

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

Associates in Dermatology, PLLC (Associates in Dermatology) filed a complaint (Complaint) against Bellsouth Telecommunications, LLC, dba AT&T Kentucky (AT&T Kentucky) alleging that it was overbilled, that Associates in Dermatology was billed on accounts that were or should have been terminated, and that AT&T Kentucky's customer service representatives were not responsive to its questions and concerns. AT&T Kentucky filed an answer (Answer) to the Complaint in which it generally denied the allegations in the Complaint, affirmatively stated that AT&T Kentucky had been responsive to Associates in Dermatology's complaints, and alleged "KRS 278.544 divests the Commission of subject matter jurisdiction *in whole or part* over the allegations in the complaint."¹ (emphasis added).

¹ Answer at paragraph 2.

As referenced by AT&T Kentucky, KRS 278.544 states that the rates charged for nonbasic services shall be governed by the marketplace as opposed to KRS 278.030, and states that:

[N]onbasic 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 278.544.²

By so stating, KRS 278.544 essentially eliminates the Commission's traditional authority to establish reasonable rates and adequate service standards for nonbasic telephone services. However, the Commission retained jurisdiction over nonbasic services "as specifically stated in KRS 278.541 to 278.544," and it retained its existing jurisdiction over basic local exchange service.³

KRS 278.542 lists a number of exceptions to the limit on the Commission's jurisdiction in KRS 278.544, stating, in relevant part, that

[n]othing in KRS 278.541 to 278.544 shall affect the commission's jurisdiction with respect to: . . . (e) Accuracy of billing for telecommunications services, in accordance with the truth-in-billing regulations prescribed by the Federal Communications Commission; . . . (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.⁴

² KRS 278.544(4).

³ Nonbasic service is defined in KRS 278.541(5) to include any type of telecommunications service other than basic local exchange service that is not offered as part of a "package," as defined by KRS 278.541(7), with nonbasic services, so the limit on the Commission's jurisdiction over nonbasic service essentially limits the Commission's jurisdiction over all service except for basic local exchange service.

⁴ KRS 278.542.

Those exceptions initially appear to provide the Commission broad jurisdiction over claims regarding inaccurate billing like those made by Associates in Dermatology, because the truth-in-billing regulations provide significant substantive protections.⁵ However, the Federal Communication Commission's (FCC) "truth-in-billing regulations" have limited applicability.

Specifically, the truth-in-billing regulations state that they are applicable to "[t]elecommunications common carriers."⁶ While that term is not defined, it appears to refer to "telecommunications carriers" as used in 47 U.S.C.A. § 153(51), which states that a "telecommunications carrier" is "any provider of telecommunications services" but that "a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." Based on that definition, the "truth-in-billing regulations" would only apply to Associates in Dermatology's Complaint if AT&T Kentucky was providing a "telecommunications service."⁷ However, despite the fact that the FCC has treated interconnected voice over internet protocol (VoIP) service like traditional telephone service on numerous occasions,⁸ and even designated interconnected VoIP service providers as eligible

⁵ See 7 C.F.R. § 64.2401 (setting forth the FCC's substantive truth-in-billing requirements).

⁶ 47 C.F.R. § 64.2400(b); see also 47 C.F.R. § 64.2401 (setting forth the FCC's substantive truth-in-billing requirements).

⁷ "Telecommunications service" is defined by 47 U.S.C.A. § 153(53) as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

⁸ See *VoIP E911 Order*, 20 FCC Rcd. 10245, 10266-70, paragraphs 36-41 (2005) (adopting a requirement that interconnected VoIP providers immediately provided enhanced 911 capabilities to their customers); *IP Enabled Services*, 24 FCC Rcd. 6039, 6039 paragraph 2 (2009) ("We extend to providers of interconnected VoIP service the discontinuance obligations that apply to domestic non-dominant telecommunications carriers under section 214 of the Communications Act of 1934."); *USF--ICC Transformation Order*, 26 FCC Rcd. 17663, 18028-29 paragraphs 972-974 (2011) (prohibiting local exchange carriers from blocking of interconnected VoIP traffic passing through the publically switch

telecommunications carriers,⁹ several courts in other federal circuits have held that interconnected VoIP is not a telecommunications service,¹⁰ 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.¹¹

Here, AT&T Kentucky alleged in its Answer that it provided “nonbasic (business VoIP) service” to Associates in Dermatology.¹² If that is the case, then there is a significant question regarding whether the Commission has jurisdiction to hear the Complaint, because its jurisdiction over nonbasic service is limited to the exceptions in KRS 278.541 to 278.544 and the only exceptions that appear to apply to the allegations in the Complaint do not appear to apply to interconnected VoIP service. However, the

telephone network); *Numbering Policies for Modern Communications*, 30 FCC Rcd. 6839, 6839-41, paragraphs 1–3 (2015) (allowing interconnected VoIP providers to obtain telephone numbers directly from the North American Numbering Plan Administrators); *see also Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 722 (8th Cir. 2018) (Grasz, J. dissenting) *cert. denied* (noting that the FCC opened a proceeding in 2004 to address whether interconnected VoIP is a telecommunications service but the case is still open).

⁹ *Telecommunications Carriers Eligible for Universal Service Support Connect America Fund*, WC Docket Nos. 09-197, 10-90, DA 19-925, 2019 WL 4915469 (FCC Sept. 18, 2019) (in which the FCC designated an interconnected VoIP provider as an “eligible telecommunications carrier” pursuant to Section 254(e) Communications Act of 1934); *see also In re FCC 11-161*, 753 F.3d 1015, 1048-9 (10th Cir. 2014) (noting that only eligible telecommunications carrier may receive universal service funds and that the FCC authorized interconnected VoIP services to receive those funds).

¹⁰ *See Charter Advanced Services (MN), LLC*, 903 F.3d at 719-20 (where the 8th Circuit held that interconnected VoIP was not a telecommunications service); *Southwestern Bell Telephone, L.P. v. Missouri Public Service Com’n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006) (indicating that “IP-PSTN [traffic] is an information service” due to the net protocol conversion).

¹¹ *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, 27 FCC Rcd. 4436, 4455 paragraph 47 (2012) (issuing the final truth-in-billing rules and indicating that they do not apply to VoIP service); *Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges*, 32 FCC Rcd. 6022, 6027, paragraph 13 (2017) (noting that the current truth-in-billing rules do not apply to interconnected VoIP and requesting public comment regarding whether they should be extended to interconnected VoIP); *see also Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges*, 33 FCC Rcd. 5773 (2018) (where the FCC indicated that it declined to extend the slamming rules to interconnected VoIP service but did not mention whether the truth-in-billing rules would be extended to interconnected VoIP service).

¹² Answer at paragraph 2.

record is not clear regarding the nature of the services provided to AT&T Kentucky, i.e., what exactly AT&T Kentucky describes as “business VoIP,” whether the service it provided was limited to “business VoIP” service or included other services over which the Commission has jurisdiction, and whether the allegations in the Complaint fit within other exceptions. Thus, the Commission is not able to determine that it lacks jurisdiction over the allegations in the Complaint based on the Complaint and Answer alone.

The Commission does have authority to determine its own jurisdiction in this matter even if the facts may ultimately indicate that the Commission lacks subject matter jurisdiction over the substance of the Complaint.¹³ To determine whether it has jurisdiction over the substance of the Complaint, the Commission finds that limited discovery should be permitted regarding the nature of the services AT&T Kentucky provided Associates in Dermatology, including the nature of the services provided by AT&T Kentucky and the nature of the claims being made by Associates in Dermatology.¹⁴ However, since the purpose of such an inquiry would be to determine whether the Commission has jurisdiction, the parties should not attempt to request information regarding the veracity of the allegations themselves. Following limited discovery, the Commission finds that AT&T Kentucky should be permitted, but not required, to file a brief arguing why it contends that the Commission lacks subject matter jurisdiction over the Complaint, and thereafter, Associates in Dermatology should be permitted, but not required, to file a brief explaining its contention that the Commission does have

¹³ See *City of Greenup v. Public Service Com'n*, 182 S.W.3d 535, 538-9 (Ky. App. 2005) (“We think it a sound principle of law that a quasi-judicial agency such as the PSC, like a Court, has authority, by implication, to determine its own jurisdiction.”).

¹⁴ Specifically, the parties may submit written requests for information to each other pursuant to 807 KAR 5:001, Section 4(12) and this Order by January 6, 2020, as indicated in the procedural schedule attached hereto.

jurisdiction over the Complaint and responding to AT&T Kentucky's brief if it files one. Thereafter, the Commission will determine whether it has jurisdiction over the allegations in the Complaint.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky shall file responses to the requests for information set forth in Appendix A no later than December 20, 2019.

2. Associates in Dermatology shall file responses to the requests for information set forth in Appendix B no later than December 20, 2019.

3. The procedural schedule set forth in Appendix C to this Order shall be followed.

4. a. Responses to requests for information shall be appropriately bound, tabbed, and indexed and shall include the name of the witness responsible for responding to the questions related to the information provided, with copies to all parties of record, and the original and ten copies to the Commission.

b. Each response shall be answered under oath or, for representatives of a public or private corporation or a partnership or an association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

c. A party shall make timely amendment to any prior response if it obtains information which indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.

d. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

e. Careful attention should be given to copied material to ensure that it is legible. When the requested information has been previously provided in this proceeding in the requested format, reference may be made to the specific location of that information in responding to this request.

f. Any party filing a paper containing personal information shall, in accordance with 807 KAR 5:001, Section 4(10), encrypt or redact the paper so that the personal information cannot be read.

5. Requests for information shall be limited to matters reasonably calculated to assist the Commission in determining whether it has subject matter jurisdiction over the allegations in the Complaint, including the nature of the service provided by AT&T Kentucky during the relevant periods and the nature of the allegations being made by Associates in Dermatology.

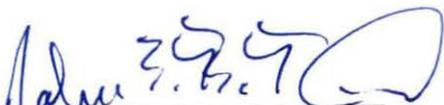
6. The Commission shall issue an order regarding whether it has jurisdiction over Associates in Dermatology's Complaint after the period for filing briefs has passed.

7. Nothing contained herein shall prevent the Commission from entering further orders in this matter.

By the Commission

ENTERED
DEC 03 2019
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Executive Director
for Wanda R. Rison

Case No. 2019-00047

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2019-00047 DATED **DEC 03 2019**

1. Provide Associates in Dermatology's address at which AT&T Kentucky provided the service or services at issue in this matter.

2. State whether Associates in Dermatology continues to receive service from AT&T Kentucky, and if so, list and briefly describe the current services Associates in Dermatology receives from AT&T Kentucky.

3. Other than the services identified in response to Request for Information No. 2 above, list and briefly describe all services that AT&T Kentucky has provided Associates in Dermatology in the last three years; and identify the date on which AT&T Kentucky last provided each of those services.

4. Provide any contracts between AT&T Kentucky and Associates in Dermatology under which Associates in Dermatology continues to receive service, and for each, state whether the contract has expired or been terminated, i.e., is service being provided on a month-to-month basis or is Associates in Dermatology bound to receive service for a period of time.

5. Other than those contracts provided in response to Request for Information No. 4 above, provide any contracts between AT&T Kentucky and Associates in Dermatology that were terminated or expired in the last three years.

6. a. State whether AT&T Kentucky provided "basic local exchange service" to Associates in Dermatology as that term is used in KRS 278.541(1), and explain the basis for AT&T Kentucky's response with references to specific facts that support its response.

b. If AT&T Kentucky did provide “basic local exchange service” to Associates in Dermatology, state whether it provided it as part of a “package” as that term is used in KRS 278.541(7), and explain the basis for AT&T Kentucky’s response with references to specific facts that support its response.

7. State whether calls to and from Associates in Dermatology using the service provided by AT&T Kentucky originate on an internet protocol (IP) network when Associates in Dermatology is the caller and terminate on an IP network when Associates in Dermatology is the recipient of the call.

8. If calls made and received by Associates in Dermatology using the service provided by AT&T Kentucky originate or terminate, respectively, on an IP network:

a. State whether Associates in Dermatology is able to make calls that terminate on the Public Switched Telephone Network (PSTN) or receive calls that originate on the PSTN, and if so, describe how Associates in Dermatology is connected to the PSTN network;

b. State whether Associates in Dermatology connects to the IP network through which calls originate and terminate using internet access provided by a third party, internet access provided by AT&T Kentucky, a closed network provided by AT&T Kentucky, or some other means; and

c. State whether Associates in Dermatology would be able to use the service provided by AT&T Kentucky by connecting its phones (and other customer premises equipment) to any internet connection regardless of location or whether Associates in Dermatology’s service could only be utilized at a specific location, and explain any technical reasons why the service could only be utilized at a specific location.

9. If calls made and received by Associates in Dermatology using the service provided by AT&T Kentucky do not originate and terminate, respectively, on an IP network, describe the type of network on which the calls made or received by Associates in Dermatology originate and terminate, respectively.

10. State when, if ever, AT&T Kentucky last provided service or any telephone line to Associates in Dermatology, whether for voice calls or to transmit facsimiles, under circumstances in which calls from Associates in Dermatology would originate on an analog network or calls to Associates in Dermatology would terminate on an analog network, and if so, describe the service and state whether that service provided access to the PSTN.

11. State whether the service AT&T Kentucky provides or provided to Associates in Dermatology requires Associates in Dermatology to use equipment on its premises that differs from the equipment necessary to make an ordinary voice call and an ordinary facsimile transmission over the PSTN, and if so, identify each such piece of equipment, and briefly explain its function and why it is necessary.

12. State whether the service AT&T Kentucky provides or provided to Associates in Dermatology is or was accessed using the same telephone lines, or any portion thereof, through which analog service may be provided.

13. a. Confirm that Associates in Dermatology makes voice calls using the service provided by AT&T Kentucky by dialing telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements, and if you are not able to confirm, explain the basis for your response.

b. State whether Associates in Dermatology's calls made using the service provided by AT&T Kentucky are or were routed using the dial tone associated with the numbers dialed, and briefly explain AT&T Kentucky's response.

14. Confirm that Associates in Dermatology receives voice calls through the service provided by AT&T Kentucky when another person dials a telephone number assigned to Associates in Dermatology in accordance with the North American Numbering Plan, and associated international agreements, and if you are not able to confirm, explain the basis for your response.

15. a. Identify the point of demarcation between Associates in Dermatology's network facilities and AT&T Kentucky's network facilities;

b. Identify the format in which a voice call and a facsimile transmission must enter AT&T Kentucky's network at the point of demarcation between Associates in Dermatology's network facilities and AT&T Kentucky's network facilities; and

c. Assuming Associates in Dermatology originates a local call or facsimile transmission to an AT&T Kentucky customer in Jefferson County, Kentucky that receives telephone service through the PSTN network, describe how the call (i.e., the customers' information) will be routed through AT&T Kentucky's network and any third parties' networks, if any, including all points at which any protocol conversion occurs.

16. State whether AT&T Kentucky contends that a net protocol change occurs to the information transmitted in voice calls when Associates in Dermatology uses or used the service provided by AT&T Kentucky to make a local call to another AT&T Kentucky customer who is or was receiving the same voice service provided by AT&T Kentucky to Associates in Dermatology, and explain each basis for AT&T Kentucky's contention.

17. State whether AT&T Kentucky provides (or provided) Associates in Dermatology access to the PSTN through its local exchange, and if so, explain whether it charges or charged Associates in Dermatology the same rate that it would charge customers from other telephone providers for access to its local exchange.

18. Provide any additional evidence, if any, that AT&T Kentucky believes is necessary to support its assertion that the Commission lacks subject matter jurisdiction over this matter.

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2019-00047 DATED **DEC 03 2019**

1. Provide Associates in Dermatology's address at which the service or services at issue in this matter were provided.

2. State whether Associates in Dermatology continues to receive service from AT&T Kentucky, and if so, list and briefly describe the current services Associates in Dermatology receives from AT&T Kentucky.

3. Other than the services identified in response to Request for Information No. 2 above, list and briefly describe all services that AT&T Kentucky has provided Associates in Dermatology in the last three years, and identify the date on which AT&T Kentucky last provided each of those services.

4. Provide any contracts between AT&T Kentucky and Associates in Dermatology under which Associates in Dermatology continues to receive service, and for each, state whether the contract has expired or been terminated, i.e., is service being provided on a month-to-month basis or is Associates in Dermatology bound to receive service for a period of time.

5. Other than those contracts provided in response to Request for Information No. 4 above, provide any contracts between AT&T Kentucky and Associates in Dermatology that were terminated or expired in the last three years.

6. State whether AT&T Kentucky provided "basic local exchange service" to Associates in Dermatology as that term is used in KRS 278.541(1), and explain the basis

for Associates in Dermatology's response with references to specific facts that support its response.

b. If AT&T Kentucky did provide "basic local exchange service" to Associates in Dermatology, state whether it provided it as part of "package" as that term is used in KRS 278.541(7), and explain the basis for Associates in Dermatology's response with references to specific facts that support its response.

7. Identify the "services no longer in use" for which "[Associates in Dermatology] was billed" by AT&T Kentucky; provide the bills that Associates in Dermatology contends included charges for "services no longer in use," and identify the charges on each bill that Associates in Dermatology contends arose from each such service.

8. Identify all "over billing" and "billing on accounts that should have been terminated" referred in the Complaint by identifying the billing cycles in which Associates in Dermatology contends that there was overbilling or billing on accounts that should have been terminated; identifying the services for which Associates in Dermatology contends that it was overbilled or for which it was billed on accounts that should have been terminated; and providing the bills that Associates in Dermatology contends include over billing and billing on accounts that should have been terminated, and identifying the amounts on each bill that Associates in Dermatology contends were over or improperly billed and the services for which Associates in Dermatology contends those amounts were billed.

9. State whether Associates in Dermatology was provided telephone service by AT&T Kentucky via an internet protocol (IP) network at the point where Associates in Dermatology originated calls, and explain the basis for the response.

10. Confirm that AT&T Kentucky previously “verified that the accounts in question were not in contract” and, therefore, that Associates in Dermatology “[would] not incur any fees should [it] disconnect or port the numbers from AT&T” as AT&T Kentucky indicated in the November 15, 2018 letter attached to its answer to the complaint herein, and if you are not able to confirm, please explain why you cannot confirm.

11. Given AT&T Kentucky’s answer to the complaint, identify and describe in detail the relief to which Associates in Dermatology contends it is entitled in this matter with reference to specific services and amounts for which Associates in Dermatology contends it was over charged and any non-monetary relief Associates in Dermatology continues to request.

12. Provide any additional evidence, if any, that Associates in Dermatology believes is necessary to support its assertion that the Commission has subject matter jurisdiction over this matter.

APPENDIX C

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2019-00047 DATED **DEC 03 2019**

First requests for information to AT&T Kentucky and Associates in Dermatology shall be filed no later than.....01/06/2020

AT&T Kentucky and Associates in Dermatology shall file responses to first requests for information no later than.....01/20/2020

AT&T Kentucky may file a brief regarding jurisdiction no later than.....01/30/2020

Associates in Dermatology may file a brief regarding jurisdiction no later than.....02/07/2020

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