

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
GERRI MURPHY REALTY, INC.,
Complainant,
v.
AT&T CORPORATION
Defendant,
File No. EB-01-TC-F008

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 2001

Released: October 15, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the above-captioned formal complaint filed by complainant Gerri Murphy Realty, Inc. (GMRI). The Complaint raises three issues for the Commission's consideration: (1) whether AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A on file with the Commission at the time of the events giving rise to this proceeding is lawful; (2) whether GMRI is liable pursuant to AT&T's tariff for charges associated with long distance telephone calls made in September 1999 by third parties who obtained unauthorized access to GMRI's communications system; and (3) whether AT&T's conduct with regard to the unauthorized calls was unreasonable in violation of Sections 201(b), 203, and 206 of the Communications Act of 1934, as amended. For the reasons discussed below, we conclude that: (1) AT&T's tariff is lawful; (2) GMRI is liable under AT&T's tariff for the unauthorized charges; and (3) AT&T's conduct with regard to the unauthorized calls was not unreasonable or otherwise in violation of the Communications Act.

1 Complaint at 12.

2 Id; see Brief of GMRI in Support of Formal Complaint, Summary (filed July 27, 2001) (GMRI Brief).

3 Complaint at 11; 47 U.S.C. §§ 201, 203, 206.

II. BACKGROUND

A. Parties To the Proceeding

2. GMRI is a real estate agency incorporated in Georgia.⁴ In 1996, GMRI acquired the assets of Head Realty, Co. (Head Realty) and pursuant to that transaction, became a subscriber to AT&T's 800 Service under AT&T Tariff F.C.C. No. 2 and AT&T's Long Distance Message Telecommunications Service (LDMTS) under AT&T Tariff F.C.C. No. 1. Pursuant to the Head Realty transaction, GMRI also acquired a contract with Southern Bell for ESSX-1 service, which it renewed in 1997.⁵ The ESSX system controlled GMRI's telephone service and also controlled the physical phone lines connecting the central office switch with GMRI.⁶ In addition, the ESSX-1 service included a Direct Inward Dialing feature that allowed "incoming calls from the exchange or toll network" to "be dialed directly to completion to" any outbound number.⁷ During the relevant time frame, GMRI was also using an on site Panasonic telephone/voice mail system that was password protected.⁸ Whether that system permitted external or remote access is a matter of dispute.⁹

3. AT&T is an interexchange carrier (IXC) and, for purposes of this proceeding, was engaged in the provision of interLATA telecommunications services. Under the regulatory framework in place at the time of the events giving rise to this proceeding, AT&T was classified as a "nondominant" interexchange carrier. As a result, AT&T was required to file and maintain tariffs with the Commission that contained charges, terms, and conditions of its common carrier offerings.

B. Underlying Facts

4. On or about September 7, 1999, AT&T noticed that GMRI's 800 number was receiving a high number of inbound calls from the New York area and that there was a high number of international calls to locations where suspected fraud has occurred in the past.¹⁰ AT&T's security division then contacted GMRI to inform it of the unusual

⁴ Complaint at 3.

⁵ *Id.* at 5-6; *see also* AT&T's Brief at 1-2.

⁶ Complaint at 6.

⁷ *See* Georgia state tariffs of Southern Bell Telephone and Telegraph Company, appended to GMRI's Complaint, Exhibit J, Sections A112.8.1A and O.1.a.(2).

⁸ Complaint at 6; AT&T Brief at 2-3.

⁹ *See* Reply Brief of GMRI at 2 (Reply Brief).

¹⁰ AT&T Brief at 6; GMRI Brief at 2-3

calling patterns detected.¹¹ Subsequent conversations ensued between the parties, the contents of which are in dispute. GMRI alleges that despite complying with all of AT&T's recommendations, the fraudulent toll calls continued.¹² AT&T contends that GMRI decided to contact GMRI's voice mail technician to resolve the problem and, when advised to authorize a block of the area codes at issue, initially declined.¹³ According to AT&T, after several days of continued unauthorized calling, AT&T placed a block on the area codes without prior authorization and the toll fraud ceased.¹⁴ GMRI contends that the toll fraud ceased only after AT&T advised it to discontinue its 800 number except for calls from Alaska and Guam.¹⁵

5. AT&T subsequently billed GMRI for all of the telephone calls, both authorized and unauthorized, pursuant to AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A and F.C.C. No. 2, Section 2.4.1.A.¹⁶

C. Procedural History

6. On March 8, 2000, GMRI filed an informal complaint with the Commission alleging that AT&T's effort to collect charges for unauthorized telephone calls originating from GMRI's telephone number were illegal and unjust.¹⁷ On November 16, 2000, AT&T filed its response, stating that it could not offer any resolution to the complainant because the account was in pre-litigation.¹⁸ On December 20, 2000, the Commission's Consumer Information Bureau closed the complaint.¹⁹

7. On February 5, 2001, AT&T filed a lawsuit against GMRI in the United States District Court, Northern District of Georgia, Atlanta Division²⁰ seeking \$90,270.89 in charges for the provision of long distance telecommunications services relating to the calls at issue.²¹ The District Court stayed the proceeding pending the filing of a formal

¹¹ AT&T Brief at 6; GMRI Brief at 3.

¹² GMRI Brief at 4.

¹³ AT&T Brief at 7.

¹⁴ *Id.*

¹⁵ GMRI Brief at 4.

¹⁶ AT&T Brief at 7; GMRI Complaint at 1.

¹⁷ Joint Statement of the Parties (filed June 20, 2001) at 9 (Joint Statement).

¹⁸ *Id.*; see AT&T Response, (filed November 16, 2000).

¹⁹ Joint Statement at 9.

²⁰ *AT&T Corp. v. GMRI, a/k/a Coldwell Banker GMRI, et al.*, Civil Action No. 1:01-CV-0337 (District Court Action).

²¹ Joint Statement at 9.

complaint with the Commission, retained jurisdiction over AT&T's claims, and dismissed GMRI's counterclaims.²² On May 15, 2001, GMRI filed the above-captioned Complaint alleging that AT&T's tariff is unlawful, that GMRI is not liable for the unauthorized calls and that AT&T's effort to collect the unauthorized charges violates Sections 201, 203, and 206 of the Communications Act.²³

III. DISCUSSION

A. Lawfulness of AT&T's Tariff

8. GMRI challenges the lawfulness of AT&T's Tariff F.C.C. No. 1, Section 2.4.1.A on grounds that the allocation of risk associated with toll fraud is improperly placed on individual customers.²⁴ The relevant tariff provision provides that "[t]he Customer is responsible for the payment...for LDMTS calls or services: -- Originated at the Customer's number(s)." GMRI suggests that "a more reasonable means for recovering the loss of the risk of toll fraud is through spreading it and sharing it" among AT&T's entire customer base.²⁵ We disagree that AT&T's tariff is unlawful.

9. As AT&T notes in its Brief, it offers a variety of enhanced NetProtect options to limit customer liability for toll fraud.²⁶ Furthermore, customers who do not choose one of the enhanced NetProtect options are automatically enrolled in AT&T's Basic service which caps liability at \$25,000 prior to AT&T's notification, and offers a 50 percent reduction in charges if the customer detects the fraud first and notifies AT&T.²⁷ We find that such provisions both provide customers with reasonable security options and create appropriate incentives for customers to secure and monitor their telephone systems. Particularly in view of the security options available to its customers, we find no merit in GMRI's argument that AT&T should be required to spread the risk of fraud over its entire customer base. We therefore reject GMRI's allegation that AT&T's tariff unlawfully allocates the risk of toll fraud to individual customers.

B. Liability for Unauthorized Calls

10. GMRI contends that it is not liable for the unauthorized calls placed over its telephone lines because the calls were "not specifically requested by GMRI, were not

²² *Id.*

²³ Complaint at 11; 47 U.S.C. §§ 201, 203, 206.

²⁴ Complaint at 15.

²⁵ *Id.*

²⁶ AT&T Brief at 19. AT&T's NetProtect Plus Service offers a \$2,000 liability cap prior to notification of the fraud, with a 50 percent reduction if the customer detects the fraud first and notifies AT&T. AT&T's NetProtect Premium has a \$0 liability cap up to two hours after notification of the fraud. See AT&T Tariff F.C.C. No. 1, §§ 5.9, 5.8.

²⁷ *Id.*

made at GMRI's locations, were not originated at GMRI's phones and were the result of telephone toll fraud." ²⁸ While GMRI attempts to distinguish the facts in this case from prior Commission precedent, our holding in *Chartways Technologies, Inc. v. AT&T*²⁹ is dispositive.

11. In *Chartways*, the Commission affirmed the Common Carrier Bureau's determination that a customer who had subscribed to AT&T's LDMTS and 800 services was liable for unauthorized calls made from remote locations through the customer's PBX system. Construing the very same tariff provisions that are before the Commission in this proceeding, the Commission held that "the clear meaning of the relevant tariff provisions is that the customer's obligation includes liability for unauthorized usage involving incoming 800 Service calls or LDMTS calls that originate at the customer's numbers." ³⁰ Moreover, the Commission found that the unauthorized calls did, in fact, originate at the customer's number even though the unauthorized calls involved inbound 800 calls.³¹ The Commission noted that each incoming unauthorized call using the 800 service is "separate and distinguishable" from the outgoing unauthorized calls using LDMTS."³² As a result, the Commission concluded that with regard to 800 Service, there is no requirement under the tariff that a call originate at the customer's number because all 800 calls terminate there and because the service is specifically designed to allow unknown callers access to the service.³³ Hence, the complainant in *Chartways* was liable under the tariff for charges associated with the incoming 800 calls. With regard to the disputed outgoing LDMTS calls, the Commission held in *Chartways* that because the unauthorized callers were able to obtain a local dial tone from the premises, the unauthorized calls did originate from Chartways' numbers.³⁴ The Commission therefore found that Chartways was liable for these calls as well under AT&T's tariff.³⁵

12. While there is some dispute in the record as to the particular facility misused by the callers, both parties agree that the inbound callers used GMRI's ESSX system in order to obtain a local dial tone.³⁶ GMRI argues that because the ESSX system was not within its immediate control, the unauthorized calls did not "originate at the

²⁸ Complaint at 1.

²⁹ 8 FCC Rcd 5601 (1993).

³⁰ 8 FCC Rcd at 5603, ¶ 11.

³¹ *Id.* at 5603, ¶ 13.

³² *Id.*

³³ *Id.* The Commission adds that "the customer has, by subscribing to the service, implicitly authorized any call utilizing the service." *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ AT&T Brief at 10; GMRI Brief at 9. AT&T contends that the fraud was most likely facilitated by GMRI's on-site voice mail system. *See* AT&T's Brief at 11.

customer's number" within the meaning of the relevant tariff provision.³⁷ We disagree. Consistent with our decision in *Chartways*, we find that regardless of whether GMRI had physical control over the ESSX system, that system was exploited by the unauthorized callers who then made use of GMRI's number to make fraudulent toll calls. Although there are no stipulated facts in this proceeding to suggest that GMRI had physical control over the ESSX system, we find it significant that GMRI, with the assistance of BellSouth, installed the ESSX system without consulting AT&T in any way, and that it was this equipment that provided the point of vulnerability for the unauthorized callers.³⁸ Furthermore, there is no indication in the record that AT&T had the ability to determine whether particular 800 or LDMTS calls were authorized or that AT&T represented to GMRI that it had such capabilities.³⁹ In order to determine that the high number of international calls placed over GMRI's lines were fraudulent, AT&T first had to verify with GMRI that those calls were not authorized. Moreover, there is evidence in the record to suggest that GMRI could have made use of several BellSouth service options to restrict its ESSX service from making outbound calls.⁴⁰ In addition, AT&T offered several enhanced NetProtect options that, had GMRI elected to subscribe to them, would have reduced its liability associated with the unauthorized calls.⁴¹ We therefore find that absent any evidence that AT&T was in a position to restrict access to and egress from GMRI's ESSX system, and because there is undisputed evidence in the record suggesting that GMRI had control over the system, GMRI is liable under AT&T's tariff for the charges associated with the fraudulent calls.

C. Alleged Violations of the Communications Act

13. GMRI contends that AT&T's effort to collect the unauthorized charges violates Sections 201, 203, and 206 of the Communications Act.⁴² Specifically, GMRI argues that: (1) AT&T breached its alleged duty to warn GMRI of the potential for telephone fraud, and its alleged duty to inform GMRI of the existence of four NetProtect

³⁷ GMRI's Reply Brief at 7.

³⁸ See *Chartways*, 8 FCC Rcd at 5604, ¶ 16. Federal courts have also recognized that in instances where the complainant creates the vehicle and mechanism through which the fraudulent calls are made, regardless of whether that mechanism is in the immediate control of complainant, the unauthorized toll calls "originated" at customer's number within the meaning of the relevant tariff provision. See *AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. 701, 710 (C.D. Ill. 1996).

³⁹ We reject GMRI's unsupported allegations that AT&T maintained control over the ESSX system merely by virtue of its past affiliation with BellSouth or Lucent Technologies Inc., the claimed manufacturer of the equipment used by BellSouth to provide the ESSX service. See Complaint at 16.

⁴⁰ See the "Secondary Optional Features" set forth in Georgia state tariffs of Southern Bell Telephone and Telegraph Company, appended to GMRI's Complaint, Exhibit J, Sections A112.8.10.5. (w), (x), and (y); Code Restriction Arrangements, Section A112.8.10.5. (m).

⁴¹ AT&T Brief at 1; Complaint at 11.

⁴² Complaint at 11; 47 U.S.C. §§ 201, 203, 206. GMRI briefly alleges that AT&T's practices are unreasonable, in violation of sections 201 and 203 of the Act, and that it is entitled to recover damages under section 206.

programs offered by AT&T to limit customer liability; and (2) AT&T was negligent either in failing to block the fraudulent calls immediately, or alternatively, in failing to promptly disconnect or recommend the disconnection of GMRI's 800 number.⁴³ We address these arguments below, rejecting GMRI's contention that AT&T violated the Communications Act.

1. Alleged Duty to Warn or Inform

14. We find that GMRI's allegation that AT&T had a duty to warn its customers of the risk of toll fraud, or to inform its customers of other services it provides to reduce liability in such circumstances, is not supported by Commission precedent. In *Chartways*, and again in *Directel, Inc. v. AT&T*,⁴⁴ the Commission held that AT&T has no duty to warn its customers of the risk associated with fraudulent telephone activity.⁴⁵ In *Chartways*, the Commission concluded that the record did not demonstrate "a failure by AT&T to comply with any existing disclosure obligation imposed by the Commission or required by Section 201(b) of the Act."⁴⁶ The Commission further held that the record in *Chartways* did not indicate that AT&T "had any basis for questioning [complainant's] choices about which security measures to implement in connection with [it's] own telecommunications equipment."⁴⁷ Similarly, in *Directel*, complainants alleged that AT&T had an affirmative duty to warn it of the risks associated with toll fraud.⁴⁸ Referencing its decision in *Chartways*, the Commission reiterated its position AT&T had no affirmative duty to warn complainant about toll fraud risks.⁴⁹ We find the same to be true in this proceeding.

15. In support of its allegation that AT&T had an affirmative duty to warn its customers of potential toll fraud, GMRI cites language in a notice of proposed rulemaking in which the Commission requested comment on whether tariff provisions that fail to recognize an obligation by the carrier to warn customers of risks are unreasonable.⁵⁰ Because the Commission never subsequently issued an order or adopted a rule on the issue, the language cited by GMRI cannot be used to support any allegations regarding a carrier's duty to warn its customers about toll fraud. As AT&T correctly notes, three years after the Commission issued the NPRM on toll fraud, it decided

⁴³ GMRI Brief at 6-12.

⁴⁴ 11 FCC Rcd 7554 (1996).

⁴⁵ *Chartways*, 8 FCC Rcd at 5604, ¶ 16; *Directel*, 11 FCC Rcd at 7562-63, ¶ 19.

⁴⁶ *Chartways*, 8 FCC Rcd at 5604, ¶ 16.

⁴⁷ *Id.*

⁴⁸ *Directel*, 11 FCC Rcd at 7558, ¶ 8.

⁴⁹ *Id.* at 7562-63, ¶ 19.

⁵⁰ *Policies and Rules Concerning Toll Fraud*, Notice of Proposed Rulemaking, 8 FCC Rcd 8618, 8630, ¶ 24 (1993).

Directel, in which it held that AT&T had no affirmative duty to warn the complainant about the risks associated with toll fraud.⁵¹ We therefore find unpersuasive GMRI's argument regarding AT&T's duty to warn customers about the risks of toll fraud.⁵²

16. GMRI further contends that AT&T had a duty to inform its customers of other services it provides to reduce any liability that may result from toll fraud.⁵³ While we agree that such information would be useful to consumers, long-standing case law contradicts GMRI's claim that AT&T had such a duty.⁵⁴ GMRI's reliance on language the Commission used in a proceeding implementing Section 254(g) of the Communications Act is inapposite.⁵⁵ We therefore find that AT&T did not have a duty to inform GMRI of the other services it provides that may have reduced GMRI's liability under these circumstances.

2. Alleged Negligence

17. GMRI also contends that AT&T's conduct after the toll fraud was discovered was unreasonable, in violation of the Communications Act.⁵⁶ Specifically, GMRI alleges that AT&T was negligent either in failing to block the fraudulent calls immediately, or alternatively, in failing to promptly disconnect or recommend the disconnection of GMRI's 800 number.⁵⁷ We reject GMRI's claims in this regard.

18. AT&T's tariff limits AT&T's liability to its customers except in instances of willful misconduct.⁵⁸ When GMRI took service under this tariff, it implicitly agreed to

⁵¹ See AT&T Brief at 14, 15; *Directel*, 11 FCC Rcd 7554 at ¶ 19.

⁵² Because we find that AT&T did not have a duty to warn GMRI of the risks associated with toll fraud, we do not address whether AT&T breached that duty.

⁵³ Complaint at 12.

⁵⁴ See *AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. at 708; see also *Marco Supply Co. v. AT&T*, 875 F.2d 434, 436 (4th Cir. 1989).

⁵⁵ *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act as Amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Second Report and Order. In Re: Western Union Tel. Co.* 27 F.C.C. 2d 515 (1971) is not on point. The issue in that proceeding was "discrimination" and the Commission's holding was based on an extra charge imposed on customers for physical delivery. GMRI makes no allegation of discrimination in this proceeding. In addition, no extra charge was directly imposed on GMRI for its lack of knowledge. To the contrary, GMRI's failure to select one of AT&T's enhanced NetProtect options automatically placed GMRI into the default NetProtect option offered by AT&T.

⁵⁶ Complaint at 2; GMRI's Brief at 10.

⁵⁷ GMRI's Brief at 10.

⁵⁸ See AT&T Tariff No. 1, Section 2.3.1. GMRI does not argue that the willful misconduct provision of the tariff is itself unlawful.

this standard of liability. Therefore, we limit our discussion to whether AT&T's conduct, with regard to the unauthorized calls, rose to the level of willful misconduct.

19. Willful misconduct has been defined as “the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or...the intentional omission of some act, with knowledge that such omission will probably result in damage or injury...”⁵⁹ We conclude that AT&T did not engage in any activity that supports a finding of willful misconduct. To the contrary, the evidence in the record indicates that immediately after AT&T discovered the high volume of calls originating from GMRI's telephone lines, it contacted GMRI to warn it of the potential of fraud.⁶⁰ GMRI admits that AT&T made several calls to GMRI, recommending preventative action.⁶¹ GMRI contends that notwithstanding its compliance with all of AT&T's recommendations, the fraudulent toll calls continued until AT&T advised GMRI to discontinue its 800 number.⁶² While AT&T's factual account differs significantly from GMRI's, even under the factual scenario provided by GMRI, we find no evidence that AT&T took any actions with the knowledge that its conduct would likely injure GMRI. To the contrary, AT&T's actions were intended to reduce the incidence of fraud. There is also no evidence to suggest that AT&T made any affirmative representations to GMRI that it would correct the problem and then failed to follow up on those representations.⁶³ In light of the record before us, we find that any acts or omissions by AT&T here do not constitute willful misconduct.⁶⁴

IV. CONCLUSION

20. For the reasons discussed above, we find AT&T's tariff lawful and find that GMRI is liable under AT&T's tariff for the disputed charges associated with long distance telephone calls made in September 1999 by third parties who obtained unauthorized access to GMRI's communications system. In addition, we conclude that AT&T's effort to collect such charges pursuant to its tariff does not violate Sections 201, 203, or 206 of the Communications Act.

⁵⁹ *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).

⁶⁰ Complaint at 7.

⁶¹ *Id.* at 8.

⁶² *Id.*

⁶³ *See MCI v. Management Solutions, Inc.*, 798 F.Supp. 50, 52 (D.Me.1992)(holding that affirmative representation to correct a problem and subsequent failure to follow up on those representations may constitute willful misconduct).

⁶⁴ We reject GMRI's unsupported allegation that the actual charges sought under AT&T's tariff for unauthorized telephone fraud are unreasonable. *See* Complaint at 16.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, the above-captioned complaint filed by GMRI on May 15, 2001 is DENIED.

22. IT IS FURTHER ORDERED that the Chief of the Telecommunications Consumers Division of the Enforcement Bureau shall forward a copy of this Memorandum Opinion and Order to the Clerk, United States District Court for the Northern District of Georgia.

FEDERAL COMMUNICATION COMMISSION

Magalie Roman Salas
Secretary