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June 1, 2007

CERTIFICATE OF SERVICE

RE: Case No. 2005-00186

I, Beth O'Donnell, Executive Director of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the addressee by U.S. Mail on June 1, 2007.

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Executive Director

BOD/tw  
Enclosure

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INQUIRY INTO LIMITATIONS	)	
OF USE FOR TARIFFED SERVICES	)	ADMINISTRATIVE
DESIGNATED OR OTHERWISE	)	CASE NO. 2005-00186
REFERRED TO AS UNLIMITED	)	

O R D E R

The Commission, on June 22, 2005, initiated this proceeding pursuant to KRS 278.260 and KRS 278.280 in order to inquire into the practice whereby certain telecommunications providers in the Commonwealth label, describe, or market a filed service as "unlimited" when limitations on use exist. After substantial discovery, pleadings, and conferences, the Commission concludes that this subject matter is no longer within the purview of the Commission's jurisdiction. Accordingly, the Commission finds that this case is moot and should be dismissed.

BACKGROUND

The Commission initiated this action based on its concerns arising from four formal complaints.<sup>1</sup> In those cases, the Complainants purchased service under plans labeled or otherwise described as "unlimited," but the Complainants were nonetheless subjected to additional charges for excessive use under the "unlimited" plan. The

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<sup>1</sup> Case No. 2005-00006, Shirley Jackson v. Dialog Telecommunications, Inc.; Case No. 2005-00007, Joseph Randolph Woosley v. Momentum Telecom; Case No. 2005-00025, Billy Ray Hinkle v. Budget Phone, Inc.; Case No. 2005-00061, Mary D. Minton v. Momentum Telecom (Ky. PSC Apr. 28, 2005).

Complainants alleged that they believed their respective calling plans actually to be “unlimited” and sought the reversal of the charges incurred for exceeding the terms of the plans. The Commission, by Order entered on April 28, 2005, dismissed the complaints, finding that, as the Defendants were operating under properly filed tariffs, the Commission could not provide the requested retroactive relief.

The Commission, in the April 28, 2005 Order, listed several of its concerns regarding the fairness and reasonableness of the limitations on “unlimited” plans. The Commission’s concerns included customers’ awareness of the usage limitations, notification of violation of the limitations, and the reasonableness of the use of the term “unlimited” in promoting these plans. The Commission preliminarily concluded that the practice of offering a calling plan that is labeled, described, or marketed as “unlimited” when, in fact, limits exist on those plans, was deceptive and, therefore, unreasonable.

In the June 22, 2005 Order, the Commission set forth a procedural schedule and propounded data requests to the 436 telecommunications providers operating in the Commonwealth. The Attorney General requested and was granted intervention on June 23, 2005.

In the data requests, the Commission sought information regarding the availability of “unlimited” plans, the nature of any limitations on those plans, the manner in which customers were informed of the limitations, and, when the limitations were exceeded, the marketing of those plans and the history of any consumer complaints arising from “unlimited” plans.

Responses were due to the Commission by July 22, 2005. Any comments or requests for a hearing were to be filed by August 15, 2005. With few exceptions, those

utilities still doing business in Kentucky responded timely. The Attorney General moved the Commission to extend to September 15, 2005 the date by which comments could be filed or a hearing could be requested. The Commission granted the motion. On August 29, 2005, the Attorney General filed with the Commission a request that, in lieu of a hearing, an informal conference be scheduled. The Commission granted the request and scheduled an informal conference for December 6, 2005. At the informal conference, the Attorney General requested more time in which to request additional information from individual utilities.

On April 24, 2006, the Commission issued an Order in which it found that sufficient time (more than 4 months) had passed in order for the Attorney General to accumulate additional information. The Commission allowed an additional 30 days to complete discovery and 15 days after that date to request a hearing.

On June 2, 2006, the Attorney General filed a motion requesting that the Commission schedule a hearing, but with a date to be determined by further Order. The stated purpose of the request was for potential settlement of possible consumer protection claims by the Attorney General with individual utilities. The Commission granted the Attorney General's motion for a hearing but also scheduled the hearing for December 19, 2006.

On December 11, 2006, the Attorney General filed with the Commission a motion to cancel the hearing scheduled for December 19, 2006 and to allow time for all interested parties to file written comments. The Attorney General attached to his motion his written comments. As grounds for his motion, the Attorney General stated, "It now appears that taking evidence would only introduce redundant information into the

record, thus making the hearing superfluous and indeed unnecessary.”<sup>2</sup> In lieu of the hearing, the Attorney General “believes that allowing parties to tender final written comments would be in the best interests of the Commission and all parties of record.”<sup>3</sup>

The Commission granted the motion, finding that sufficient information was in the record for the case to be submitted for a decision. The Commission further ordered that any party could file comments to the case within 30 days, with responses due 10 days thereafter.

### DISCUSSION

The Commission initiated this action after concluding that “the practice of offering a calling plan that is labeled, described, or marketed as ‘unlimited,’ when, in fact, limits exist on those plans, is potentially deceptive and, therefore, unreasonable.”<sup>4</sup> The purpose of the action was to review the various “unlimited” plans provided in the state, assess the limits, if any, on them, and issue rules regarding the use and availability of such plans. Numerous utilities, during the course of this proceeding, amended their tariffs to either remove “unlimited” offerings or to remove the usage limitations.

However, the Commission’s jurisdiction over telecommunications service providers was limited upon the effective date, July 12, 2006, of legislation enacted by the General Assembly and codified as KRS 278.541, KRS 278.542, KRS 278.543, and KRS 278.544. These statutes reduced the regulatory oversight of the

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<sup>2</sup> AG’s Motion to Cancel Hearing and For Leave to Tender Written Comments in Lieu of a Hearing at 2.

<sup>3</sup> Id.

<sup>4</sup> June 22, 2005 Order at 2.

telecommunications industry in Kentucky, except for "basic service" and other, very limited, circumstances. KRS 278.541(1) defines basic service as:

[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. Emergency 911 telephone 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 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.

As defined by KRS 278.541(5), "nonbasic service" is:

[A]ll retail telecommunications services provided to a residential or business customer, all arrangements with respect to those services, and all packages of products or service; . . .

In KRS 278.544(4), the Kentucky Legislature exempted nonbasic services offered in Kentucky from numerous statutes that the Commission historically used to ensure that utilities offer adequate, reasonable and sufficient service in Kentucky. KRS 278.544(4) states:

Notwithstanding any provision of the 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 78.541 to KRS 278.544. (emphasis added.)

The services at issue here constitute a package of products or services which are “nonbasic” services, not “basic” services, under the provisions of KRS 278.541(5). The Commission, therefore, lacks the jurisdiction to order telecommunications utilities that offer “unlimited service” to refrain from imposing limitations on that service.

Even if the Commission retained the authority under KRS 278.260 and KRS 278.280 to issue an Order affecting “unlimited” service, KRS 278.544(1) provides an additional hurdle to such enforcement. KRS 278.544(1) provides:

Telephone utilities **may** file with the commission schedules or tariffs reflecting the rates, terms, and conditions for nonbasic services that are generally available to all subscribers qualifying for the rates, terms, and conditions. The rates, terms, and conditions for basic and nonbasic service shall be valid upon the effective date stated in the schedule. Tariffs for nonbasic services in effect on July 12, 2006, shall continue to be effective as binding rates, terms, and conditions until withdrawn or modified by the utility.

Traditionally, under KRS 278.160, all utilities are required to keep on file a tariff that contains the terms, rates, and conditions of service. For nonbasic service, KRS 278.544(1) clearly now makes that filing requirement voluntary, rather than compulsory. Moreover, if a telephone utility chooses to file a tariff, it becomes effective upon the effective date and is exempt from Commission review pursuant to the exemptions found in KRS 278.544(4).

The Commission’s reservation of power over telephone utilities is found in KRS 278.541. There, although numerous reservations of Commission jurisdiction are listed, none leave the Commission with the statutory authority to set requirements on

"unlimited" service.<sup>5</sup> The Commission is a "creature of statute and has only such powers as granted by the General Assembly."<sup>6</sup> Of course, the Commission retains the authority to enforce the telephone utilities' observance of the terms and conditions contained in any tariff they have on file with the Commission.

### CONCLUSION

As discussed herein, the Commission now lacks the necessary jurisdiction to issue an Order regarding the offering of "unlimited" services that are, in fact, limited. Lacking the jurisdiction to issue any effective Order, we now find that this case is moot and should be dismissed without prejudice.

IT IS THEREFORE ORDERED that:

1. This case is dismissed.
2. This is a final and appealable Order.

Done at Frankfort, Kentucky, this June 1, 2007.

By the Commission

ATTEST:



Executive Director

<sup>5</sup> It is possible, however, that the Commission, pursuant to KRS 278.542(h), may entertain complaints on an individual basis to determine if the service provided constitutes "cramming" and/or violates 47 C.F.R. § 64.2401, the Federal Communications Commission's Truth-in-Billing requirements. The issue, however, is not before us today, and we will reach no final conclusion of this matter.

<sup>6</sup> PSC v. Jackson County Rural Elec. Coop., Inc., 50 S.W.3d 764, 767 (Ky. App. 2000).