KRS 278.543(5), which limits the Commission's jurisdiction over telecommunications complaints to basic local exchange services only:

The commission shall have original jurisdiction over complaints as to basic local exchange service of any electing telephone utility, except that the commission shall not have jurisdiction to set, investigate, or determine rates as to any electing telephone utility other than as set forth in this section. Upon a complaint in writing made against any electing telephone utility by any person stating that basic local exchange service in which that complainant is directly interested is unreasonable, unsafe, insufficient, or unjustly discriminatory, or that basic local exchange service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order concerning a complaint shall be entered by the commission without a formal public hearing. A person may intervene in accordance with commission administrative regulations. The commission shall fix the time and place for the hearing and

shall provide notice to the electing telephone utility and the complainant not less than twenty (20) days in advance. The commission may dismiss any complaint without a hearing if it decides that a hearing is not necessary, in the public interest, or for the protection of substantial rights. The complainant and the electing telephone utility shall be entitled to be heard in person or by an attorney and to introduce evidence.<sup>25</sup>

Limiting the Commission's jurisdiction over telecommunication carriers is consistent with the Legislature's stated policy goal of deregulating the telecommunications industry.<sup>26</sup> For example, KRS 278.544(4) also provides:

Notwithstanding any provision of 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 278.544.

Likewise, the Legislature limited the Commission's jurisdiction over regulation of broadband services such as McNally's VoIP service package:

The provision of broadband services shall be market-based and not subject to state administrative regulation. Notwithstanding any other provision of law to the contrary except as provided in subsections (3) and (4) of this section, no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to the following:

(a) The availability of facilities or equipment used to provide broadband services; or

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<sup>25</sup> KRS 278.543(5).

<sup>26</sup> "The establishment of public policy is granted to the legislature alone." *Com. Ex rel. Cowan v. Wilkinson*, 828 S.W. 2d 610, 614 (Ky. 1992).

(b) The rates, terms or conditions for, or entry into, the provision of broadband service.<sup>27</sup>

In 2017, the General Assembly further limited the Commission's jurisdiction over telecommunications carriers like AT&T Kentucky:

In exchanges with fifteen thousand (15,000) or more housing units as of January 1, 2015, based on United States Census data current as of January 1, 2015, **and after September 1, 2017, in all exchanges** [...] [t]he commission shall not impose any requirements or otherwise regulate the terms, conditions, rates, or availability of any retail service of the modifying utility[.]<sup>28</sup> (Emphasis added.)

The Commission retains jurisdiction over basic local exchange service “[a]ccuracy of billing for telecommunication services, in accordance with truth-in-billing regulations prescribed by the Federal Communications Commission,”<sup>29</sup> and “[b]illing 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[.]”<sup>30</sup>

### DISCUSSION AND FINDINGS

Before the Commission can determine whether McNally has established a *prima facie* case for which the Commission may provide redress, it must determine whether it can exercise jurisdiction. The threshold questions are whether McNally received “basic local exchange service” or “nonbasic service” from AT&T Kentucky or whether KRS 278.542(1)(e) or (h) grant jurisdiction. Based on the plain language of

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<sup>27</sup> KRS 278.5462(1).

<sup>28</sup> KRS 278.5435(3)(a).

<sup>29</sup> KRS 278.542(1)(e).

<sup>30</sup> KRS 278.542(1)(h).



KRS 278.541(1) and (5), the Commission concludes that McNally received nonbasic service at all relevant periods. To qualify as a basic local exchange service under KRS 278.541(1), service must be limited to a “primary, single voice grade line” with only the features set forth in KRS 278.541(1)(a)-(c). However, even prior to McNally’s adoption of non-analog VoIP, its analog service included voicemail and rollover services, which under KRS 278.541(1)(c)(6) are features that prevented its service from being characterized as merely basic local exchange service. Furthermore, when Mr. McNally added additional nonbasic services, including two VoIP lines, unlimited long distance, facsimile service, and internet service, the bundling of these nonbasic services with the analog line precluded the analog line from constituting basic local exchange service.<sup>31</sup> Since McNally contracted for nonbasic service, the Commission may not exercise jurisdiction on the basis that this matter involves Commission-regulated basic local exchange service.<sup>32</sup>

McNally argued that KRS 278.030, KRS 278.040, KRS 278.260 and KRS 278.280 grant the Commission jurisdiction to resolve McNally’s complaint against AT&T Kentucky.<sup>33</sup> However, the Commission may not exercise jurisdiction because McNally received nonbasic service from AT&T Kentucky. KRS 278.544(4) specifically exempts the Commission from exercising jurisdiction pursuant to KRS 278.030, KRS 278.260, and KRS 278.280. “[T]he provisions of [KRS 278.544] shall be set by the marketplace and

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<sup>31</sup> KRS 278.541(5).

<sup>32</sup> KRS 278.544(4);

<sup>33</sup> Complaint at 1-2.

are not governed by KRS 278.030[.]”<sup>34</sup> Moreover, “nonbasic services are exempt from action or review by the commission under [...] KRS 278.260 [and] KRS 278.280[.]”<sup>35</sup>

“Shall” is mandatory.<sup>36</sup> As the Kentucky Supreme Court also stated:

In common or ordinary parlance, and in its ordinary signification, the term “shall” is a word of command and ... must be given a compulsory meaning. If the words of the statute are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation. Shall means shall.<sup>37</sup>

Therefore, based on the plain and unambiguous text of KRS 278.544(4), the Commission is without jurisdiction to resolve McNally’s complaint against AT&T Kentucky on that basis.<sup>38</sup> McNally’s argument for the Commission to extend its jurisdiction to regulate AT&T pursuant to *Simpson County Water District v. City of Franklin*<sup>39</sup> is inapplicable. *Simpson County Water District* was decided prior to the enactment of KRS 278.571 through 278.5464. The Legislature mandated that the Commission is without jurisdiction to act or review “nonbasic service” complaints except under the limited circumstances provided by KRS 278.542(1).

Last, KRS 278.542(1)(e) and (h) provide two exceptions to the Legislature’s limitation on the Commission’s jurisdiction over telecommunications regulation. McNally

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<sup>34</sup> KRS 278.544(4).

<sup>35</sup> KRS 278.544(4).

<sup>36</sup> KRS 446.010(39).

<sup>37</sup> *Vandertoll v. Com.*, 110 S.W. 3d 789, 795-796 (Ky. 2003) (internal quotations and citations omitted).

<sup>38</sup> While KRS 278.040 is not specifically listed in KRS 278.544(4), that statute is in the nature of an enabling statute. It is clear that the legislature intended to limit the Commission’s jurisdiction to regulate telecommunications carriers by passing KRS 278.541-278.5464.

<sup>39</sup> *Simpson County Water District v. City of Frankfort*, 872 S.W. 2d 460 (Ky. 1994).

disputed the accuracy of certain charges on its bill and alleged that AT&T Kentucky billed McNally for services that McNally did not want. Notably, two of these disputes appear to be for unwanted internet features and features associated with a non-analog, VoIP fax line. Both exceptions reference the “truth-in-billing regulations prescribed by the Federal Communications Commission[.]”<sup>40</sup> As the Commission discussed in another complaint brought against AT&T Kentucky, the FCC has held that its “truth-in-billing” regulations do not apply to VoIP services.<sup>41</sup> As recently as 2020, federal courts have also found that VoIP is an “information service” rather than a “telecommunications service.”<sup>42</sup> Neither of these exceptions would allow the Commission to exercise jurisdiction here if McNally’s dispute with AT&T Kentucky is over the inaccurate billing of information services. The Commission may only exercise jurisdiction over such billing disputes of telecommunication services. Although McNally states that it attached a copy of its bill to its complaint,<sup>43</sup> no such bill was attached. McNally also alleges that AT&T Kentucky billed McNally for voicemail and three-way calling that do not work.<sup>44</sup> However, it is not clear from McNally’s complaint whether these services fail to work with its analog line or its VoIP line. Thus, the Commission cannot conclude whether the dispute involves the overbilling of telecommunication services or information services.

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<sup>40</sup> KRS 278.542(1)(e) and (h).

<sup>41</sup> Case No. 2019-00047, *Associates in Dermatology, PLLC v. Bellsouth Telecommunications, LLC dba AT&T Kentucky* (Ky. PSC Dec. 3, 2019), Order at 4.

<sup>42</sup> See, e.g., *Federal Trade Com'n v. Educare Centre Services*, 433 F. Supp. 3d 1008 (W.D. Texas, 2020).

<sup>43</sup> Complaint at 6, paragraph 34.

<sup>44</sup> Complaint at 4–5, paragraphs 24(a)–(b).

Having reviewed McNally's complaint, the Commission finds that the complaint has not established a *prima facie* case that the utility has violated a statute, regulation, tariff, or order for which the Commission may grant relief because the applicable legal authority does not grant the Commission jurisdiction to take any action on this complaint. In accordance with 807 KAR 5:001, Section 20(4)(a)(1)-(2), the Commission finds that McNally should be afforded the opportunity to amend its complaint. The Commission finds that McNally should file an amended complaint within 20 days from the date of service of this Order. The Commission directs McNally to the Commission's July 22, 2021 Order in Case No. 2020-00085<sup>45</sup> regarding filings with the Commission. Because Mr. McNally signed and filed the complaint as an attorney on behalf of McNally, electronic filing procedures apply.

IT IS THEREFORE ORDERED that:

1. McNally's complaint is rejected for filing for failing to state a *prima facie* case.
2. McNally shall have 20 days from the date of service of this Order to file an amended complaint with the Commission that conforms to the requirements of 807 KAR 5:001, Section 20(1), and that states a *prima facie* case.
3. McNally's amended complaint shall be filed electronically and in conformity with the requirements of 807 KAR 5:001, Section 8.
4. A copy of this Order shall be served upon Mr. McNally at 2527 Nelson Miller Parkway, Suite 104, Louisville, Kentucky 40223.

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<sup>45</sup> Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19* (Ky. PSC July 22, 2021), Order (in which the Commission mandated the use of the electronic filing procedures found in 807 KAR 5:001, Section 8, except for *pro se* formal complaints filed against utilities).

PUBLIC SERVICE COMMISSION

  
Chairman

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Commissioner



ATTEST:

  
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