

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of a Formal Complaint of
Pignatelli & O'Brien, LLC, against Integra
Telecom of Utah, Inc.

Docket Number 13-057-06

**RESPONSE OF INTEGRA
TELECOM OF UTAH, INC. TO
FORMAL COMPLAINT OF
PIGNATELLI AND O'BRIEN, LLC**

I. INTRODUCTION AND SUMMARY

Integra Telecom of Utah, Inc. ("Integra") respectfully submits to the Utah Public Service Commission this Response to the Formal Complaint filed by Integra customer Pignatelli & O'Brien, LLC.

Pignatelli & O'Brien, LLC ("P&O") asks the Public Service Commission (the "Commission") to invalidate certain Integra charges for carrying international calls originating from P&O's server. Although a third party illegally "hacked" into P&O's network hardware and placed the calls, P&O seeks redress for this criminal activity from Integra, who has no control over or access to its customer's internal network hardware and furthermore faces its own substantial underlying costs for the illegal calls. Not satisfied with Integra's credit for half the charges, P&O asks the Commission to find that it is not responsible for any payment to Integra for the fraudulent calls.

The Commission should dismiss the complaint for two reasons. First, P&O has improperly filed its complaint before the Commission, which does not assert jurisdiction over international calls. Second, P&O's complaint fails on the merits. P&O has cited no statute, rule, or tariff with which Integra has failed to comply. When P&O brought an informal complaint before the Department of Public Utilities (the "DPU"), the DPU investigated the matter and found that Integra's charges were proper. At the conclusion of their investigation in DPU Index Number 5013, the DPU stated in relevant part that:

...based on [its] review of the company's response, the company tariff, Master Service Agreement, and the UT Public Service Commission (PSC) Rules and Regulations, the company (Integra) is not in violation. Your informal Complaint with the Division of Public Utilities (DPU) is now closed. ¹

The Commission should come to the same conclusion. For the reasons that will be detailed in this Response, the Commission should dismiss P&O's formal complaint. To the extent that the

¹ Exhibit 1, August 23, 2013, e-mail from Marialie Martinez of the DPU to Melissa O'Brien of P&O, forwarded in an e-mail from Miss O'Brien to Catherine Murray, Integra Manager of Regulatory Affairs.

Commission chooses to examine the merits of the complaint, the Commission should find that P&O must pay Integra's service charges pursuant to contract and tariff.

II. P&O'S COMPLAINT REGARDING SERVICE CHARGES FOR INTERNATIONAL CALLS DOES NOT BELONG BEFORE THE COMMISSION.

There is no dispute that the criminals who took over P&O's private branch exchange ("PBX") hardware used the access to place only international calls. Integra's bill for carrying these international calls is the subject of P&O's complaint.

International calling is under the jurisdiction of the Federal Communications Commission ("FCC"). The U.S. Code, 47 U.S. C. § 151, states in relevant part that the FCC is created: "for the purpose of regulating interstate and foreign commerce in communication by wire and radio....." Section 152 of the same U.S. Code section states in part: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States..."

The Utah legislature has specifically directed the Public Service Commission's authority to intrastate services. Section 54-4-1 of the Utah Code states in full:

Section 54-4-1. General jurisdiction.

The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

On their website, the Utah Division of Public Utilities describes the authority of the Commission over telecommunications services as follows:

The Utah Public Service Commission has regulatory jurisdiction over public utilities providing service within the State of Utah. Their regulatory authority covers the following:

Telecommunications corporations providing INTRASTATE (calls originating and terminating within Utah) long distance services to consumers. However, the Utah Public

Service Commission does not regulate INTERSTATE & INTERNATIONAL long distance calls.²

Clearly, this complaint has been improperly brought before the Commission. The Commission should therefore dismiss the complaint.

III. SHOULD THE COMMISSION CHOOSE TO ADDRESS THE COMPLAINT, THE COMMISSION SHOULD FIND THE CUSTOMER FULLY LIABLE FOR THE BILLED CHARGES.

A. The Customer Entered Freely into a Clear Contract.

On December 5, 2008, Complainant P&O, a law firm, signed a 36-month contract with Integra. In doing so, the customer chose among multiple carriers providing service in Utah.³ Integra's service contract states, among other things, that, "Customer acknowledges that Customer has received, read and understands this Agreement and the Master Services Agreement, and agrees to be bound by all of the terms and conditions of the foregoing documents and policies."⁴

Section 4 of the Master Services Agreement (MSA) states in relevant part:

FRAUD, TELEPHONE NUMBERS AND DIRECTORY LISTINGS

Customer is responsible for payment of any charges incurred due to fraud, abuse, or misuse of the Services, whether known or unknown, to Customer. It is the Customer's obligation to take all measures to ensure against such occurrences.⁵

B. The Terms of Integra's Master Services Agreement Are Supported by Integra's Tariffs.

Integra's state tariff governing its service, filed pursuant to Utah Commission rule, and federal price lists posted in accordance with FCC rules, establish the customer's responsibility for charges incurred through third party abuse of the Customer's equipment. Under the sections entitled Liability of the Customer, the tariff and price list contain essentially identical language stating that the customer is responsible for calling charges even if an unauthorized third party placed the call.

Integra's state tariff, Integra Telecom of Utah, Inc. Regulations and Schedules, Utah Price List No. 3, Section 2.7.2 (B)(1), states in full:

² www.publicutilities.utah.gov/utillist.html. Emphasis in original.

³ A list on the Department of Public Utilities' website shows that Integra is one of over 100 competitive local exchange carriers serving Utah, contradicting P&O's assertion at p. 6 of the Complaint that it entered into a contract with Integra because "P&O had no bargaining power." www.publicutilities.utah.gov/utillist-telecom.html.

⁴ Exhibit 2, Integra Voice & Services agreement.

⁵ Exhibit 3, Integra Master Services Agreement.

B. Liability for Unauthorized Use

1. Except as provided for elsewhere in this Price List, the Customer is responsible for payment of all charges for Services provided under this Price List. This responsibility is not changed due to any use, misuse, or abuse of the Customer's service or Customer-provided equipment by Users or other third parties, the Customer's employees, or the public.⁶

Integra's federal price list, Integra Telecom Holdings, Inc. Terms, Conditions, Rates and Fees for Service, Domestic Interstate and International Telecommunications Services, Section 2.6.2 (B)(1) states in full:

B. Liability for Unauthorized Use

1. Except as provided for elsewhere in this Schedule, the Customer is responsible for payment of all charges for Services provided under this Schedule. This responsibility is not changed due to any use, misuse, or abuse of the Customer's service or Customer-provided equipment by Users or other third parties, the Customer's employees, or the public.⁷

Once a telecommunications carrier's tariff is approved by an appropriate federal or state agency, the terms of the tariff are considered to have the force and effect of law. *AT&T Corp. v. Beehive Tel. Co.*, 2010 U.S. Dist. LEXIS 5804 (D. Utah Jan. 26, 2010) at 25. Telecommunications customers are presumed to know the terms of the tariffs governing their service. *AT&T Corp. v. Fleming & Berkley*, 1997 U.S. App. LEXIS 33674 (9th Cir. Cal. Nov. 25, 1997) at 5.

Integra's tariff provisions regarding toll fraud charges fit well within with the standard of other Utah telecommunications carriers, including major carriers Qwest/CenturyLink and AT&T.⁸

Integra's MSA and tariff provisions regarding toll fraud, as well as those of other telecommunications carriers, place responsibility for the payment of toll fraud charges on the customer. This policy is both fair and reasonable, for reasons that will be discussed in Section F below.

C. Third Party Criminal Activity Resulted in the Charges under Dispute.

Shortly before 5:00 AM, on June 15, 2013, an unknown party "hacked" into the hardware server on P&O's premises and originated an unauthorized call from the server to an international

⁶ Exhibit 4, relevant section of Integra's state tariff, Regulations and Schedules of Intrastate Interexchange and Competitive Local Exchange Telephone Services Applying to End-User Communications Services within the State of Utah Provided by Integra Telecom of Utah Inc.

⁷ Exhibit 5, relevant Sections of Integra Telecom Holdings, Inc. Terms, Conditions, Rates and Fees for Service, Domestic Interstate and International Telecommunications Services.

⁸ Exhibit 6, relevant Sections of tariffs of Qwest/CenturyLink and SBC d/b/a AT&T.

destination. Once able to do so, the party placed further unauthorized international calls. This illegal activity is known as “toll fraud.”⁹

Integra’s switch tracks all calls for billing and passes this information to a separate system that monitors potential illegal activity. Because innumerable calls are legitimately placed by customers to overseas destinations, and a telephone company cannot properly block a customer’s calls without determining that the calls are something other than legitimate, the switch’s anti-fraud function is only triggered when a sufficient volume of calls shows a pattern of abuse. Integra’s fraud alert system is robust, and well within the performance standard of the telecommunications industry.¹⁰

In this case, the triggering volume occurred at just after 8:00 AM, whereupon the system sent a “fraud alert.” A trouble ticket was issued at 8:20 AM. After the completion of certain manual processes, rendered more complicated than usual by the multiple Business Telephone Numbers and the volume of customer circuits involved, all relevant international calls were blocked by 10:25 AM. A few illegitimate calls continued to come through the switch after Integra put its block on, probably because the calls had not been terminated until then and would therefore not have been tracked by the switch.¹¹

D. Integra Acted Promptly and Appropriately To Mitigate the Damage from the Illegal Activity.

Upon receiving its system alert regarding possible toll fraud activity, Integra acted promptly and appropriately to block further calls. From its position as network provider, Integra acted as quickly as possible to address the problem associated with illegal activity directed against the customer’s server. Integra had discovered and blocked the customer’s outgoing fraudulent calls twenty minutes before Level 3, the underlying carrier, issued its first toll fraud “carrier alert” at 10:45 AM. Integra’s prompt actions likely saved significant further damage from the criminal activity.¹²

E. After Issuing a Bill for the Charges, Integra Voluntarily Applied a Large Credit.

On July 11, 2013, Integra sent a bill to P&O for \$28,815.79, which included \$22,231.98 in toll fraud charges and \$6,377.34 in associated charges and fees. Thereafter, Integra voluntarily issued a credit to P&O for approximately 50% of the toll fraud charges and associated charges

⁹ Exhibit 7, Affidavit of Mitch Nodland, Integra, at Paragraph 4.

¹⁰ Id. at Paragraph 5.

¹¹ Id. at Paragraph 6.

¹² Id. at Paragraph 7.

and fees, or \$14,211.00. After the application of all credits, P&O's remaining liability to Integra is therefore \$ 14,604.79.¹³

Integra has significant costs from the service provided by its own underlying carriers in this incident.

P&O has paid nothing on the bill but its monthly service charge of \$184.35.¹⁴

F. Logic and Case Law Support the Customer's Responsibility for Charges Stemming from Toll Fraud.

Integra's governing MSA, its filed tariffs, and those of similarly situated telecommunications carriers establish that customers will be responsible for payment of toll fraud charges. Logic supports this position. Integra is responsible for carrying the communications service to and from the customer premises. The customer is responsible for installing and maintaining hardware that will interface with the communications service and ensure that calls are legitimate. Unless Integra is the customer's hardware vendor--which is not the case with P&O--the vendor, not Integra, is able to install, set, inspect, and monitor the customer's PBX. Among many things the vendor or telecommunications consultant can do to protect the customer's system are: run periodic security audits to check for loopholes in the PBX; tailor access to the PBX to conform to business needs; delete/change all default passwords; frequently change default codes/passwords on voice mailboxes; and program the PBX to terminate access after the third invalid attempt. As the service provider, Integra has no access to the customer's PBX and can do none of these things.¹⁵

Case law supports placing the responsibility for toll charges on the customer. In *AT&T Corp. v. Fleming & Berkley*, the Ninth Circuit addressed a situation in which a law firm customer of AT&T refused to pay AT&T's charges for international calls generated by the customer's criminally "hacked" server. As in the P&O situation, AT&T did not manufacture, sell, or lease the PBX to the customer. *AT&T* at p. 3. The Court noted that AT&T's federal tariff, like Integra's, placed responsibility for fraudulent call charges on the customer. *Id.* at p. 7. The Court noted further that, even if the tariff were not considered, fairness would call for the same conclusion. As the Court stated, "AT&T did not, and could not, control access to appellants' phone system." *Id.* at p. 15. "Appellants could have prevented the alleged fraud in the first instance by not utilizing an off-premises answering service, or by using a system with effective security features." *Id.* at p. 16. The Court allowed summary judgment for AT&T in its suit to collect the charges.

¹³ Exhibit 8, Affidavit of Mark R. Wohlers, Integra, at Paragraph 4.

¹⁴ *Id.* at Paragraph 5.

¹⁵ Exhibit 7 (Nodland Affidavit) at Paragraph 8.

IV. CONCLUSION

For the reasons stated in this Response, Integra requests that the Commission dismiss P&O's complaint, or, to the extent the Commission examines the merits of the Complaint, find that P&O must pay the charges duly owing to Integra for services rendered.

Dated: October ____, 2013.

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