



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: APRIL 24, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF COMPETITIVE SERVICES (BUYS) *DB*
 DIVISION OF LEGAL SERVICES (FUDGE) *FF*
DIVISION OF APPEALS (HELTON) *W*

RE: DOCKET NO. 992037-TI - 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.

AGENDA: 05/01/2001 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: PLACE THIS DOCKET ON AGENDA ITEM LIST IMMEDIATELY FOLLOWING DOCKET NO. 010364-TI. THIS RECOMMENDATION IS A REVISION TO AND REPLACEMENT OF STAFF'S APRIL 19, 2001, RECOMMENDATION.

FILE NAME AND LOCATION: S:\PSC\CMP\WP\992037_r.RCM

CASE BACKGROUND

- September 20, 1996 - The Federal Communications Commission (FCC) released and adopted a Report and Order (FCC 96-388) detailing the implementation of the pay telephone reclassification and compensation provisions of the Telecommunications Act of 1996.
- October 7, 1997 - The FCC per-call compensation rule went into effect (Subsection 64.1300, Title 47, United States Code).

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- November 1, 1997 - AT&T Communications of the Southern States, Inc. (AT&T) updated its General Services Tariff to include a payphone surcharge of \$.30.
- February 1, 1999 - Rule 25-24.630, Florida Administrative Code, Rate and Billing Requirements was amended 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.
- February 1, 1999 - AT&T updated its Custom Network Services Tariff to include a payphone surcharge of \$.28.
- February 26, 1999 - AT&T implemented a non-subscriber surcharge of \$2.50 that was applied to calls made from payphones that terminated to an end user who was not presubscribed to AT&T.
- August 1, 1999 - AT&T updated its Custom Network Services Tariff to reduce the payphone surcharge to \$.26.
- August 19, 1999 - Staff sent a certified letter to AT&T informing the company that a review of its tariffs indicated that AT&T may have overcharged end users for intrastate 0+ or 0- calls made from pay telephones from the time rate caps became effective, and requested that AT&T investigate the situation and provide staff with written responses to specific questions pertaining to any overcharges.
- December 30, 1999 - Staff opened this docket to investigate and determine the appropriate method for refunding the apparent overcharges.
- March 2, 2000 - AT&T provided a written response to staff's certified letter in which AT&T stated that there are two surcharges that may be charged in connection with certain operator-handled calls; a non-subscriber surcharge and a payphone surcharge. AT&T stated that it would remove the non-subscriber surcharge from its tariff. However, AT&T stated that it does not agree that the payphone surcharge is covered by the existing rate caps. (Attachment A)
- April 28, 2000 - Staff sent AT&T a letter requesting that AT&T provide written answers to specific questions regarding the public payphone surcharge listed in its tariff.

- May 30, 2000 - AT&T provided staff with a written response and stated that a payphone surcharge is applicable to payphone completed calls under AT&T's Custom Network Service Tariff and General Services Tariff.
- January 5, 2001 - Staff informed AT&T via letter that it believes AT&T is in violation of Rule 25-24.630, Florida Administrative Code, and should proffer to determine the number of calls affected by the payphone surcharge, quantify the amount to be refunded to consumers, and refund the amount overcharged.
- February 5, 2001 - AT&T filed a petition with the FCC requesting that the FCC 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.
- March 13, 2001 - Internal Affairs - The Commission requested that staff file a recommendation so that the Commission can vote on the issue prior to the FCC ruling on AT&T's petition.
- March 14, 2001 - AT&T submitted a proposed resolution for charging end users a \$2.50 non-subscriber surcharge in excess of the rate caps established in Rule 25-24.630, Florida Administrative Code. On March 27, 2001, staff opened Docket No. 010364-TI to address the non-subscriber surcharge issue.
- March 22, 2001 - The Commission sent comments to the FCC urging the FCC to hold AT&T's Petition in abeyance to allow the Commission time to address the payphone surcharge issue at the May 1, 2001, Agenda Conference.

The Commission is vested with jurisdiction over this matter pursuant to Section 364.3376, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission order AT&T to cease charging end users a payphone surcharge and refund the total amount of the payphone surcharges, plus interest, billed to end users since February 1, 1999, for 0+ intrastate calls made from a payphone in excess of the rate caps listed in Rule 25-24.630, Florida Administrative Code?

RECOMMENDATION: Yes. The Commission should order AT&T to cease charging end users a payphone surcharge and refund the total amount of the payphone surcharges, plus interest, it billed to end users since February 1, 1999, for 0+ intrastate calls made from a payphone or in a call aggregator context in excess of the rate caps listed in Rule 25-24.630, Florida Administrative Code. AT&T should be required to determine the total amount that it overcharged end users, and refund that amount, plus interest, to end users pursuant to Rule 25-4.114, Florida Administrative Code, Refunds. The refunds should be credited to the affected end users' local exchange telephone bill by September 30, 2001. Any money not refunded, including interest, should be remitted to the Commission by November 30, 2001, and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund. In addition, AT&T should be required to submit a report consistent with Rule 25-4.114, Florida Administrative Code, with the Commission once all monies have been refunded. **(BUYS, FUDGE, HELTON)**

STAFF ANALYSIS: 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. Based on the comparison, it appears AT&T's tariffed rates exceed the rate cap. Specifically, AT&T adds a payphone surcharge to intrastate 0+ calls made from a payphone.

In its letter dated March 2, 2000, AT&T indicated that it does charge a payphone surcharge in excess of the rate cap listed in Rule 25-24.630(1), Florida Administrative Code, but it does not believe that the payphone surcharge is included in the existing rate cap. In its letter dated May 20, 2000, AT&T stated that under its Custom Network Service Tariff, the payphone surcharge was \$.28 from February 1 to July 31, 1999, and has been \$.26 since August 1, 1999. The payphone surcharge under AT&T's General Services Tariff is \$.30, which has been in effect from November 1997, to the present. AT&T also stated it estimates the total amount collected from public payphone surcharges during the period from February 1, 1999 through March 31, 2000, in connection with 0+ and 0-intrastate calls originating from pay telephones is \$760,000.

AT&T has also indicated that it believes the FCC has preempted the Commission's rules and allowed AT&T to apply the payphone surcharge in addition to the charges allowed under the rate caps. Specifically, AT&T does not believe that the Commission has jurisdiction over payphone charges and thus does not have jurisdiction over the payphone surcharge currently collected by the company. AT&T argues that it should be allowed to collect the payphone surcharge over and above the current rate cap which it believes only applies to operator service charges. Staff believes that the payphone surcharge AT&T has been collecting is the fee that AT&T pays the payphone owner when AT&T acts as the operator service provider. Simply designating a charge as a payphone surcharge does not preempt the Commission's jurisdiction. The Commission clearly has jurisdiction over operator service provider charges. Thus, sStaff disagrees with AT&T and asserts that the rate cap includes all charges, including a payphone surcharge, for intrastate 0+ calls made from payphones.

Staff maintains that Rule 25-24.630, Florida Administrative Code, is consistent with the FCC's regulations implementing the pay telephone reclassification and compensation provisions of the Telecommunications Act of 1996. Staff cannot find any part of the Telecommunications Act of 1996 or FCC regulations that preempt the Commission from establishing maximum rates that an operator service provider (OSP) can charge for 0+ calls made from a payphone. Any compensation AT&T remits to the payphone providers should be paid out of the revenues derived from the charges for the call pursuant to Rule 25-24.630, Florida Administrative Code.

The Commission has promulgated Rule 25-24.630, Florida Administrative Code, Rate and Billing Requirements, to implement the maximum charges for operator services as required by Section 364.3376(3), Florida Statutes, which states:

For operator services, the commission shall establish maximum rates and charges for all providers of such services within the state.

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 is charging and billing end users for third-party, person-to-person, and collect calls. Accordingly, AT&T is a provider of operator services and is subject to the requirements of the rules governing operator service providers, including Rule 25-24.630, Florida Administrative Code.

AT&T argues that when Rule 25-24.630 was last amended, 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. This argument is not persuasive because on its face, Rule 25-24.630(1) pertains to the maximum charges that may be applied to 0+ and 0- calls made from a pay telephone. Rule 25-24.630(1), Florida Administrative Code, states:

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.

Moreover, the payphone surcharge that AT&T has included in its tariff and billed to end users is not approved by the Commission and is therefore in violation of Rule 25-24.630(8)(d), which states:

An operator services provider shall not bill or collect a surcharge levied by any entity, either directly or through its billing agent, except Commission-approved charges for pay telephone providers.

Staff contends that the rate caps established in Rule 25-24.630(1), Florida Administrative Code, include all charges for an intrastate 0+ call made from a payphone that is billed to an end user by an OSP, including any compensation paid to the payphone service provider. The definition of *rate* is the cost per unit of a service or commodity. The definition of *cap* is a limit or restraint. Simply put, the definition of a *rate cap* is the limit of the cost per unit of service. If AT&T is allowed to charge and bill end users for miscellaneous surcharges in excess of the maximum rates specified in the rate cap, then the intent of the rule and the Florida Statute is circumvented. Consequently, if AT&T's argument has any validity, it could add more surcharges to

its tariff for other reasons, e.g., a surcharge to fund the implementation of a system to track "dial-around" calls.

This recommendation is consistent with previous Commission decisions and actions. In four previous dockets, the Commission has ordered OSPs to refund payphone surcharges that resulted in the charge to end users exceeding the Commission's rate caps. In Dockets Nos. 991359-TI, 000022-TI, 000036-TI, and 001808-TI, the Commission issued orders approving the companies' offers to refund overcharges that included payphone surcharges that the companies billed end users in excess of the rate caps.

In Docket No. 000022-TI, 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 UniversalCom, Inc., the Commission issued Order No. PSC-00-0542-PAA-TI on March 16, 2000, in which it stated:

We find that the rate caps implemented on February 1, 1999, are the maximum the company may tariff for those types of calls. UniversalCom's tariffed per minute rate and intraLATA surcharge for person-to-person and non person-to-person calls on file with us are below the parameters set by the Rule. The interLATA surcharge for these types of calls, however, is above the cap, and therefore, the interLATA surcharge imposed in excess of the rate cap and the payphone surcharge need to be refunded.

Based on the foregoing, staff recommends that the Commission should order AT&T to cease charging end users a payphone surcharge and refund the total amount of the payphone surcharges, plus interest, it billed to end users since February 1, 1999, for 0+ intrastate calls made from a payphone or in a call aggregator context in excess of the rate caps listed in Rule 25-24.630, Florida Administrative Code. AT&T should be required to determine the total amount that it overcharged end users, and refund that amount, plus interest, to end users pursuant to Rule 25-4.114, Florida Administrative Code, Refunds. The refunds should be credited to the affected end users' local exchange telephone bill by September 30, 2001. Any money not refunded, including interest, should be remitted to the Commission by November 30, 2001, and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund. In addition, AT&T should be required to submit a report consistent with Rule 25-4.114, Florida Administrative Code, with the Commission once all monies have been refunded.

DOCKET NO. 992037-TI
DATE: April 24, 2001

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. If no person, whose interests are substantially affected by the proposed action files a protest within the 21 day protest period, a Consummating Order should be issued, but this docket should remain open pending the completion of the refund and receipt of the final report on the refund. After completion of the refund and receipt of the final refund report, this docket may be closed administratively. **(FUDGE)**

STAFF ANALYSIS: Whether staff's recommendation on Issue 1 is approved or denied, the result will be a proposed agency action order. If no timely protest to the proposed agency action is filed within 21 days of the date of issuance of the Order, a Consummating Order should be issued, but this docket should remain open pending the completion of the refund and receipt of the final report on the refund. After completion of the refund and receipt of the final refund report, this docket may be closed administratively.



Rhonda P. Merritt
Law & Government Affairs
Assistant Vice President - Florida

Suite 700
101 N. Monroe St.
Tallahassee, FL 32301
850 425-6342
FAX: 850 425-6361

March 2, 2000

Ms. Kelly Biegalski
Division of Communications
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RE: Docket 992037

Dear Ms. Biegalski:

Thank you for the opportunity to respond to Staff's questions about AT&T's rates for operator services. The purpose of this letter is to discuss two rates that may be charged in connection with certain operator-handled calls: a non-subscriber surcharge and a payphone surcharge.

After numerous discussions with Staff on the applicability of the operator services rate cap (Rule 25-24.630), AT&T will modify its tariff to remove the non-subscriber surcharge. We do not agree that this surcharge is in violation of the existing rate cap. However, the number of occasions where this surcharge is applied is extremely low and does not warrant prolonged discussion or litigation.

Based on our analysis of billing data, we estimate that the \$2.50 non-subscriber surcharge was billed an average of once every two to three weeks for calls from payphone or call aggregators. Using the average of twice per month, the amount which is alleged to have been overcharged is approximately \$65.00 (two charges per month @ \$2.50/ea. x 13 months).

The non-subscriber surcharge, by its nature, is billed by the appropriate local exchange carrier. The customers who incur this charge are not AT&T presubscribed customers, so it is difficult if not impossible for AT&T to know for certain which non-AT&T customers incurred the charge. Because of the small amount of money involved and the difficulty of locating the persons who incurred the charges, AT&T agrees to make a refund of the amount in question directly to the Florida general revenue fund as settlement of this matter.

Regarding the payphone surcharge, AT&T again does not agree that this charge is covered by the existing operator service rate cap. AT&T is aware that there has been confusion on the applicability of Florida intrastate rate caps to federally-approved charges, including the payphone surcharge. In fact, Staff has recently opened a docket to clarify the rule on this point, in addition to other proposed rule changes (Docket 991930).

AT&T charges this rate in good faith, and in reliance on the FCC's approval. At no time in the prior rulemaking proceeding did AT&T understand that the rate cap was intended to limit charges approved by another jurisdiction. Therefore, because of this existing debate, AT&T requests that Staff recommendation on this item be deferred to a subsequent docket, if applicable, after the outcome of Docket 991930 is final. This will allow an efficient use of both your resources and ours and avoid arguing the same issue in two separate dockets.

We appreciate the opportunity you have given us to work with you on resolution of these two issues.

Sincerely,

Rhonda Merritt

Rhonda P. Merritt