BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

FORMAL COMPLAINT OF PIGNATELLI & O'BRIEN, LLC AGAINST INTEGRA TELECOM OF UTAH	Docket No. _____ **Formal Complaint**

COMPLAINT AGAINST INTEGRA TELECOM OF UTAH FOR UNFAIR ASSESSMENT OF CHARGES

Pignatelli & O'Brien, LLC ("P&O") respectfully files this complaint with the Public Service Commission of Utah (the "Commission"). P&O regrets having to appeal to the Commission for assistance but efforts to resolve the below dispute with Integra Telecom of Utah ("Integra" or the "Company") have been unsuccessful. P&O believes that, as a regulator of Integra, the Commission has special interest in ensuring that Integra is treating its customers fairly. As detailed in the below complaint, hiding under the veil of intentionally concealed and legally unconscionable language, Integra seeks to hold P&O liable for calls that Integra acknowledges were not made by P&O.

P&O is serving courtesy copies of this pleading on each of the public service commissions before which Integra does business. P&O's hope is that this will bring to light the manner in which Integra is treating its customers. P&O appeals to you, the Commission, to stop this practice before it puts small business customers out of business through no fault of their own. In this case, Integra thought nothing of charging a customer who rarely exceeded $225 a month for service a total of $28,815.79 for services

that Integra acknowledges that P&O never used. P&O requests that the Commission initiate formal agency proceedings in this case, pursuant to R746-240-8.

Summary of Pignatelli & O'Brien's Position

P&O argues that:

1. Despite being well aware of the problem of toll fraud, Integra failed to respond to the hacking in a timely fashion because it has absolutely no incentive to act quickly to protect its customers.
2. Integra intentionally concealed its Master Service Agreement ("MSA") because it contains unconscionable terms.
3. Integra's MSA contains language too broad to be legally enforceable.
4. Integra's tariff language is dated and does not take into account: (a) the changed environment of telecom fraud, and (b) Integra's unfair application of the tariff language. Furthermore, P&O is curious about the process by which the Commission reviews tariff language, whether Commission approval is necessary in the telecom industry, and the representations made by Integra during any such review by the Commission.

Factual Background

P&O started taking phone service from Integra in December 2008. In the last four and a half years, P&O's monthly bill has consistently been between $200-225 and P&O has always paid timely. On June 15, 2013, in the middle of the night, two of the voicemail boxes at the P&O offices were hacked. The fraud was acknowledged in a form

letter from Integra dated four days later attached hereto as Exhibit A. According to Integra, hackers try different combinations of passwords and break into the voicemails. They then have a way of selling international time and literally thousands of calls can be made in a matter of hours. P&O had never heard of such a thing but Integra told P&O that it is becoming a more common scam. Integra called it "toll fraud." It is apparently becoming so common that Integra has a form letter it sends to victims of this fraud. The letter received by P&O had no information as to the extent of the fraud and no information about what P&O should do next.

On July 17, 2013, P&O received a bill for $28,815.79. That bill is attached as Exhibit B. P&O was told by the customer service representative at Integra that the figure represented 2,291 international calls over a seven hour timeframe.

When P&O received the bill, P&O immediately took steps to resolve the matter with Integra. The day after receiving the bill, P&O had its system checked by the installer who confirmed that their system was installed correctly. Once the system was inspected, P&O called Integra's customer service department and when the representative could not help P&O, he refused to provide the phone number of a manager. He would only provide an email. P&O immediately emailed but was at the mercy of whenever Integra felt like responding. Despite efforts to resolve the matter, and an offer by Integra to waive half of the charges, P&O received another bill on August 19, 2013, with the same balance of $28,815,79 due. Exhibit C. Pursuant to R746-240-7, P&O worked through the informal complaint process with the Division of Public Utilities. Attached as Exhibit D is a timeline of the efforts made by P&O to resolve the matter.

Integra's Failure to Act Timely

In its response to the Informal Complaint, attached as Exhibit E, Integra acknowledges that it has an anti-fraud alert. It states that its anti-fraud function "is only triggered when a sufficient volume of calls shows a pattern of abuse." As discussed above, P&O was a $200 a month client over four and a half years. If P&O had five international calls in any given month, it would be surprising. Nearly 2,300 calls were made on June 15, 2013. It took Integra over seven hours to block the calls. Even when an alert was triggered at 8:00 am, it took two hours and 25 minutes to put any sort of block on the calls.

P&O has not been given access to how the calls broke down but a straight extrapolation suggests that 791 calls were made between 8:00 am and 10:25 am while Integra got its act together. In dollar terms, that straight extrapolation amounts to $9,948.

It begs the question of the threshold of Integra's anti-fraud function. P&O never made even five international calls a month. In this case, 2,291 international calls were made in seven hours. If the threshold to trigger an alarm at Integra is so high, its system is flawed at best, completely ineffective at worst. To make matters worse, Integra acknowledges that it was well aware of this type of fraud before it happened with P&O. Yet it did nothing to upgrade its system to prevent against the extent to which a customer can be harmed.

The simple fact is that, under Integra's "take no responsibility" policy, it has no incentive to stop the calls or to act with any sort of urgency. Integra, the only party that can stop the calls, has absolutely no reason to do so promptly. Instead, a customer that

has no idea the calls are being made is held responsible for all of them and Integra makes a profit. The policy is nonsensical.

The policy also runs counter to industry norm. Credit card companies have invested in anti-fraud technology because they are on the hook when customers are billed for unauthorized charges. It is a common occurrence that a credit card customer cannot use her credit card for a few hours because there has been questionable activity. Customers put up with, and even appreciate, this minor inconvenience because it means credit card companies are watching that their customers are not the victims of fraud. Integra does not watch out for its customers because it is going to bill them anyway. Perhaps if Integra had some responsibility placed on it, it would change its fraud alert system so that hackers could not do the type of damage they did in this case.

Integra Never Provided its Master Service Agreement to P&O

In its response to P&O's Informal Complaint, Integra states that P&O was formerly an Eschelon customer before Integra took over Eschelon's customer base. This is factually incorrect. P&O opened its office in December of 2008 when it signed up with Integra. Integra states that Eschelon's practice was to provide a Master Service Agreement ("MSA") to its customers. This is immaterial as P&O was never an Eschelon customer. Similarly, when Integra sent the former Eschelon customers a MSA on July 1, 2008, P&O did not receive it because it was neither an Eschelon customer nor an Integra customer at that time. That Integra believes that (1) P&O was ever an Eschelon customer and (2) that Integra provided the above referenced notice to P&O speaks to the quality of its record keeping.

Nor did P&O receive the MSA when it signed up for service with Integra. P&O understands that Integra is hanging its hat on the fine print at the bottom of the "Agreement for Service" that purported to set out expected rates. Not only is an incorporation by reference in fine print sneaky and bad business, if you can read on, the cited provision states that the MSA and Rules and Regulations can be found on Integra's website. This is not true. There is no MSA listed in the "Public Info and Policies" section, where it would logically fall. In addition, a search of Master Service Agreement in the Search command results in 13 documents, none of which is the MSA that Integra has recently sent P&O and the Commission.

Integra knows that the language is unconscionable. It knows it is so broad as to fail legal scrutiny, as discussed in more detail below. So it buries the language.

In addition, it is important to note that this is a service agreement under which P&O had no bargaining power. Integra puts a "Service Agreement" in front of its customer after its technician has set up service. Despite the MSA being squeezed into a short pamphlet using small type, it does not have its technicians provide the MSA when customers are asked to sign a Service Agreement. Instead, Integra puts the onus on the customer to go find the MSA. A customer may think that the MSA is one of the 13 documents that resulted from the Search command on Integra's website, but they would be incorrect. The MSA is apparently a document that resides in the desks of Integra employees to send to customers only when they are being held responsible for something they did not know could happen.

In *Williams v. Walker-Thomas Furniture Company*, the court found that "when a party of little bargaining power, and hence little real choice, signs a commercially

unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms." In such a case, the "court should consider whether the terms of the contract are so unfair that enforcement should be withheld." 350 F.2d 445 (D.C. Cir. 1965). *See also Weaver v. American Oil Co.*, 276 N.E.2d 144 (1971)

> When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting.

<u>The Provisions of the MSA are Too Broad to be Legally Enforceable</u>

Section 4 of the MSA reads:

> 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.

Basically, Integra absolves itself of responsibility for any sort of fraud, even if it was the party in the best position to stop or limit the damage of the fraud. In *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482 (1977), the court said that "the basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." There is no denying that the clause

cited above is so one-sided to be unconscionable. P&O had no way of knowing that the fraud was occurring until after the damage had been done. Integra, the one party that could have stopped the fraud, did not do so, and now points to the unbelievably broad and unconscionable language cited above.

P&O had its phone system professionally installed. It had it professionally inspected after the fraud occurred and everything was installed properly. In fact, before Integra initiated service, it sent not one but two employees out to P&O's office and Integra's own technicians inspected the installation. P&O has not a single employee that knows about the technology behind phone service or that toll fraud was even a possibility. From P&O's standpoint, it had done everything correctly. It had dotted its i's and crossed its t's. It relied on Integra to do what it was hired to do.

The Tariff Should be Reopened and Reexamined

Integra points to its tariff language as cover for its behavior. Again, the tariff language is not provided on Integra's website. If Integra wants to point to tariff language as a way to escape responsibility, an honest company would put said tariff language in a place where customers could find and review it.

A careful look at the tariff pages shows that the tariff became effective on December 28, 2009. As a company not involved in the telecom industry, P&O is not aware of what was involved in making the tariff effective. Is Commission approval necessary? Did the Commission conduct hearings? Was there notice and an opportunity to be heard as required by due process? How many days of hearings did the Commission hold? Did any public witnesses appear? In other words, if Integra is going

to point to the onerous language in its tariff as a basis to charge a small business customer for nearly $29,000 in fraudulent charges, what representations to the Commission did Integra have to make to allow its tariff to become "effective."

P&O respectfully submits that it is time that the Commission reopen Integra's tariff and take a good look at the provisions and how the Company is applying them. In addition, perhaps the advent and rise of toll fraud necessitates a reevaluation of this policy. P&O cannot imagine that assessing a small business with $28,815.79 for calls that everyone acknowledges were not made by P&O is what the Commission had in mind for this language. Knowing how Integra is applying this language should raise a red flag as to their policies in general.

Conclusion

BASED ON THE FOREGOING, Pignatelli & O'Brien respectfully requests: (1) that the Commission initiate formal investigative proceedings pursuant to R746-240-8; (2) that the Commission find that Integra's filed tariffs do not provide adequate notice to its customers; (3) that the Commission find the provisions of Integra's MSA to be so overbroad as to be legally unenforceable; (4) that the Commission reopen Integra's filed tariff to ensure that it is fair to customers, allowing notice and opportunity to be heard for all parties; and (5) that the Commission Order that Pignatelli & O'Brien is not responsible for the fraudulent charges incurred in June 2013.

RESPECTFULLY SUBMITTED: September __, 2013.

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Christina Pignatelli
Melissa Pignatelli O'Brien

Managers, Pignatelli & O'Brien