

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Timothy McGibbons against AT&T Communications of the Southern States, LLC d/b/a Lucky Dog Phone Co. d/b/a ACC Business Service d/b/a Unispeaksm Service d/b/a www.prepaidserviceguide.com d/b/a CONQUEST for alleged improper billing of international toll charges incurred via Internet use.

DOCKET NO. 021056-TI
ORDER NO. PSC-03-0037-FOF-TI
ISSUED: January 6, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

FINAL ORDER DISMISSING COMPLAINT OF TIMOTHY MCGIBBONS

BY THE COMMISSION:

BACKGROUND

On March 15, 2001, the Division of Consumer Affairs (CAF) received a complaint from attorney, Michael B. Twomey, on behalf of Timothy McGibbons. Mr. Twomey alleged in his complaint that AT&T Communications of the Southern States (AT&T) improperly billed calls made by his client's son using the Internet. At issue are Internet calls made from Mr. McGibbons' home using a dedicated computer line owned by his employer, the Florida Lottery. The Florida Lottery is the official holder of the AT&T service and account in question. We note that the Florida Lottery has not filed a complaint with us regarding this matter.

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FPSC-COMMISSION CLERK

In the complaint, Mr. Twomey states that his client, Mr. McGibbons, is the real "party in interest" because the Florida Lottery will require Mr. McGibbons to reimburse the Lottery for the cost of the Internet calls. Mr. Twomey claims that AT&T improperly billed in excess of \$3,700 in international toll charges for calls allegedly made to Madagascar at a billing rate of \$3.99 per minute. Mr. Twomey asserts that when Mr. McGibbons' minor child was using the Internet to visit a website, the child was deceived into making a selection on his computer screen, which unbeknownst to him caused the computer to disconnect from the local Internet Service Provider. Once disconnected, the computer then dialed an international number whose per minute charges are among the highest in the world. Mr. Twomey asserts that at no time did the Florida Lottery, any employee at the Florida Lottery, or the minor child know that the local Internet service was disconnected and that an international call had been placed in this "Cyber Dialer Attacks." Mr. Twomey asks that the calls be forgiven because he believes they were placed as a result of deceitful practices. In addition, Mr. Twomey in his initial complaint requests that the Florida Lottery place a block on the computer line to preclude any future international calls.

On March 29, 2001, AT&T sent its report to our CAF staff. In its report, AT&T confirmed that the Florida Lottery was the customer of record and as such, AT&T could not provide specifics of its investigation to Mr. McGibbons. AT&T also asserted that it was sustaining the charges since the charged service was rendered in good faith. Further, AT&T asserted that asking the company to absorb the costs would be unfair since it had already paid the website owner and thus would lose money. However, AT&T stated that it offered to waive half of the cost, but Mr. McGibbons declined the offer.

On June 5, 2001, our CAF staff requested that AT&T provide a one-time waiver of the charges as it had done in two similar cases. Therein our staff noted that in similar complaints, AT&T treated these types of calls as 900 calls and issued credits for the first bill.

In its July 23, 2001, supplemental response, AT&T indicated that it spoke with the customer and all charges were sustained. On July 24, 2001, Mr. Twomey sent a letter requesting that this

Commission order AT&T to desist any efforts to collect the disputed tolls pending resolution of the complaint.

On July 26, 2001, CAF referred the complaint to the Office of the General Counsel for its review. On August 15, 2001, our legal staff with the assistance of our staff from the Division of Competitive Markets and Enforcement sent a data request to AT&T. On August 30, 2001, AT&T responded by letter that it did not believe that this Commission has jurisdiction over this matter because it involves international calls, and Mr. Gibbons is not the customer of record. AT&T stated that for those reasons it believes that the complaint should be dismissed. AT&T then stated that it respectfully declined to respond to our staff's data request in light of its request to dismiss the complaint.

Our legal staff sent another letter on September 12, 2001, requesting that AT&T respond to our staff's data request. In the letter, our staff indicated that it was unclear at that point whether there was some component of the complaint that was within our jurisdiction. Therefore, our staff stated that there was insufficient information to determine that we had no jurisdiction in the matter.

In its September 24, 2001, letter, AT&T responded that it believes there is sufficient information to conclusively determine that this Commission lacks jurisdiction since the complaint only involves international, direct-dialed calls to Madagascar. AT&T also asserted that the Federal Communications Commission (FCC) has exclusive jurisdiction over international calls. Further, AT&T reiterated that Mr. McGibbons is not the customer of record and that the Florida Lottery did not file a complaint. AT&T concluded in its letter that for all these reasons the complaint should be dismissed.

On May 20, 2002, our staff legal counsel sent a letter to Mr. Twomey advising him that since the account holder of record did not file a complaint and the complaint involves allegedly improperly billed international calls, our staff proposed closing the complaint. In the letter, Mr. Twomey was also advised that he could request an informal conference if he disagreed with the resolution.

On June 19, 2002, our staff legal counsel received a letter from Mr. Twomey requesting an informal conference. On July 1, 2002, our CAF staff sent Mr. Twomey a letter with an enclosed copy of Form X required by Rule 25-22.032(8), Florida Administrative Code, to request an informal conference. On July 17, 2002, Mr. Twomey requested an informal conference and subsequently Form X was completed.

An informal conference was scheduled and subsequently held on August 29, 2002. At the informal conference, Mr. Twomey reiterated his position that AT&T was billing for an adult website which was improperly provided to a minor. Mr. Twomey again requested that AT&T credit the account for the service he asserts was improperly provided to a minor. AT&T restated its position that the complaint does not fall within this Commission's jurisdiction. Further, AT&T declined to credit the account. The informal conference was concluded without a settlement.

This Order addresses whether the complaint should be dismissed.

DECISION

As noted in the complaint, Mr. McGibbons is not the official holder of the AT&T service or account number in question. However, Mr. McGibbons alleged that he was the "real party in interest" because the Florida Lottery would force him to reimburse the Florida Lottery for any monies it pays to AT&T for these calls. We disagree.

We find that the Florida Lottery, as the account holder in this matter, has standing to lodge a complaint against AT&T for improper billing. However, the Florida Lottery has not filed a complaint against AT&T regarding this matter. Pursuant to Rule 25-22.032, Florida Administrative Code, any customer of a regulated utility may file a complaint whenever he has an unresolved dispute with the utility regarding his telephone service. However, the rule does not permit a person who is not the customer of the utility to file a complaint regarding another person's account, unless the customer of the utility provides a written authorization that the third party is authorized to act on behalf of the utility's customer of record. It is our understanding that the

Florida Lottery has not provided Mr. McGibbons any such authorization to act on its behalf regarding this account.

Thus, we find that Mr. McGibbons does not have standing to file this complaint since he is not the account holder and was not filing the complaint on behalf of the Florida Lottery but rather himself personally. Whether or not Mr. McGibbons is held liable for non-business calls made on the Florida Lottery's account is an internal matter between the Florida Lottery and Mr. McGibbons over which we have no jurisdiction.

Further, after investigating the matter, we have been unable to determine that the complaint involves any intrastate charges, but rather only international charges incurred by use of the Internet. In our opinion, the Federal Communications Commission is the appropriate agency to address any complaints regarding alleged improperly billed international calls.

Accessing information on the Internet using dial-up modems can expose the user to "Cyber Dialer Attacks." When a person selects an option on a webpage to view certain materials, it is possible that the website will download a program to the user's modem which directs the modem to disconnect from the user's Internet Service Provider and redial using an international number. This results in the user, without their knowledge, being exposed to high usage charges. These charges will appear on the user's telephone bill as 1+ dialed international calls. While we find these types of "Cyber Dialer Attacks" are unfortunate and distasteful situations, we have to follow the law as we find it. While we are sure to act on matters within our jurisdiction even when that jurisdiction may be disputed, we cannot act when a matter is clearly not within our jurisdiction as is the case herein.

Since the account holder of record has not filed a complaint and the complaint involves billing of international calls, Complaint No. 368480T, Complaint of Timothy McGibbons against AT&T for alleged improper billing of international toll charges incurred for Internet use shall be dismissed for lack of standing by the complainant and lack of subject matter jurisdiction.

Based on the foregoing, it is

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ORDERED by the Florida Public Service Commission that Complaint No. 368480T, Complaint of Timothy McGibbons against AT&T for alleged improper billing of international toll charges incurred for Internet use is hereby dismissed for lack of standing by the complainant and lack of subject matter jurisdiction. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of January, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.