

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION INTO THE PROVISION	)	
OF SERVICE BY PILGRIM TELEPHONE, INC.	)	
IN VIOLATION OF KRS 278.160 AND THE	)	CASE NO. 98-181
COMMISSION S ORDER IN ADMINISTRATIVE	)	
CASE NO. 359 IN RESPONSE TO	)	
FORMAL COMPLAINT	)	

O R D E R

On March 23, 1998, Katherine K. Yunker ( Complainant ) filed a formal complaint with the Commission against Pilgrim Telephone, Inc. ( Pilgrim ). The complaint alleges that, without having previously filed a tariff and notification of intent to operate in Kentucky, Pilgrim charged and collected for intrastate long-distance service in violation of KRS 278.160 and the Order in Administrative Case No. 359.<sup>1</sup> According to the complaint, the collect call which is the subject of the complaint originated in Frankfort on November 19, 1997, at 1:00 p.m. and was accepted by the Complainant s office in Lexington. When the Complainant received her monthly bill from GTE, however, she was charged \$6.18 for a collect call originating in Cambridge, Massachusetts, from a number controlled by Pilgrim.

On April 24, 1998, the Commission issued an Order requiring Pilgrim to file a written response to the Complainant s allegations and present evidence concerning the

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<sup>1</sup> Administrative Case No. 359, Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones (June 21, 1996).

alleged violations of KRS 278.160 and the Order in Administrative Case No. 359. Pilgrim was also asked to show cause why it should not be penalized pursuant to KRS 278.990 and should not be required to refund any compensation collected prior to filing a tariff with the Commission should violations be found.

Pilgrim filed both an Answer and a Response on June 9, 1998. In its Answer, Pilgrim asserts that the Commission is without subject matter jurisdiction to hear the matters raised in the complaint as Pilgrim is purely an interstate telecommunications carrier and provider of enhanced services and does not provide intrastate service.<sup>2</sup> Pilgrim admits that it does not have authority to provide intrastate service in Kentucky but maintains that it neither advertises nor offers to provide intrastate service in Kentucky.<sup>3</sup>

Further, Pilgrim admits that an unknown party placed a call to Pilgrim's SafeCall platform in Cambridge, Massachusetts, on November 19, at approximately 1:00 p.m. from a phone with the number 502-223-9908.<sup>4</sup> According to Pilgrim, the caller then caused its system to make a second call to the Complainant's office in Lexington. Pilgrim conferenced these calls together using the SafeCall service.<sup>5</sup> Pilgrim requests that the Commission find that it was not acting in violation of any Kentucky

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<sup>2</sup> Answer at 1.

<sup>3</sup> Id. at 4.

<sup>4</sup> It was later determined that the number belongs to a payphone at the Five Star Food Mart on Schenkel Lane, Frankfort, Kentucky. The phone is owned by Coin Phone Management Company of Louisville.

<sup>5</sup> Answer at 2.

statute or regulation or, alternatively, that any violation of a statute or regulation was inadvertent and occurred only as a result of the Complainant's agent misdialing and reaching Pilgrim's unadvertised platform number.<sup>6</sup>

In its Response, also filed on June 9, 1998, Pilgrim provides a more detailed description of the manner in which the call from Frankfort to Lexington was processed through its SafeCall system. Pilgrim describes its SafeCall service as follows:

Pilgrim accepts an inbound interstate call from a calling party, processes it in its switch, and re-originates an outbound interstate call from the outbound platform number of the SafeCall service, which is 617-225-1801. Unlike the more common service provided by common carriers whereby traffic is switched through intermediate sources in various states in order to complete one end-to-end call, the SafeCall service actually terminates the first call in Cambridge, it re-originates the call to the location determined by the calling party from its own switch location in Cambridge, thereby creating the collect call charge from the Cambridge telephone number, and then conferences the two calls together.<sup>7</sup>

Pilgrim asserts that the SafeCall system involves two interstate calls, one from the calling party to the SafeCall platform in Cambridge and another from the platform to the collect call recipient. Pilgrim supports the assertion based upon its termination of the 800 portion of the call and subsequent re-origination of the collect call to the called party. Pilgrim also claims that the interstate nature of the calls should be evident from the fact that the original call to the platform (via Pilgrim's 1+800 number) is free to the

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<sup>6</sup> Id. at 4-5.

<sup>7</sup> Response at 3. The SafeCall service is designed to protect the anonymity of the caller. By re-originating the collect call from its platform in Cambridge, Pilgrim protects the confidentiality of the calling party's origination information. The called party's bill identifies Cambridge and the Pilgrim's platform number, 617-225-1801, as the called from information. [Response at 4]

calling party while the called party is billed for the collect call charges associated with the call from the platform to his or her number.<sup>8</sup> Based upon the premise that SafeCall is actually two interstate calls, Pilgrim reiterates its position that the Commission does not have jurisdiction over the call at issue in the complaint.<sup>9</sup>

#### EVIDENCE PRESENTED AT HEARING

A public hearing was held on September 9, 1998. Katherine Yunker and Charles Yeomans, Ms. Yunker's office manager, testified on behalf of the Complainant. Scott Yacino, Vice President of Operations at Pilgrim Telephone, testified on behalf of the Defendant.

#### Factual Dispute

The primary factual dispute concerns the manner in which the call was made by Ms. Yunker's employee, Ms. Bishop. Both Ms. Yunker and Mr. Yeomans testified that Ms. Bishop remembered dialing 0+ to make the collect call from Frankfort to Lexington.<sup>10</sup> Unfortunately, Ms. Bishop was unavailable to testify at the hearing.

Pilgrim theorized that Ms. Bishop inadvertently reached Pilgrim's unadvertised SafeCall platform by misdialing MCI Telecommunications Corporation's (MCI) 1+800-COLLECT.<sup>11</sup> There is a single digit difference between the SafeCall platform

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<sup>8</sup> Id. at 4.

<sup>9</sup> Id. at 1.

<sup>10</sup> Transcript at 30.

<sup>11</sup> Response at 4.

number (1+800-365-5328) and MCI s 1+800-COLLECT number (1+800-265-5328).<sup>12</sup> Moreover, according to Pilgrim, it was technically impossible for Ms. Bishop to have accessed Pilgrim s network by dialing 0+ from the payphone on Schenkel Lane.<sup>13</sup> Pilgrim asserted that it did not have a contract with Coin Phone Management Company of Louisville to automatically carry 0+ collect calls and that the phone was presubscribed to AT&T Communications of the South Central States, Inc. ( AT&T ).<sup>14</sup> Thus, AT&T would automatically carry any 0+ or 1+ number dialed from the payphone. Pilgrim urges the Commission to reject Ms. Yunker s theory of a 0+ call.

A secondary factual dispute concerns whether the call was branded by Pilgrim. The Complainant alleges that the call was not branded.<sup>15</sup> Pilgrim introduced as contrary evidence, a transcript of the branding message in which Pilgrim was clearly identified as the carrier of the call.<sup>16</sup> Pilgrim urges the Commission to reject the Complainant s assertion that, unlike every other call to its network, there was no branding of this call.<sup>17</sup>

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<sup>12</sup> At the hearing, the Defendant produced a transcript of the SafeCall prompts (Defendant s Exhibit 2) which identified the SafeCall number as 1+800-565-5328 or 1+800-KOLLECT.

<sup>13</sup> Transcript at 95.

<sup>14</sup> Id. at 54 and 60. Pilgrim also filed an affidavit (Defendant s Exhibit 6) from Melissa J. Burnett, General Manager for BellSouth Public Communications, which states that the preferred interexchange carrier ( PIC ) at the phone at the time of the call was AT&T.

<sup>15</sup> Complaint at 2 and Transcript at 30.

<sup>16</sup> Id. at 60-62; Defendant s Exhibit 2.

<sup>17</sup> Post-Hearing Brief at 6.

The Commission makes no finding with regard to these disputed issues of fact. Instead, the Commission concludes that they are irrelevant to a finding that the call is intrastate in nature and subject to the Commission's jurisdiction.

#### Nature of the Call as Intrastate or Interstate

Pilgrim presented significant evidence regarding the jurisdictional nature of a call employing the SafeCall system. Pilgrim asserts that the SafeCall system involves two interstate calls, the originating call from the caller to Pilgrim's platform and the billed call from Pilgrim to the call recipient. The 800 portion of the call, the originating call, is carried by Pilgrim's 800 service provider, TransNational Communications. According to the call detail provided by TransNational, a call was placed in Frankfort at 1:00 p.m. which lasted for 5.7 minutes; TransNational billed Pilgrim \$.49 for the call.<sup>18</sup> Pilgrim alone bears the cost of this originating call.<sup>19</sup>

According to Pilgrim, it accepts an inbound interstate call from a calling party, the call is processed by Pilgrim's switch, and routed by the switch to the SafeCall access platform or voice processor.<sup>20</sup> The voice processor then prompts the caller to enter the number he or she wishes to call.<sup>21</sup> Once the number has been entered, the voice processor makes a second outbound interstate call to the collect call recipient. The calls are then conferenced together by the voice processor to complete the SafeCall

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<sup>18</sup> Defendant's Exhibit 4.

<sup>19</sup> Response at 4; Defendant's Exhibit 3 at 4.

<sup>20</sup> Transcript at 77; Defendant's Exhibit 3 at 3.

<sup>21</sup> Transcript at 47; Defendant's Exhibit 2.

service which maintains automated operator supervision of each of the calls until their completion.<sup>22</sup>

### FINDINGS OF FACT

The Commission finds that the call at issue in this case is an intrastate call subject to the Commission's jurisdiction. The Commission rejects Pilgrim's assertion that the technical aspects of the SafeCall configuration indicate that there are two distinct interstate calls beyond the Commission's jurisdiction. The Commission also rejects Pilgrim's contention that the Commission must yield to the jurisdiction of the Federal Communications Commission (FCC) because of the mix of intrastate and interstate calls provided through the SafeCall system.

The FCC has repeatedly acknowledged that both court and [FCC] decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications for defining the nature of the communications.<sup>23</sup> In Long Distance/USA, for example, the FCC rejected the claim that a call which passes through an intermediate switch becomes two calls. There, the FCC made the following relevant observation:

In general, all of the defendants' arguments on this issue ignore or reject the fact that the complainant's services convey a single communications from the caller to the called party. Indeed, from the caller's point of view any intermediate switching during the call is transparent. *[T]he user intends to make a single call terminating not at the complainant's intermediate switch, where the 800 leg of the call's journey ends, but at the telephone line of the called party.* Thus, to the caller, [there is a single call] regardless of whether that caller must dial a

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<sup>22</sup> Defendant's Exhibit 3 at 2-3; Post-Hearing Brief at 9.

<sup>23</sup> Long Distance/USA, Inc. et al. v. Bell Telephone Company of Penn. 10 FCC Rcd No. 4 at 1637 (1995).

second number at some point before the call is completed.<sup>24</sup> (emphasis added)

Moreover, the FCC recently reaffirmed the application of this end-to-end test in a Memorandum Opinion and Order issued October 30, 1998.<sup>25</sup> In its Order, the FCC again stated that the end-to-end nature of the communications [is] more significant than the facilities used to complete such communications.<sup>26</sup>

In addition to the numerous FCC decisions, this Commission has applied the end-to-end analysis to a two-part call configuration. In Case No. 10002,<sup>27</sup> the Commission concluded that a call configuration similar to the one at issue in the present case constituted intrastate service. There, a call made in Kentucky was transported by an underlying IXC to the switch of International Telecharge Incorporated (ITI) in Atlanta, Georgia. After billing information was secured, an ITI facility placed an interstate call from Atlanta to the called number in Kentucky which was carried by a second IXC. According to the Commission's findings, [a] call on ITI's network actually consists of two calls bridged together at ITI's Atlanta point-of-presence.<sup>28</sup> The

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<sup>24</sup> Id. at 1638.

<sup>25</sup> GTE Telephone Operating Cos., Memorandum Opinion and Order, Case No. 98-292, adopted and released October 30, 1998.

<sup>26</sup> Id. at 11.

<sup>27</sup> Case No. 10002, Application of International Telecharge, Inc. For a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the State of Kentucky.

<sup>28</sup> Id. at 5-6.



Commission found that ITI was providing intrastate service in Kentucky and required ITI to refund amounts collected for calls which originated and terminated within Kentucky.<sup>29</sup>

Although Pilgrim attempts to distinguish its SafeCall service as a form of conferencing rather than switching, the Commission finds that the end-to-end principle is equally applicable to both a switched and a conferenced call configuration. Whether conferenced or switched, a call may pass through multiple facilities before reaching the intended call recipient. Thus, in accordance with the end-to-end analysis affirmed by the FCC and employed by the Commission in Case No. 10002, the Commission finds that the method by which the call is processed through Pilgrim's switch and then its voice processor is irrelevant. A call that both originates and terminates in Kentucky is an intrastate call subject to the jurisdiction of the Commission.

The Commission also rejects Pilgrim's contention that its jurisdiction must yield to the jurisdiction of the FCC even if it finds that a call made through SafeCall constitutes a single intrastate call. Pilgrim asserts that it is not feasible to segregate calls which originate and terminate in a single state from those which originate and terminate in two states.<sup>30</sup> According to Pilgrim, it would be administratively burdensome to determine the points of origination and termination for each call employing the SafeCall system.<sup>31</sup> Based upon this evidence, which was not contradicted, Pilgrim

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<sup>29</sup> Id. at 17-18.

<sup>30</sup> Post-Hearing Brief at 14-15.

<sup>31</sup> Post-Hearing Brief at 14-15.

contends that the Commission must conclude that it does not have jurisdiction over this matter.<sup>32</sup>

The Commission disagrees. The Commission is not required to make a specific finding because testimony has not been contradicted by the Complainant. Nor is it required to accept a particular conclusion of law. Instead, the Commission finds that it is not necessary for Pilgrim to actually separate, on an individual call basis, those calls that originate and terminate in a single state from those that originate and terminate in separate states. The Commission may reasonably conclude that a certain percentage of Pilgrim's SafeCall calls result in communications that both originate and terminate in Kentucky. Thus, pursuant to KRS 278.160 and Administrative Case No. 359, the Commission has authority to require Pilgrim to have an approved tariff on file with the Commission prior to providing intrastate service in Kentucky. Moreover, such a requirement does not violate the inseparability doctrine Pilgrim presented in support of FCC jurisdiction.<sup>33</sup> The Commission's regulation of intrastate service by Pilgrim will not thwart or impede the FCC's exercise of its lawful authority over interstate communications services, as required for application of the doctrine.<sup>34</sup>

The Commission also finds that the confidential portions of the record in this case do not qualify for confidential treatment under the exemptions set forth in KRS 61.870 et seq. The formal hearing testimony of Scott Yacino, afforded conditional confidentiality

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<sup>32</sup> Id. at 15.

<sup>33</sup> Post-Hearing Brief at 15.

<sup>34</sup> NARUC v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217 (9<sup>th</sup> Cir. 1990).

at the time of the hearing, was general in nature. Much of the information contained in the confidential record is recited in non-confidential portions of the record. The Commission, therefore, finds that Mr. Yacino did not disclose information of a proprietary nature which if disclosed would permit an unfair commercial advantage to Pilgrim's competitors.

IT IS THEREFORE ORDERED that:

1. Within 30 days from the date of this Order, Pilgrim shall file a schedule of rates and conditions of service pursuant to KRS 278.160 and Administrative Case No. 359.

2. Within 10 days from the date of this Order, Pilgrim shall refund any amounts collected for intrastate service provided to the Complainant.

3. Pilgrim shall provide the Commission with appropriate proof that a refund to the Complainant has been made.

4. The confidential portions of the record will be placed in the public record. In accordance with 807 KAR 5:001, Section 7(2)(4), Pilgrim shall have 20 days from the date of this Order in which to seek any remedy afforded by law.

Done at Frankfort, Kentucky, this 10<sup>th</sup> day of March, 1999.

By the Commission

ATTEST:

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Executive Director