

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
AT&T Communications)
)
Apparent Liability for Forfeiture and)
Order to Show Cause)
)

ORDER

Adopted: January 13, 2004

Released: January 15, 2004

By the Commission:

I. INTRODUCTION

1. On January 4, 1995, the Commission initiated an enforcement action pursuant to section 503(b) of the Communications Act of 1934, as amended (Act),¹ against AT&T Communications (now AT&T Corporation or AT&T) by issuing a Notice of Apparent Liability for Forfeiture (*NAL*).² The *NAL* found that AT&T was apparently liable for a forfeiture in the amount of \$1,000,000 for willfully and repeatedly violating section 201(a) of the Act³ by failing to provide communications service under Contract Tariff FCC No. 383 after receiving orders for this service from three resellers, Public Service Enterprises, Inc. (PSE), Tel-Save, Inc. (Tel-Save), and General Electric Capital Communications Systems, Inc. (GECCS).⁴ The Commission also ordered AT&T to show cause why it should not be required to provide service to these resellers.⁵ On February 3, 1995, AT&T filed a response to the *NAL* stating that technical infeasibility and the resellers' own conduct prevented AT&T from provisioning the ordered

¹ 47 U.S.C. § 503(b). This section provides, in relevant part: "Any person who is determined by the Commission . . . to have . . . willfully or repeatedly failed to comply with any of the provisions of this Act or any rule, regulation, or order issued by the Commission under this Act . . . shall be liable to the United States for a forfeiture penalty." *Id.* at § 503(b)(1)(B). The section further specifies maximum allowable penalties for violations, pursuant to which the Commission found AT&T apparently liable for the maximum allowable penalty when it issued the *NAL*. *Id.* at § 503(b)(2)(B). *See also* 47 C.F.R. § 1.80.

² *AT&T Communications Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 10 FCC Rcd 1664 (1995) (*NAL*).

³ 47 U.S.C. § 201(a). Section 201(a) of the Act requires common carriers such as AT&T to furnish communication service upon reasonable request, and the Commission has interpreted this section to require common carriers to permit unlimited resale of their services. *NAL*, 10 FCC Rcd at 1664. *See also Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, RM-1997, RM-2218, Report and Order, 60 FCC 2d 261 (1976) (subsequent history omitted).

⁴ *NAL*, 10 FCC Rcd at 1664.

⁵ *Id.*

service.⁶ On December 11, 1995 PSE and GECCS filed comments in reply to AT&T's response.⁷ On January 11, 1996, AT&T filed a reply to the comments of PSE and GECCS.⁸ In this order we cancel the proposed forfeiture and dismiss the order to show cause.

II. BACKGROUND

2. On August 9, 1993, AT&T filed Contract Tariff 383 with the Commission.⁹ Contract Tariff 383 offered larger volume customers with a minimum amount of quarterly usage certain quarterly usage credits of 10 percent and 15 percent on their quarterly charges. Shortly after the tariff become effective on August 23, 1993, PSE, Tel-Save and GECCS ordered service under the tariff, and AT&T acknowledged receipt of these orders.¹⁰ After some dispute between AT&T and the three resellers about whether the two usage credits offered under the tariff applied cumulatively or alternatively, AT&T agreed to allow PES, Tel-Save, and GECCS to receive both credits cumulatively. A revised tariff allowing only alternative discounts subsequently became effective on November 16, 1993.¹¹ As of December 1994, however, AT&T had not yet provided service under Contract Tariff 383.¹² The Commission issued the *NAL* on January 4, 1995, because, among other reasons, it was unaware of any satisfactory explanation for AT&T's failure to provide the requested service for 17 months after AT&T filed Contract Tariff 383.¹³

3. After issuance of the *NAL*, GECCS, in February 1996, filed a formal complaint against AT&T for failing to provide the requested service.¹⁴ The Commission's Common Carrier Bureau dismissed the formal complaint, finding that GECCS had not met its burden to demonstrate that AT&T acted unreasonably in refusing to undertake the substantial and burdensome redesign of its network that would have been required to provide the requested service in the precise manner that GECCS desired.¹⁵ Thus the Bureau declined to rule that AT&T violated section 201 of the Act or the Commission's resale policies.¹⁶ In so ruling, the Bureau stated: "Our disposition of GECCS's complaint resolves the issues presented in the portion of the *NAL* proceeding relating to GECCS. Accordingly . . . we conclude that our ruling in this

⁶ *AT&T Communications Notice of Apparent Liability for Forfeiture and Order to Show Cause*, Response of AT&T Corp. (filed Feb. 3, 1995) (*AT&T Response*).

⁷ *AT&T Communications Notice of Apparent Liability for Forfeiture and Order to Show Cause*, Comments of GE Capital Communications Systems, Inc.; Comments of Public Services Enterprises of Pennsylvania, Inc. (filed Dec. 11, 1995) (*GECCS Comments, PSE Comments*).

⁸ *AT&T Communications Notice of Apparent Liability for Forfeiture and Order to Show Cause*, Reply of AT&T Corp. (filed Jan. 11, 1996) (*AT&T Reply*).

⁹ AT&T Corporation, Transmittal No. 528 (filed Aug. 9, 1993).

¹⁰ *NAL*, 10 FCC Rcd at 1665.

¹¹ AT&T Corporation, Transmittal No. 952 (filed Nov. 16, 1993). *See also NAL*, 10 FCC Rcd at 1665.

¹² *NAL*, 10 FCC Rcd at 1666.

¹³ *Id.* at 1666 and 1667.

¹⁴ *GE Capital Communications Services Corporation v. AT&T Corporation*, Formal Complaint (filed Feb. 23, 1996).

¹⁵ *GE Capital Communications Services Corporation v. AT&T Corporation*, File No. E-96-22, Memorandum Opinion and Order, 13 FCC Rcd 13138, 13147 (Com. Car. Bur. 1998).

¹⁶ *Id.* at 13149.

matter fully disposes of the *NAL* as it relates to AT&T's dealings with GECCS. Those portions of the *NAL* that relate to parties other than GECCS are unaffected by this ruling."¹⁷

4. With respect to the other two resellers, PSE filed comments in reply to AT&T's response to the *NAL*. There is no evidence in the record that, after doing so, PSE pursued its request for service under Contract Tariff 383. Tel-Save terminated its request for service under Contract Tariff No. 383 in June 1994, before the Commission issued the *NAL*, as part of a larger settlement agreement with AT&T.¹⁸ It filed no reply comments to AT&T's response to the *NAL*.

III. DISCUSSION

5. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁹ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²⁰ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has willfully or repeatedly violated the Act or a Commission rule.²¹

6. Based on the record compiled in this proceeding, we cannot find, based on a preponderance of the evidence, that AT&T willfully or repeatedly refused to provide service to either PSE or Tel-Save in violation of section 201(a) of the Act. The record consists of factual assertions made by AT&T in its response to the *NAL*, supported by detailed affidavits from AT&T personnel responsible for the PSE and Tel-Save accounts and copies of correspondence regarding PSE and Tel-Save orders for service under Contract Tariff 383. PSE provides contradictory allegations in its comments, and supports its allegations with copies of correspondence between PSE and AT&T regarding its order for Contract Tariff 383 service and internal memoranda. AT&T counters PSE's allegations in its reply. Because Tel-Save never replied to AT&T's response to the *NAL*, AT&T's assertions regarding its processing of Tel-Save's order for service under Contract Tariff 383 are not contradicted.

¹⁷ *Id.* at 13150, n.70. Also subsequent to issuance of the *NAL*, the Commission reclassified AT&T as nondominant in the market for interstate, domestic, interexchange telecommunications service. *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

¹⁸ *NAL*, 10 FCC Rcd at 1666, n.15.

¹⁹ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1). Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of section 312(f)(1) indicates that this definition of "willful" applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (*Southern California Broadcasting*). "Repeated" means that the act was committed or omitted more than once, or lasts more than a day. *Southern California Broadcasting*, 6 FCC Rcd at 4388.

²⁰ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²¹ *See, e.g., SBC Communications Inc., Apparent Liability for Forfeiture*, File No. EB-01-IH-0642, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

7. AT&T's response to the *NAL* states that it was unable to process orders for service under Contract Tariff 383 from PSE and Tel-Save due to the resellers' own conduct, specifically their failure to specify the locations where they wanted the service provided.²² With respect to PSE, the record indicates a factual dispute as to whether or not AT&T provided PSE the information and forms necessary to complete its order for service. AT&T claims its representative e-mailed the necessary information and forms and provides a copy of this e-mail; PSE claims it never received the e-mail.²³ The record also indicates that, on more than one occasion, PSE directed AT&T to process orders for other services before processing Contract Tariff 383 orders, which AT&T interpreted as a lack of interest in Contract Tariff 383 service.²⁴ Based on these reasons supplied by AT&T for its failure to provide the service initially requested by PSE, we cannot find, based on a preponderance of the evidence, that AT&T willfully or repeatedly refused to provide service to PSE in violation of section 201(a) of the Act.

8. With respect to Tel-Save, AT&T asserts that, after ordering Contract Tariff 383 service in only three locations where it could not possibly have met the usage requirements for receiving credits under the tariff, Tel-Save never supplied orders identifying additional locations for providing the service.²⁵ AT&T also asserts that, for several months prior to formally withdrawing its request for Contract Tariff 383 service in June 1994, Tel-Save was negotiating with AT&T to settle outstanding litigation, and withdrew its request for service when settlement was reached.²⁶ These assertions are not contradicted by Tel-Save. Based on these reasons supplied by AT&T for its failure to provide the service initially requested by Tel-Save, we cannot find, based on a preponderance of the evidence, that AT&T willfully or repeatedly refused to provide service to Tel-Save in violation of section 201(a) of the Act.

9. With respect to GECCS, we adopt the Bureau's finding that GECCS did not meet its burden to demonstrate that AT&T acted unreasonably in refusing to provide the requested service as resolving the issues presented in the *NAL* as it relates to GECCS.²⁷ Thus, we cannot find, by a preponderance of the evidence, that AT&T willfully or repeatedly refused to provide service to GECCS in violation of section 201(a) of the Act.

10. For the foregoing reasons we cancel the *NAL* and dismiss the order to show cause.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to section § 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that the Notice of Apparent Liability for Forfeiture in the

²² *AT&T Response* at 44-47, 51-54 and Exhibit 12, Affidavit of Gregory Brown at 2.

²³ *AT&T Response* at 53 and Exhibit 13, Affidavit of Mary Ann Hansen at 6 and Exhibit D; PSE Comments at 7 and Attachments 11 and 12.

²⁴ *AT&T Response* at 53-54 and Exhibit 18, Affidavit of Frank Escalante at 4, 8-10.

²⁵ *AT&T Response* at 46 and Exhibit 12, Affidavit of Gregory Brown at 3-4; Exhibit 13, Affidavit of Mary Ann Hansen at 5-6.

²⁶ *AT&T Response* at 47, Affidavit of Gregory Brown at 6-9.

²⁷ *GE Capital Communications Services Corporation v. AT&T Corporation*, File No. E-96-22, Memorandum Opinion and Order, 13 FCC Rcd 13138, 13147 and 13149 (Com. Car. Bur. 1998). See also para. 3, *supra*.

amount of \$1,000,000 issued to AT&T Corporation for willfully and repeatedly violating section 201(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 201(a), by failing to provide communication service upon the reasonable request of General Electric Capital Communications Systems, Inc. (GECCS), Public Service Enterprises, Inc. (PSE), and Tel-Save, Inc. (Tel-Save), is CANCELLED.

12. IT IS FURTHER ORDERED that the Order to Show Cause why it should not be required to furnish service to General Electric Capital Communications Systems, Inc. (GECCS), Public Service Enterprises, Inc. (PSE), and Tel-Save, Inc. (Tel-Save), issued to AT&T Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary