

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation and determination of appropriate method for refunding interest and overcharges on intrastate 0+ calls made from pay telephones and in a call aggregator context by AT&T Communications of the Southern States, Inc. d/b/a Connect 'N Save and d/b/a Lucky Dog Phone Co. and d/b/a ACC Business.

DOCKET NO. 992037-TI
ORDER NO. PSC-01-1141-PAA-TI
ISSUED: May 21, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

NOTICE OF PROPOSED AGENCY ACTION
ORDER DECLINING TO REQUIRE REFUNDS

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On September 20, 1996, the Federal Communications Commission (FCC) released a Report and Order (FCC 96-388) detailing the implementation of the pay telephone reclassification and compensation provisions of the Telecommunications Act of 1996. The FCC's per-call compensation rule, 47 CFR §64.1300, became effective

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October 7, 1997. In response, on November 1, 1997, AT&T Communications of the Southern States, Inc. (AT&T) updated its General Services Tariff to include a \$.30 payphone surcharge.

In the meantime, we amended Rule 25-24.630, Florida Administrative Code, on February 1, 1999, to cap rates for intrastate 0+ and 0- calls made from pay telephones or in a call aggregator context to \$.30 per minute plus \$3.25 for a person-to-person call and \$1.75 for a non person-to-person call. We have jurisdiction over operator service surcharges pursuant to Section 364.3376, Florida Statutes.

Since we amended Rule 25-24.630, Florida Administrative Code, AT&T updated its Custom Network Services Tariff to include a payphone surcharge of \$.28 on February 1, 1999. In addition, AT&T implemented a non-subscriber surcharge of \$2.50 on February 26, 1999, that was applied to calls made from payphones that terminated to an end user who was not presubscribed to AT&T. AT&T updated its Custom Network Services Tariff on August 1, 1999, to reduce the payphone surcharge to \$.26.

On August 19, 1999, our staff informed AT&T that a review of AT&T's tariffs indicated that AT&T may have overcharged end users for intrastate 0+ or 0- calls since February 1, 1999, when we implemented the rate cap. Commission staff requested AT&T to look into the situation. This docket was opened on December 30, 1999, to investigate and determine the appropriate method for refunding any apparent overcharges. AT&T responded that there were two surcharges that may be charged in connection with certain operator-handled calls--a non-subscriber surcharge and a payphone surcharge. Another docket, Docket No. 010364-TI was opened to resolve any issues surrounding the \$2.50 non-subscriber surcharge, which AT&T ultimately agreed to remove from its tariff. However, concerning the payphone surcharge, which is at issue in this docket, AT&T argued that it should be allowed to keep the payphone surcharge over and above the existing operator service rate caps established in Rule 25-24.630, Florida Administrative Code.

AT&T filed a petition with the FCC on February 5, 2001, requesting the FCC to issue a declaratory ruling that states may

not foreclose carriers from establishing cost recovery mechanisms to recoup from payphone users the costs of operating payphones and forbidding state commissions from limiting or otherwise regulating AT&T's right to establish a payphone surcharge for any category of calls placed from a payphone. We sent comments to the FCC addressing AT&T's petition on March 22, 2001, in which we urged the FCC to hold AT&T's petition in abeyance to allow us time to address the payphone surcharge issue.

The Florida Legislature required us to establish maximum rates and charges for operator services. Section 364.3376(3), Florida Statutes. We did so in Rule 25-24.630(1), Florida Administrative Code, which provides:

Services charged and billed to any end user by an operator services provider for an intrastate 0+ or 0-call made from a pay telephone or in a call aggregator context shall not exceed a rate of \$.30 per minute plus the applicable charges for the following types of telephone calls:

- (a) A person-to-person call -- a charge of \$3.25;
- (b) A call that is not a person-to-person call -- a charge of \$1.75.

Operator services are defined in Section 364.02(9), Florida Statutes, which states:

"Operator service" includes, but is not limited to, billing or completion of third-party, person-to-person, collect, or calling card or credit card calls through the use of a live operator or automated equipment. -

AT&T admits that it is a provider of operator services and subject to the requirements of our rules governing operator service providers, including Rule 25-24.630, Florida Administrative Code.

When Commission staff compared AT&T's tariff for operator service rates and charges to the rate caps established in Rule 25-

24.630, Florida Administrative Code, it appeared that AT&T's tariffed rates exceeded the rate cap because AT&T adds a payphone surcharge to intrastate 0+ calls made from a payphone. AT&T admits that it charges a payphone surcharge in excess of the rate cap listed in Rule 25-24.630(1), Florida Administrative Code. However, AT&T maintains that our rate cap was not intended to cover the payphone surcharge. AT&T argues that it has lawfully collected a payphone surcharge of \$.28 from February 1 to July 31, 1999, and of \$.26 since August 1, 1999, under its Custom Network Service Tariff. In addition, AT&T has had a payphone surcharge of \$.30 in effect under its General Services Tariff since November 1997. From February 1, 1999 through March 31, 2000, AT&T estimates it has collected \$760,000 from these payphone surcharges.

AT&T also argues that we are preempted by the FCC from prohibiting payphone surcharges. AT&T contends that we do not have jurisdiction over payphone charges and thus do not have jurisdiction over the payphone surcharge currently collected by the company. AT&T argues that our rate cap applies only to operator service charges, and thus it should be allowed to collect the payphone surcharge over and above the current rate cap. Our staff responds that the payphone surcharge is the fee that AT&T pays the payphone owner when AT&T acts as the operator service provider. According to staff, simply designating a charge as a payphone surcharge does not preempt our jurisdiction.

In addition, AT&T argues that when we last amended Rule 25-24.630, Florida Administrative Code, at no time during the rulemaking proceeding did AT&T understand that the operator service provider rate cap was intended to limit charges approved by another jurisdiction. AT&T believes that Rule 25-24.630 applies only to operator service provider surcharges and not payphone surcharges. Our staff disagrees. They contend that the plain language of Rule 25-24.630 prohibits AT&T from collecting the pay phone surcharge.

We find that based on Rule 25-24.630's rulemaking record, there is ambiguity concerning the question whether our intent was to prohibit an operator service provider from collecting other surcharges above the maximum operator service surcharges set out in the rule. Accordingly, we decline to require AT&T to refund the

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monies collected from its payphone surcharge. Instead, we direct our staff to initiate rulemaking to look into whether Rule 25-24.630, Florida Administrative Code, should specifically prohibit operator service providers from charging any other types of surcharges over and above the operator service provider surcharges established in the rule.

In addition, we find that we clearly have jurisdiction over operator service provider charges. Since we are not requiring AT&T to refund the payphone surcharges already collected, we need not address any federal preemption concerns raised by the company.

Finally, we find that this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T Communications of the Southern States, Inc. shall not be required to refund payphone surcharges in excess of the rate cap, at this time. It is further

ORDERED that the Commission staff shall initiate rulemaking to look into whether Rule 25-24.630, Florida Administrative Code, should specifically prohibit operator service providers from charging any other types of surcharges over and above the operator service provider surcharges established in the rule. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

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By ORDER of the Florida Public Service Commission this 21st
day of May, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JKF/MAH

Chairman Jacobs dissented from the Commission's decision.

Commissioner Jaber dissented from the Commission's decision with
the following opinion:

The plain language of Rule 25-24.630(1), Florida
Administrative Code, provides:

Services charged and billed to any end user by an
operator services provider for an intrastate 0+ or 0-
call made from a pay telephone or in a call aggregator
context shall not exceed a rate of \$.30 per minute plus
the applicable charges for the following types of
telephone calls:

- (a) A person-to-person call -- a charge of \$3.25;
- (b) A call that is not a person-to-person call -- a
charge of \$1.75.

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(Emphasis added) In my opinion, there is no ambiguity that Rule 25-24.630, on its face, requires operator service providers to charge end users no more than the cap established by our rule.

AT&T is an operator service provider subject to the rate cap established by our rule. The payphone surcharge as described by AT&T, in my opinion, is being applied to an operator service. As such, I believe AT&T should be required to stop collecting the payphone surcharge and to refund the payphone surcharges collected since we implemented the operator service provider surcharge rate cap.

For these reasons, I dissent.

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 that is available under Section 120.57, 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 will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on June 11, 2001.

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In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.