

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

DOCKET NO. 13-2299-01
ORDER DISMISSING COMPLAINT

ISSUED: November 12, 2013

SYNOPSIS

The Commission dismisses the Pignatelli & O'Brien, LLC complaint against Integra Telecom of Utah for failure to state a claim upon which relief can be granted, and for lack of jurisdiction.

By The Commission:

ORDER OF DISMISSAL

I. BACKGROUND

1. On September 5, 2013, Pignatelli & O'Brien, LLC ("P&O") filed a formal complaint in this docket against Integra Telecom of Utah ("Integra"), requesting the Commission relieve P&O of paying a bill of approximately \$29,000, as the result of a breach of P&O's voicemail service by an unknown third party who accessed P&O's lines to make international calls.¹ P&O also claims 1) Integra's tariffs do not provide adequate notice to its customers; 2) Integra's master service agreement is overly broad and, therefore, unenforceable; and 3) Integra's tariff should be reopened to ensure notice and opportunity to be heard for all parties.

¹ See Formal Complaint of Pignatelli & O'Brien, LLC, filed September 5, 2013.

2. On October 3, 2013, in response to a Commission action request, the Division of Public Utilities (“Division”) filed a memorandum recommending the Commission dismiss the complaint.² The Division provides the following review and recommendation:

Integra’s approved tariff clearly states, “The company shall not be liable for any damages, including usage charges, that the Customer may incur as a result of the unauthorized use of its communications equipment. The unauthorized use of the Customer’s communications equipment includes, but is not limited to, the placement of calls from the Customer’s premises and the placement of calls through Customer-controlled or Customer-provisioned equipment that are transmitted or carried over the Company’s network services without the authorization of the Customer. The Customer shall be fully liable for all such charges.”

Integra’s Master Service Agreement also clearly defines that the “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.”

P&O has not shown that Integra violated any Commission Administrative Rules, Utah Law, court ruling, Commission ruling or the Integra Tariff. The Division therefore recommends that the complaint against Integra be dismissed.³

3. On October 7, 2013, Integra filed a response requesting the Commission dismiss P&O’s complaint for the same reasons the Division cites in its memo.⁴ Integra also claims P&O improperly filed its complaint with the Commission, which does not have jurisdiction over international calls.⁵

² See Division Memorandum, filed October 3, 2013.

³ Id., at 2-3.

⁴ See Response of Integra Telecom of Utah, Inc. to Formal Complaint of Pignatelli and O’Brien, LLC, filed October 7, 2013. While not captioned as such, we read Integra’s filing as a motion to dismiss.

⁵ See id. at 2.

4. Attached to Integra's October 7, 2013, filing are affidavits of Mitch Nodland, Manager of Network Repair for Integra, and Mark R. Wohlers, Manager of Client Services for Integra.⁶ On October 8, 2013, Integra filed an amended affidavit of Mitch Nodland.⁷

5. Affiant Nodland states, in part: "Integra is responsible for carrying the communications service to and from the customer premises. The customer [i.e., P&O] is responsible for installing and maintaining hardware that will interface with the communications service and ensure that calls are legitimate. . . ."⁸

6. Affiant Wohlers adds: "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 and fees, or \$14,211.00. After the application of all credits, P&O's remaining liability to Integra is . . . \$14,604.79."⁹

7. P&O filed no response to Integra's motion to dismiss, and the deadline for doing so has expired.¹⁰

II. STANDARD OF REVIEW

Rule 12(b)(6) of the Utah Rules of Civil Procedure, which is incorporated by reference by Utah Admin. Code R746-100-1(C), permits a party to file a motion to dismiss for "failure to state a claim upon which relief can be granted."¹¹ In ruling on a motion to dismiss for

⁶ See *id.*, Exhibit 7, Affidavit of Mitch Nodland, and Exhibit 8, Affidavit of Mark R. Wohlers.

⁷ See Affidavit of Mitch Nodland, filed October 8, 2013.

⁸ See *id.* at 2, ¶ 8.

⁹ See *supra* n. 6, Exhibit 8, Affidavit of Mark R. Wohlers, at 1, ¶ 4.

¹⁰ See Utah Admin. Code R746-100-4(D).

¹¹ Utah R. Civ. P. 12(b)(6) (LexisNexis 2010).

failure to state a claim, the Commission construes the complaint in the light most favorable to the complainant and indulges all reasonable inferences in its favor.¹²

III. DISCUSSION

A. P&O Has Failed to State a Claim Upon Which Relief Can Be Granted

Viewing the facts in the light most favorable to the complainant, P&O has failed to specify “the law or a rule or order of the commission” Integra allegedly violated.¹³ Even assuming the truth of all the facts P&O alleges, the Commission sees no apparent violation in its complaint. Further, P&O failed to respond to Integra’s motion to dismiss, claiming in part P&O failed to cite a statute, rule, or tariff with which Integra has failed to comply; thus, “[a]bsent a response or reply, the Commission may presume . . . there is no opposition.”¹⁴ Further, the Division explains in its recommendation that both Integra’s tariff and master service agreement support Integra’s actions in this matter. Accordingly, we dismiss P&O’s complaint for failure to state a claim upon which relief can be granted.

B. The Commission Lacks Jurisdiction Over International Calls

Integra also argues P&O’s complaint should be dismissed because the Commission lacks jurisdiction over disputes concerning international calls. Integra argues jurisdiction over international calls is properly before the Federal Communications Commission, not the Utah Public Service Commission. We agree.¹⁵ Therefore, we dismiss P&O’s complaint for lack of jurisdiction inasmuch as it involves international calls.

¹² Cf. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991).

¹³ Utah Code Ann. § 54-7-9(2) (LexisNexis 2010).

¹⁴ See Utah Admin. Code R746-100-4(D).

¹⁵ See generally 47 U.S.C. § 151 (The Federal Communications Commission is created “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . .”); *id.* § 151(a) (“The provisions

IV. ORDER

For the foregoing reasons, the Commission grants Integra's motion to dismiss.

DATED at Salt Lake City, Utah, this 12th day of November, 2013.

/s/ Ron Allen, Chairman

/s/ David R. Clark, Commissioner

/s/ Thad LeVar, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#248706

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

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 . . ."). See also <http://www.fcc.gov/what-we-do> ("The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories.").

CERTIFICATE OF SERVICE

I CERTIFY that on the 12th day of November, 2013, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

Christina Pignatelli
Pignatelli and O'Brien, LLC
PO Box 682590
Park City, UT 84068-2590

By E-Mail:

Cathy Murray (camurray@integratelecom.com)
Integra

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Brent Coleman (brentcoleman@utah.gov)
Utah Assistant Attorneys General

Hand-Delivery:

Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

Administrative Assistant