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

In the Matter of	)	
	)	
AudioText International, Ltd.,	)	
	)	
Complainant,	)	
	)	**File No. EB-03-MD-010**
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.		

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 2004 **Released:** February 13, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we grant in substantial part a formal complaint that AudioText International, Ltd. ("AudioText") filed against AT&T Corporation ("AT&T") under section 208 of the Communications Act of 1934, as amended ("Act").[1] AudioText filed its Complaint pursuant to an order of the United States District Court for the Eastern District of Pennsylvania referring certain issues to the Commission under the doctrine of primary jurisdiction.[2] AudioText alleges in the Complaint that AT&T violated section 203(c)(3) of the Act by engaging in conduct that was not authorized by AT&T's governing tariff.[3] Specifically, AudioText alleges that AT&T violated the terms of AT&T's tariff, and thus section 203(c)(3), by suspending service to AudioText,[4] refusing AudioText's requests for restoration of service,[5] and

[1] 47 U.S.C. § 208. *See* Formal Complaint, File No. EB-03-MD-010 (filed May 13, 2003) ("Complaint").

[2] *See* Appendix to Complaint ("Complaint App.") at 565-66; 587; Joint Statement of the Parties, File No. EB-03-MD-010 (filed July 23, 2003) ("Joint Statement") at 34-35, ¶¶ 181-93.

[3] 47 U.S.C. § 203(c)(3).

[4] Complaint at 43-48, ¶¶ 269-303.

[5] Complaint at 48-49, ¶¶ 304-312. AudioText also alleges that AT&T's refusal to grant AudioText's reasonable request for restoration of service violated section 201(a) of the Act, 47 U.S.C. § 201(a). Complaint at 49-50, ¶¶ 313-320. For the reasons discussed in Part III.B below, we conclude that we need not address AudioText's section 201(a) claim in this Order.

demanding that AudioText pay AT&T a security deposit[6] and current charges before they were due.[7] As explained below, we conclude that AT&T violated section 203(c)(3) by suspending and refusing to restore AudioText's service, and by making demands for a security deposit and for payment of current charges in contravention of the governing tariff.

II. FACTUAL BACKGROUND

A. The Parties

2. AudioText is a Pennsylvania corporation, with its principal place of business in Narberth, Pennsylvania.[8] At times relevant to this proceeding, AudioText bought and sold international long-distance telephone minutes to and from different carriers and different countries.[9]

3. AT&T, a New York corporation, is a national and international provider of long distance telephone services, as well as a provider of toll-free 800 services, Internet services, and transport for 900 services.[10]

B. Contract Tariff 14363

4. The dispute before us involves a long distance service agreement that AudioText and AT&T entered into on or about August 17, 2000, which was filed as Contract Tariff No. 14363 ("CT 14363").[11] Prior to entering into that agreement, the parties had operated under an earlier long distance service agreement, pursuant to which AudioText received service from AT&T beginning in February 2000.[12] During the first several months of 2000, AudioText had disputed certain charges that AT&T had billed AudioText, and AT&T had corrected some billing errors in response to AudioText's inquiries.[13] Although some billing disputes remained at the time AT&T and AudioText entered into CT 14363 in August 2000,[14] AT&T's credit department approved the provision of service to AudioText under CT 14363.[15]

5. Under CT 14363, AudioText agreed to purchase a minimum volume of international minutes from AT&T over a two-year term in exchange for, among other things, a

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6 Complaint at 50-53, ¶¶ 321-46.

7 Complaint at 53-54, ¶¶ 347-59.

8 Joint Statement at 2, ¶ 1.

9 Joint Statement at 2, ¶ 6.

10 Joint Statement at 3, ¶¶ 10-11.

11 AT&T and AudioText entered into an agreement, known as the Master Agreement, on or about August 17, 2000. AT&T implemented the terms of the Master Agreement by filing with the Commission Contract Tariff No. 14363 ("CT 14363"), which became effective on August 25, 2000. Joint Statement at 16-17, ¶¶ 96-100. The Master Agreement and CT 14363 are hereafter collectively referred to as "CT 14363."

12 *See* Joint Statement at 21, ¶ 128.

13 *See* Joint Statement at 7-16, ¶¶ 42-95.

14 *See* Joint Statement at 16, ¶¶ 94-96.

15 Joint Statement at 18, ¶ 107.

discounted per-minute rate to the United Kingdom, where the bulk of AudioText's telephone calls terminated.[16] With the discounts, the rate to the U.K. for dedicated access was $.058 per minute.[17] CT 14363 provides that, except as otherwise provided in that contract tariff, the regulations set forth in AT&T Tariff FCC Nos. 1, 2, and 14 apply to service under CT 14363.[18] AudioText began receiving service under CT 14363 on September 7, 2000.[19]

C. Audiotext's Use Of AT&T's Service To Autodial PNS Numbers In The U.K.

6. The dispute in this case concerns AudioText's use of the service it purchased from AT&T under CT 14363 to generate calls, by means of autodialers, to numbers in the U.K. that began with the prefix "070." The 070 numbers (hereafter "PNS numbers")[20] were associated with a premium service in the U.K. known as Personal Numbering Service ("PNS"), that enabled end-users to be called, using a single telephone number, at virtually any telephone number including mobile numbers.[21] The PNS numbers allowed an end-user who subscribed to PNS to have his/her calls forwarded from their place of initial receipt to any phone – mobile or land line – so that the calls were redirected to 'follow' the subscriber traveling from place to place.[22] According to AT&T, the charge for calling a PNS number was higher than the charge for a normal call.[23]

7. AudioText entered into agreements with three companies based in the U.K. ("U.K. Companies") to originate calls from the United States that were routed over international telecommunications lines and terminated to PNS numbers in the U.K.[24] AudioText programmed computer software to dial automatically the U.K. PNS numbers, and autodialed calls to as many as 5,000 U.K. PNS numbers, based on monthly volumes requested by the U.K. Companies.[25] Many of the autodialed calls were to PNS numbers that were not associated with individual users

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16 AudioText agreed to a Voice Minimum Annual Revenue Commitment ("VMARC") of $240,000 in gross international usage for the first year, and $480,000 in gross international usage for the second year of its two-year term, before the application of the discounts. Joint Statement at 16, ¶ 96.

17 Joint Statement at 17, ¶ 98.

18 Joint Statement at 30, ¶ 167; Exhibits To AT&T Answer Of AT&T Corp., File No. EB-03-MD-010 (filed June 16, 2003) ("AT&T Ex." 1 through 87) at AT&T Ex. 18.

19 Joint Statement at 17, ¶ 100.

20 The 070 numbers were allocated by the U.K. regulatory authority, Oftel (Office of Telecommunications). Joint Statement at 22-23, ¶¶ 131-32. *See* AT&T Ex. 13. Oftel has since been replaced by a new U.K. regulatory authority known as Ofcom (Office of Communications).

21 *See* AT&T Ex. 13 at 2.

22 AT&T Ex. 40, Panagia Decl., at 2, ¶ 4. *See* AT&T Ex. 13 at 2, 9-10. End-users in the U.K. received PNS from entities known as "Personal Numbering Service Providers" (PNSPs), which were not necessarily network operators. AT&T Ex. 13 at 2, 10. PSNPs allocated PNS numbers to individual end-users. AT&T Ex. 13 at 2.

23 Supplemental AT&T Answer of AT&T Corporation, File No. EB-03-MD-010 (filed June 26, 2003) ("AT&T Answer") at 4. AT&T asserts that the charge was higher for the PNS calls in part because PNS service was expected to involve a mix of landline and mobile communications. *Id*.

24 Joint Statement at 2, ¶ 2; 24, ¶ 139.

25 Joint Statement at 24, ¶ 139.

but were, instead, directed to prerecorded messages.[26] The U.K. Companies, who received revenues from the terminated PNS calls, paid AudioText an average rate of approximately $0.14 per minute for the calls that AudioText originated that terminated to one of the U.K. Companies' PNS numbers.[27] Because AudioText had negotiated a discounted rate for international calls under CT 14363, AudioText was required to pay AT&T only $.058 per minute for the calls that AudioText originated to the PNS numbers in the U.K. AT&T, however, was required to pay a high access charge of approximately $.23 per minute for terminating calls to the PNS numbers.[28] Thus, under this arrangement, AudioText made a profit on each minute of traffic that it originated to the PNS numbers over AT&T's service. AT&T, on the other hand, suffered a loss on each minute of such traffic because the per minute rate that AT&T was required to pay to terminate the PNS traffic in the U.K. exceeded the per minute rate that AT&T agreed to charge AudioText for this traffic.

D. AT&T's Suspension Of Audiotext's Service On September 15, 2000

8. Eight days after AudioText began receiving service under CT 14363, AT&T suspended the service on September 15, 2000, and thereafter refused AudioText's requests to reinstate the service. The record evidence regarding this suspension of service is summarized below.

9. On September 14, 2000, Adam Panagia, a District Manager in AT&T's Global Fraud group, received information from another AT&T employee about a pattern of calls to PNS numbers in the U.K. that appeared to be similar to the traffic associated with a so-called "scam" in south Florida that Panagia had first learned about in July 2000.[29] The Florida traffic involved an individual who ordered high bandwidth services, such as T1 lines, from U.S.-based telecommunications carriers, and then used autodialers to place a high volume of calls over the T1 circuits to PNS number ranges in the U.K.[30] Upon investigating the Florida traffic, Panagia learned that the PNS range had a very high settlement fee for terminating calls; that persons in the U.K. would partner with persons in the U.S. who would negotiate with U.S. carriers, such as AT&T, to obtain low rates for traffic to the U.K.; and that the U.S. persons would use autodialers or other artificial stimulation to generate traffic to the initial point of receipt served by the PNS range. The U.K. and U.S. persons then shared the revenue generated from the traffic to the PNS range.[31]

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[26] Joint Statement at 24, ¶ 139. An AT&T manager who personally called some of the PNS numbers to which AudioText was sending traffic reported that he heard two prerecorded messages that, respectively, discussed adult entertainment and advertised watches for sale. Both messages lasted no more than a few minutes, and then "looped" back and repeated the message. AT&T Ex. 40, Panagia Decl., at 3-4, ¶ 8.

[27] Joint Statement at 2, ¶ 3; 24, ¶ 139. It is not clear from the record whether the U.K. Companies who agreed to pay AudioText for originating calls to the PNS numbers collected revenues for the termination of calls to the PNS numbers directly, or through a sharing revenue arrangement with another U.K. entity, who collected revenues for the termination of these calls.

[28] AT&T Ex. 24; Joint Statement at 25-26, ¶ 148-49.

[29] AT&T Ex. 40, Panagia Decl., at 2-3, ¶¶ 3-7.

[30] AT&T Ex. 40, Panagia Decl., at 2, ¶ 3.

[31] AT&T Ex. 40, Panagia Decl., at 2-3, ¶ 5.

10. On September 14, 2000, AT&T Labs ran an inquiry in AT&T's call database, which revealed that AudioText had generated the second highest volume of traffic to U.K. PNS numbers since May 1, 2000.[32] Panagia then reviewed AudioText's call records on September 15, 2000, and detected the following patterns: (1) AudioText's international traffic was predominately to the U.K. PNS numbers; (2) the volume was estimated to be in excess of seven million minutes from the time AudioText began receiving service in February 2000; and (3) there were several very long calls, over 100 minutes, to the U.K. PNS numbers, and many short calls.[33] Panagia conveyed this information to AT&T in-house counsel Andrew Schlafly.[34]

11. Panagia's group also ran a credit check on AudioText and conveyed the results to Schlafly.[35] Schlafly received an e-mail message from an employee in Mr. Panagia's group on September 15, 2000 indicating that Dun & Bradstreet considered AudioText "a Low Credit Risk."[36] The message also advised Schlafly that AudioText had a current bill that was not yet due, and past due obligation of $22,946.88.[37]

12. On Friday, September 15, 2000, Schlafly decided to suspend AudioText's service. Schlafly made the decision before 4:00 p.m. that day, after speaking with Panagia.[38] The decision to suspend was based in part on the volume of the traffic AudioText had generated since February 2000 that had terminated to U.K. PNS numbers.[39]

13. At about 4:30 p.m. on September 15, 2000, Panagia telephoned AudioText's president, Hausman, and asked if Hausman was aware that a substantial volume of AudioText's traffic was going to the U.K. Hausman acknowledged awareness of that fact.[40] Panagia asked Hausman if he realized that the traffic was predominantly going to U.K. PNS or cellular numbers. Hausman acknowledged that he did.[41] Panagia and Hausman discussed whether the traffic was fraudulent, and Hausman said that it was not.[42] AT&T suspended AudioText's service at about 4:45 PM on September 15, 2000.[43]

14. Schlafly sent a certified letter to Hausman, dated September 15, 2000, stating that AT&T was suspending AudioText's service immediately because:

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32 AT&T Ex. 40, Panagia Decl., at 3, ¶ 7; Joint Statement at 23, ¶ 134; AT&T Ex. 22.

33 AT&T Ex. 40, Panagia Decl., at 3-4, ¶¶ 8-9; Joint Statement at 23, ¶ 133.

34 AT&T Ex. 40, Panagia Decl., at 3-4, ¶ 9; Joint Statement at 24, ¶ 141.

35 AT&T Ex. 40, Panagia Decl., at 4-5, ¶ 10; Complaint App. at 453.

36 Complaint App. at 453; Joint Statement at 30, ¶ 166.

37 Complaint App. at 453.

38 Joint Statement at 27, ¶ 153; Complaint App. at 444.

39 Joint Statement at 24, ¶ 140.

40 AT&T Ex. 40, ¶ 12; Joint Statement at 25, ¶ 142.

41 Joint Statement at 25, ¶ 143; AT&T Ex. 40, ¶ 12.

42 Joint Statement at 25, ¶ 144; AT&T Ex. 40, ¶ 12.

43 Joint Statement at 24, ¶¶ 137-38; Complaint App. at 273.

> AT&T has determined that Audiotext . . . is generating an extra-ordinary volume of calls from its circuits terminating on [PNS] numbers in the [U.K.]. . . ..
>
> Audiotext . . . currently has substantial unpaid obligations to AT&T, some of which is [sic] past due. Moreover, this traffic appears to us as though it may include fraudulent use of telecommunication services.[44]

15. Following the suspension of service, the parties exchanged a series of letters over a three-week period.[45] In letters to AT&T, AudioText's president, Hausman, and its outside counsel, Stephen Burns, denied that AudioText was engaged in any fraud, asserted that AT&T's actions were without justification, and demanded that AT&T restore AudioText's service.[46] AT&T sent letters to AudioText advising AudioText that its account was past due, and demanding that AudioText provide a security deposit and pay its current balance "in full."[47] In response, AudioText denied that it had any unpaid obligations to AT&T, and accused AT&T of failing promptly to issue credits to AudioText for past overcharges.[48] AudioText never provided a security deposit to AT&T, and AT&T never restored AudioText's suspended service.[49]

E. The District Court's Referral

16. On October 4, 2000, AudioText filed a complaint against AT&T in the United States District Court for the Eastern District of Pennsylvania ("District Court") charging AT&T with breach of contract and of the covenant of good faith and fair dealing.[50] AT&T answered the complaint and asserted the affirmative defense that its services to AudioText were governed by tariffs on file with the Commission and that its actions with respect to AudioText were authorized and lawful under those filed tariffs.[51] AT&T alleged that AudioText's claims were barred by its tariffs, the Act, and the filed tariff doctrine.[52] AT&T asserted additional affirmative

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44 Joint Statement at 27, ¶ 153; Exhibits To Supplemental AT&T Answer Of AT&T Corp., File No. EB-03-MD-010 (filed June 26, 2003) ("AT&T Ex." 88 through 94) 88, Schlafly Decl., at 2, ¶ 3; AT&T Ex. 47, at 34-37.

45 *See* Joint Statement at 26-30, ¶¶ 150-65.

46 Joint Statement at 27, ¶ 154; 27-28, ¶ 157; Complaint App. at 312, 317-19.

47 Joint Statement at 27, ¶ 155; 29-30, ¶¶ 162, 164-65; Complaint App. at 309, 320, 322, 327, 335-38, 343-49, 353. AT&T provided AudioText with conflicting information as to the amount by which its account allegedly was past due. On September 18, 2000, AT&T advised AudioText that it had a past due balance of $24,077.13. Joint Statement at 27, ¶ 155; Complaint App. at 309. On September 20 and/or September 25, 2000, AT&T advised AudioText that its past due balance totaled $41,202.13. Joint Statement at 29-30, ¶ 164; Complaint App. at 320, 321. These contradictory communications with AudioText are curious in view of AT&T's admission that its records showed on September 20, 2000 that AudioText's account had a past due amount of either $22,946.88 or $24,077.13. Joint Statement at 29, ¶ 161.

48 Joint Statement at 27-28, ¶ 157; Complaint App. at 312, 317-19, 323-25, 329, 332-33, 339-42, 351, 362-63.

49 *See* Complaint at 49, ¶ 311; 50, ¶ 320; AT&T Answer at 127, ¶ 390; Complaint App. at 362-63.

50 Joint Statement at 34, ¶ 181.

51 Joint Statement at 34, ¶ 182.

52 Joint Statement at 34, ¶ 182.

defenses, and counterclaimed for unpaid service bills.[53]

17. In December 2001, AT&T filed a motion in the District Court to dismiss AudioText's complaint or, in the alternative, to dismiss it without prejudice to its submission to the Commission for disposition pursuant to the primary jurisdiction doctrine.[54] The District Court ordered that AudioText may submit its claims to the Commission, and stayed all further proceedings in the case pending completion of administrative proceedings before the Commission.[55] In August 2002, AudioText filed a second complaint with the District Court charging that AT&T violated section 201 of the Act and its tariff by terminating AudioText's services and blocking its traffic.[56] In November 2002, the District Court consolidated AudioText's two suits and stayed both pending referral to the Commission for disposition.[57]

18. AudioText filed the instant Complaint with the Commission on May 13, 2003.[58] The Complaint originally contained twelve separate counts; however, following the initial status conference in this matter, AudioText withdrew Counts I, II, III, and XII from the Complaint.[59] In the remaining counts, AudioText alleged that AT&T violated the terms of the governing AT&T tariff and, thus, section 203(c)(3) of the Act, by suspending AudioText's service without authorization (Counts IV and V);[60] refusing AudioText's requests for reinstatement of service (Counts VI);[61] making an unauthorized demand for a security deposit (Counts VIII, IX, and X);[62] and demanding payment of current charges that were not yet due (Count XI).[63] AT&T filed an Answer denying all of the allegations in the Complaint, and asserting affirmative defenses.[64]

III. DISCUSSION

A. AT&T's Suspension Of Audiotext's Service Was Not Authorized By The Tariff And Thus Violated Section 203(c)(3) Of The Act.

19. In Counts IV and V of the Complaint, AudioText alleges that AT&T's suspension

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53 Joint Statement at 34, ¶ 182-83.

54 Joint Statement at 34, ¶ 186.

55 Joint Statement at 35, ¶ 191.

56 Joint Statement at 35, ¶ 192.

57 Joint Statement at 35, ¶ 193.

58 Formal Complaint, File No. EB-03-MD-010 (filed May 13, 2003).

59 Letter from Andrew S. Kasman, Counsel for AudioText, to Christopher N. Olsen and Lisa J. Saks, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-03-MD-010 (filed Aug. 15, 2003) (stating that "Audiotext [sic] hereby withdraws Counts I, II, III and XII from its Complaint in this matter").

60 Complaint at 43-48, ¶¶ 269-303.

61 Complaint at 48-49, ¶¶ 304-312. AudioText further alleges in Count VII that AT&T's refusal to grant AudioText's reasonable request for restoration of service violated section 201(a) of the Act. Complaint at 49-50, ¶¶ 313-20.

62 Complaint at 50-53, ¶¶ 321-46.

63 Complaint at 53-54, ¶¶ 347-59.

64 *See* AT&T Answer.

of AudioText's service on September 15, 2000 violated section 203(c)(3) of the Act.[65] Section 203(c)(3) provides, in pertinent part, that no carrier shall "employ or enforce any classifications, regulations, or practices affecting [its] charges except as specified in [its filed tariff]."[66] AudioText claims that AT&T's suspension of service was not authorized by the terms of the applicable tariff, and thus constituted a violation of section 203(c)(3).[67] AT&T disputes this claim, asserting that its suspension of AudioText's service was authorized by its tariff.[68]

20. Both parties rely on sections 2.9.6 and 2.2.4.B. of AT&T Tariff No. 1 to support their contentions as to the lawfulness of the suspension of service under section 203(c)(3).[69] Section 2.9.6., which is entitled "Fraudulent Use Of LDMTS [long distance message telephone service] To Avoid Payment Of Tariffed Charges," provides that "[i]n order to control fraud in any instance in which the Company has reason to believe that a Customer is using LDMTS in violation of Section 2.2.4.B., the Company may, after complying with the requirements of this sub-section, immediately and upon written notice to the Customer . . . restrict, suspend, or discontinue providing the service."[70]

21. Section 2.2.4., entitled "Fraudulent Use," states that the "fraudulent use of, or the intended or attempted fraudulent use of LDMTS is prohibited,"[71] and then lists "activities that constitute fraudulent use" in separate subsections.[72] Section 2.2.4.B. prohibits "[u]sing or attempting to use" AT&T's long distance services "*with the intent to avoid the payment*, either in whole or in part, of any of [AT&T's] tariffed charges"[73] by (1) "[r]earranging, tampering with, or making connections" not authorized by Tariff 1 to "any service components used to furnish" long-distance service;[74] or (2) "[u]sing fraudulent means or devices, tricks, schemes, false or invalid numbers, false credit devices, or electronic devices, whether directed at the Company or others."[75]

1. AT&T Had No Basis To Conclude That Audiotext Was Using The Service In Violation Of Section 2.2.4.B. Of The Tariff.

22. By its plain terms, section 2.9.6. grants AT&T authority to suspend service *only* in instances where AT&T "has reason to believe that a customer is using LDMTS in violation of

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65 Complaint at 43-48, ¶¶ 269-303.

66 47 U.S.C. § 203(c)(3).

67 Complaint at 46, ¶ 286;

68 *See* AT&T Answer at 126, ¶ 389.

69 *See* Complaint at 44-48, ¶¶ 274-86; 46-48, ¶¶ 288-303; AT&T Answer at 126, ¶ 389; AT&T Answer, Legal Analysis at 32-37, ¶¶ 96-108.

70 AT&T Ex. 58 § 2.9.6.

71 AT&T Ex. 51 § 2.2.4.

72 AT&T Ex. 51 § 2.2.4.

73 AT&T Ex. 51 § 2.2.4.B. (emphasis added).

74 AT&T Ex. 51 § 2.2.4.B.1.

75 AT&T Ex. 51 § 2.2.4.B.2.

Section 2.2.4.B. . . .."[76] In determining the lawfulness of AT&T's suspension of AudioText's service in September 2000, we must therefore examine whether AT&T had reason to believe that AudioText was using AT&T's service in violation of section 2.2.4.B. at the time it suspended service.

23. AT&T contends that it had reason to believe that AudioText was violating section 2.2.4.B., and was therefore authorized to suspend service under section 2.9.6., because AudioText's alleged increase in volume of usage and peculiar calling pattern suggested that AudioText, or one of its customers, "was using a fraudulent trick or device in violation of the tariff."[77] For the following reasons, we disagree.

24. Even if AudioText's use of autodialers to call PNS numbers could be considered a "fraudulent trick or device," AT&T has not established that it had reason to believe that AudioText was "using or attempting to use" AT&T's long distance services "*with the intent to avoid the payment . . . of any of [AT&T's] tariffed charges*," which is the only activity specifically prohibited by section 2.2.4.B.[78] To the contrary, the evidence shows that AT&T believed that AudioText was using the autodialers as part of a scheme under which AudioText would profit from the difference between the tariffed charges it would pay AT&T for service under CT 14363, and its portion of the call termination fees that AudioText's partners in the U.K. collected and agreed to share with AudioText. The record evidence shows that AT&T understood that, under this arrangement, AudioText had every incentive to continue paying AT&T for its tariffed services, because that was how AudioText would continue to profit from this arbitrage.

25. AT&T manager Adam Panagia testified that, after he learned of an emerging "scam" involving the PNS service in the U.K. in July of 2000,[79] he investigated further and found that

> the PNS range had a very high settlement fee (i.e., access charge for terminating calls. . .) and that operators in the U.K. would partner with people in the U.S. who would approach U.S. carriers, like AT&T, MCI WorldCom, and Sprint, and negotiate attractive (low) rates for traffic to the U.K. and who then would use autodialers or other false stimulation to create excessive traffic to the initial point of receipt served by the PNS range. The U.K. and U.S. individuals then share the revenue generated from the excessive traffic to the PNS range.[80]

When Panagia later notified an industry task force about this practice in November 2000, he described it as "arbitrage" to the U.K. and explained: "The originator may be *paying 5 cents a minute to the carrier* and the PNS operator may be receiving 18 cents a minute resulting in the

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[76] AT&T Ex. 58; Complaint App. at 11.

[77] AT&T Answer, Legal Analysis at 32, ¶ 98; 36, ¶ 105. *See also* AT&T Answer at 126-27, ¶ 389. AT&T does not claim it had reason to believe that AudioText was violating section 2.2.4.B.1 by "[r]earranging, tampering with, or making connections" not authorized by Tariff No. 1.

[78] AT&T Ex. 51 § 2.2.4.B. (emphasis added).

[79] AT&T Ex. 40, Panagia Decl., at 1, ¶ 1; 2, ¶ 3.

[80] AT&T Ex. 40, Panagia Decl., at 2-3, ¶ 5.

carrier losing 13 cents a minute due to the higher settlement charges."[81]

26. The record does not establish that AT&T was concerned, at the time it terminated AudioText's service in September 2000, that the U.S. originators of the traffic to U.K. PNS numbers, such as AudioText, intended to avoid payment of tariffed charges.[82] Indeed, an e-mail communication from AT&T manager Bill Robb,[83] sent on the day AT&T suspended AudioText's service, shows that AT&T understood that the "upside" for AudioText in the PNS autodialing "scam" was the profit that AudioText stood to make from the difference between the rate AudioText was paying AT&T for long distance service and the portion of the 23 cent settlement fee that the U.K.-based companies returned to AudioText.[84]

27. Although AT&T may have had legitimate concerns about AudioText's behavior, AT&T was still obligated to comply with its tariff. The relevant provisions of the Tariff provide for termination of a customer's service only when AT&T has reason to believe that the customer is attempting to avoid the payment of tariffed charges, not when AT&T is concerned generally about fraud or arbitrage.[85] Because AT&T did not have a reason to believe that AudioText

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[81] AT&T Ex. No. 38 (emphasis added); AT&T Ex. 40, Panagia Decl., at 6, ¶ 17. *See also* AT&T Ex. 22 (internal AT&T e-mail communication dated September 14, 2000, from an employee of AT&T Labs reporting on investigation of the top ten originating numbers that generated the highest volume of traffic to U.K. PNS numbers and describing the situation as "not really a fraud issue - - - rather an arbitrage/opportunistic issue"); Joint Statement at 23-24, ¶ 135.

[82] Indeed, on the day he decided to suspend AudioText's service, AT&T in-house lawyer, Schlafly, received an e-mail communication from an employee indicating that Dun & Bradstreet considered AudioText to be a "Low Credit Risk." Complaint App. at 453; Joint Statement at 30, ¶ 166.

In a declaration submitted in this proceeding, Schlafly claims that, at the time AT&T suspended AudioText's service and demanded a security deposit, he was concerned about the risk of "closely held companies" such as AudioText "running up a large bill and then switching carriers," leaving AT&T "with a substantial uncollectible." AT&T Ex. 88, Schlafly Decl., at ¶ 14. Schlafly asserts that this "non-payment risk" existed regardless of whether AudioText's traffic was legitimate, *id.* at ¶ 18, or whether AudioText itself, or one of its downstream customers, was engaged in "stimulating false traffic over the network through the use of autodialers." *Id.* at ¶ 19. This after-the-fact explanation is not corroborated by the contemporaneous record and, in any event, does not support the conclusion that AT&T had reason to believe that its "Customer [AudioText] [was] using LDMTS in violation of Section 2.2.4.B." of the tariff, that is, "*with the intent* to avoid the payment" of "[AT&T's] tariffed charges" at the time AT&T suspended AudioText's service. AT&T Ex. 58 § 2.9.6; AT&T Ex. 51 § 2.2.4.B. (emphasis added). The scenarios that Schlafly describes, where a closely held corporate customer of AT&T runs up a large bill through legitimate activity, or through the "false stimulation" of traffic by a downstream customer, do not involve situations in which the AT&T customer uses AT&T's service "*with the intent* to avoid the payment" of AT&T's tariffed charges in violation of section 2.2.4.B. of the tariff.

[83] Joint Statement at 25, ¶ 146.

[84] AT&T Ex. 24; Joint Statement at 25-26, ¶ 148-49. Robb observed in the same e-mail that "[t]he hitch is, AT&T's tariffs do not now, but soon will, include language precluding subscribers from using auto-dialers in this fashion." *Id.*

[85] Of, course, AT&T could have amended Tariff No. 1 to broaden its anti-fraud provisions in July 2000, when AT&T contends it first learned of "an emerging scam involving the use of autodialers to place a high volume of calls . . . to a range of PNS numbers in the U.K." AT&T Answer, Legal Analysis at 35, ¶ 104; AT&T Ex. 40, Panagia Decl., at 2 ¶ 3. Instead, AT&T waited until October 2000 to amend Tariff No. 1 to include an express ban on the artificial stimulation of traffic. *See* AT&T Ex. 60 § 2.2.3.D; Joint Statement at 33, ¶ 178. We express no view on the legal effect of that amendment, or on the lawfulness of AT&T's conduct after the amendment, as those issues are not before us.

intended to avoid paying AT&T's tariffed charges, AT&T's termination of AudioText's service was not authorized by the tariff and, therefore, violated section 203(c)(3).

2. AT&T Cannot Justify Its Suspension Of Service On The Ground That AudioText Was Allegedly Placing An "Extraordinarily High Volume Of Calls."

28. We also reject AT&T's contention that its suspension of AudioText's service in September 2000 was authorized by subsection 2.9.6.A. because AudioText allegedly had placed an "extraordinarily high volume of calls" at the time of the suspension.[86] Section 2.9.6.A. of Tariff No. 1 sets forth requirements that must be met in order for AT&T to suspend service "in instances where AT&T "has reason to believe that a Customer is using LDMTS in violation of Section 2.2.4.B."[87] Section 2.9.6.A. provides that AT&T may restrict or suspend service if it determines that a customer is placing an "extraordinarily high volume of calls" and AT&T fails to receive "satisfactory assurances" from the customer that the customer "is not using the service in violation of Section 2.2.4.B."[88] An "extraordinarily high volume of calls" is defined as "the volume of calls in any 24-hour period which, if continued at that rate for a period of one month, would exceed at least three times the Customer's estimated monthly usage charges for that service (as determined by the lower of the Customer's designated monthly minimum usage commitment for that service, if any, or the immediately preceding month's usage charges)."[89]

29. AT&T's arguments based on subsection 2.9.6.A. fail for two independent reasons. First, Section 2.9.6.A. applies only in instances where AT&T has reason to believe that a customer is using long distance service *to avoid payment of tariffed charges* in violation of Section 2.2.4.B. This conclusion is evident from the title, "Fraudulent Use Of LDMTS *To Avoid Payment Of Tariffed Charges*," that appears over section 2.9.6. and all of its subsections,[90] and from the text of Section 2.9.6.A, which allows AT&T to suspend service only where it fails to receive "satisfactory assurances" that the customer "is not using the service *in violation of Section 2.2.4.B*."[91] Section 2.2.4.B., as we have noted, applies only to actions taken "with the intent to avoid the payment, either in whole or in part, of any of [AT&T's] tariffed charges."[92] Because, as shown above, AT&T had no reason to believe that AudioText was engaged in activities that constituted fraudulent use of service under section 2.2.4.B., it lacked authority to initiate the suspension of service procedures of section 2.9.6.A., regardless of the volume of calls.

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86 AT&T Answer, Legal Analysis at 33-34, ¶¶ 99-102. *See also* AT&T Answer at 126-27, ¶ 389.

87 AT&T Ex. 58 § 2.9.6.

88 AT&T Ex. 58 § 2.9.6.A.; Joint Statement at 31, ¶ 171.

89 AT&T Ex. 58 § 2.9.6.A.; Joint Statement at 32, ¶ 172. Section 2.9.6.A. further provides that the customer's service "will be reinstated" if AT&T "receives satisfactory assurances within ten days that the customer was not using the service in violation of § 2.2.4.B." or if AT&T receives "an appropriate deposit pursuant to Section 2.5.6." AT&T Ex. 58 § 2.9.6.A.; Joint Statement at 32, ¶ 173.

90 AT&T Ex. 58 § 2.9.6. (emphasis added).

91 AT&T Ex. 58 § 2.9.6.A.; Joint Statement at 31, ¶ 171.

92 AT&T Ex. 51 § 2.2.4.B.

30. Moreover, an examination of the evidence concerning call volume provides us with a second, independent basis to conclude that AT&T's suspension of AudioText's service was not authorized by section 2.9.6.A. There is no evidence in the record that AT&T ever determined that AudioText had placed "an extraordinarily high volume of calls" under section 2.9.6.A. at the time AT&T suspended AudioText's service. AT&T has failed to show that, prior to suspending service, it examined calling data and found that AudioText had placed "an extraordinarily high volume of calls" under section 2.9.6.A., *i.e.*, that "the volume of calls [AudioText had placed] in any 24-hour period . . . if continued at that rate for a period of one month, would exceed at least three times [AudioText]'s estimated monthly usage charges for that service (as determined by the lower of [AudioText]'s designated monthly minimum usage commitment for that service, if any, or the immediately preceding month's usage charges)."[93] Although AT&T proffered sworn declarations from two witnesses who testified that they considered call records for AudioText at the time AT&T suspended AudioText's service,[94] neither declarant provides evidence that AT&T determined, at the time it decided to suspend service, that AudioText's call volume in any 24-hour period met the test for "an extraordinarily high volume of calls" set forth in section 2.9.6.A.

31. The undisputed evidence concerning AudioText's calling volume indicates that AT&T could not have satisfied the "extraordinarily high volume" test set out in section 2.9.6.A., even if it had tried to do so. In determining the calling volume that would have satisfied that test, we must measure AudioText's calling volume in a 24-hour period against the "immediately preceding month's usage charges," because there was no minimum monthly usage commitment set forth in CT 14363.[95] The parties agree that, in the billing period immediately preceding September 15, 2000, which ran from August 7 to September 6, 2000, AT&T charged AudioText $118,760.92 for 1,679,991.616 minutes of use.[96] Accordingly, to place an "extraordinarily high volume of calls" within the meaning of section 2.9.6.A., AudioText would have had to incur charges totaling $11,876.09 ($3 \times \$118,760.92 \div 30$) and/or place at least 167,999.161 billable minutes during one 24-hour period ($3 \times 1,679,991.616 \div 30$). There is no evidence that such usage occurred. In the nine days between September 7 and September 15, 2000, AudioText

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93 AT&T Ex. 58 § 2.9.6.A.

94 AT&T Ex. 40, Panagia Decl., at 3, ¶¶ 7-9; AT&T Ex. 41, Schlafly Decl., at 2, ¶ 5; AT&T Ex. 88, Schlafly Decl., at 2, ¶ 5. Although Panagia testified that he reviewed AudioText's calling records on September 15, 2000, and determined that AudioText's calling volume, from the time it began receiving service in February 2000, exceeded 7 million minutes, there is no indication that Panagia made any attempt to measure calling volume during a 24-hour period in accordance with the test for "an extraordinarily high volume of calls" set forth in 2.9.6.A. AT&T Ex. 40, Panagia Decl., at 3, ¶ 8. *See also* AT&T Ex. 41, Schlafly Decl., at 2, ¶ 5 (making similar reference to 7 million minute figure); Joint Statement at 21-22, ¶¶ 128-29 (stipulation regarding monthly call volume billed to AudioText).

95 *See* Complaint App. at 250. We reject AT&T's contention that AudioText was subject to a "monthly minimum usage commitment" of $20,000 under CT 14363. AT&T Answer, Legal Analysis at 33-34, ¶¶ 100-02, and n.30. Section 3.A. of CT 14363 plainly states that AudioText was subject to an *annual* revenue commitment, called a "Voice Minimum Annual Revenue Commitment-International" or "VMARC-I" of $240,000 in the first year of the contract, and $480,000 in the second year of the contract. Complaint App. at 250. *See* Joint Statement at 16, ¶ 96. AT&T's attempt to convert this annual $240,000 revenue commitment into a $20,000 monthly commitment is unsupported by the language of CT 14363.

96 Joint Statement at 21-22, ¶¶ 128-29.

incurred 428,139.850 minutes of traffic for a usage charge of $39,567.38.[97] If all days in that period saw an equal amount of traffic, AudioText incurred charges during that period at an average rate of $4,396.38 per day, for an average of 47,571.094 minutes of use per day.[98] This is substantially less than the $11,876.09 and 167,999.161 minute threshold that AudioText would have had to meet under the "extraordinarily high volume" test in section 2.9.6.A.[99]

32. In sum, because AT&T did not determine that AudioText had placed an "extraordinarily high volume of calls," it had no right under section 2.9.6.A. to contact AudioText and demand assurances that AudioText was "not using the service in violation of Section 2.2.4.B.,"[100] and then suspend service when it allegedly failed to receive such assurances. By proceeding to suspend the service anyway, AT&T violated section 2.9.6. of Tariff No. 1 and thus section 203(c)(3) of the Act.

3. AT&T's Arguments Based On Sections 2.9.6.B. And 2.9.6.D. Of The Tariff Also Lack Merit.

33. AT&T's attempt to rely on sections 2.9.6.B. and 2.9.6.D. of Tariff No. 1 to justify its suspension of AudioText's service is similarly unavailing.[101] Under § 2.9.6.B., AT&T may refuse to provide service if the customer's acts or the conditions on its premises are "consistent with patterns of known fraudulent activity such as to indicate an intention to defraud [AT&T] once [service] is provided."[102] Section 2.9.6.D. permits AT&T temporarily to restrict access to its network from any specific line "when a pattern of calling on that line is consistent with known patterns of fraudulent calling."[103] Again, because section 2.9.6. applies only where AT&T has reason to believe there is a violation of section 2.2.4.B., the term "intention to defraud" in section 2.9.6.B. and the term "fraudulent calling" in section 2.9.6.D. refer to use of AT&T's service with the intent to avoid payment of AT&T's tariffed charges in violation of section 2.2.4.B. As discussed above, AudioText's conduct did not indicate such intent.

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97 Joint Statement at 21-22, ¶¶ 128-29; AT&T Answer at 100, ¶ 293.

98 *See* AT&T Answer at 100, ¶ 293; Complaint at 47, ¶ 295.

99 Recognizing that the above calculations yield an average daily usage figure of 47,571.094 minutes for the period from September 7 to September 15, 2000, AT&T argues that AudioText does not deny that it "may have" used 167,999.012 minutes or more in one 24-hour period prior to September 15, 2000, thereby meeting the threshold for "an extraordinarily high volume of calls" under section 2.9.6.A., as measured by the prior month's usage. AT&T Answer, Legal Analysis at 34, n.30. This argument ignores the fact that section 2.9.6.A. requires AT&T to have made a determination that AudioText was placing "an extraordinarily high volume of calls," i.e., 167,999.012 minutes in one 24-hour period, before it suspended AudioText's service. There is no evidence that AT&T ever made such a determination before it suspended AudioText's service, and AT&T apparently is unable, even now, to demonstrate that AudioText's calling volume ever reached that threshold.

100 AT&T Ex. 58, § 2.9.6.A.

101 *See* AT&T Answer, Legal Analysis at 34-35, ¶ 103.

102 AT&T Ex. 58 (emphasis added).

103 AT&T Ex. 58.

4. AT&T's Attempts To Vary Or Enlarge The Rights Defined By Its Tariff Must Also Be Rejected.

34. AT&T cites a number of authorities purportedly holding that a carrier is permitted to block or suspend service where the carrier suspects that the customer is using the service in violation of the tariff, or in a manner indicative of fraud and abuse.[104] AT&T's implicit suggestion is that its suspension of AudioText's service was authorized even if AudioText was not engaged in "fraud" as specifically defined in the tariff. We are not permitted, however, to decide AudioText's section 203(c) claims based on common law, statutory, or other definitions of fraud that differ from the definition set forth in section 2.2.4. of Tariff No. 1. As the Supreme Court affirmed in *American Tel. & Tel. Co. v. Central Office Tel.*, under the filed tariff doctrine, "'the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'"[105] Indeed, AT&T plainly acknowledges in another portion of the record that its tariffs "define and limit AT&T's rights and obligations with respect to the provision of long-distance service, including AT&T's authority to block or suspend traffic from foreign countries in order to prevent suspected fraud or abuse, unlawful use, or the non-payment of services."[106] In this case, AT&T's authority to suspend traffic under section 2.9.6. of the tariff is expressly limited by the definition of "fraudulent use" set forth in section 2.2.4.B., and we have no discretion to re-write the tariff to make it cover conduct falling outside those limitations. Accordingly, we find AT&T's cited authorities to be inapposite, because none involves the application of tariff provisions that specifically defined the circumstances under which AT&T could terminate service for fraud.[107]

35. Although we by no means endorse the kind of business conduct that AudioText admittedly engaged in here, we have no authority to depart from the well-settled filed tariff doctrine simply because we wish to censure certain business conduct. Instead, the Act places the burden on carriers such as AT&T to protect themselves against customer conduct they deem unfair or undesirable by incorporating appropriate safeguards in their contract and/or tariff provisions. In this case, AT&T failed to take such protective measures before contracting with AudioText. Accordingly, because we find that AT&T's suspension of AudioText's service on September 15, 2000 was not authorized under section 2.9.6. of the tariff, we rule in AudioText's

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[104] *See* AT&T Legal Analysis at 29-30, ¶¶ 91-92, citing *In re Gerri Murphy Realty, Inc.* 16 FCC Rcd 19134, at 19135-36, ¶ 4 (2001); *Buy This, Inc. v. MCI WorldCom Communications,* 209 F. Supp. 2d 334, 336-37, 342 (S.D.N.Y. 2002); *Communications Network Servs., Inc. v. MCI WorldCom Communications, Inc.*, 573 S.E.2d 461, 463-65 (Ga. Ct. App. 2002); *In re Black Radio Network, Inc. v. Public Serv. Comm'n*, 253 A.D.2d 22, 23-26 (N.Y. App. Div. 1999); *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003). *See also* Letter from Aryeh Friedman, Counsel for AT&T, to Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-03-MD-010 (filed Sept. 18, 2003) (citing additional authorities).

[105] *American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 227 (1998) (citation omitted) (cited in AT&T Answer, Legal Analysis at 31, ¶ 94). *See Marcus v. AT&T Corp*., 138 F.3d 46, 58 (2d Cir. 1998) ("Application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results.")

[106] AT&T Answer, Legal Analysis at 31, ¶ 94.

[107] Although the facts in *In re Gerri Murphy Realty, Inc.,* 16 FCC Rcd 19134, cited in AT&T Answer, Legal Analysis at 29, ¶ 91, involved a situation in which the carrier had blocked fraudulent calls made on the customer's line without the customer's knowledge, the dispute did not concern the carrier's right to block the calls under the governing tariff, but whether the customer was required to pay for fraudulent calls made prior to the blocking.

favor on these counts.

B. AT&T's Refusal To Reinstate Audiotext's Service Violated The Tariff And Thus Section 203(c)(3) Of The Act.

36. In Count VI of the Complaint, AudioText alleges that AT&T's refusal to reinstate AudioText's service in September 2000 was impermissible under section 2.9.6.A. of Tariff No. 1 and thus violated section 203(c)(3) of the Act.[108] Section 2.9.6.A. of Tariff No. 1 provides that, where a customer's service has been restricted, suspended, or discontinued, the service "will be reinstated" if AT&T "receives satisfactory assurances within ten days" that the customer was not using the service "in violation of § 2.2.4.B.," or if AT&T receives "an appropriate deposit pursuant to Section 2.5.6."[109]

37. AudioText alleges that AT&T should have reinstated AudioText's service, because AudioText provided AT&T with assurances that it was not making fraudulent use of AT&T's service, and AT&T knew that AudioText was not using the service with the intent to avoid the payment of tariffed charges in violation of section 2.2.4.B.[110] AT&T denies these allegations,[111] arguing that the purported "assurances" it received from AudioText were in no way "satisfactory" within the meaning of the tariff.[112]

38. Section 2.9.6.A. provides for reinstatement of service in instances where AT&T has suspended, restricted or discontinued service in accordance with the terms of that section.[113] As discussed above, AT&T's suspension of AudioText's service was not authorized under section 2.9.6.A., because AT&T had no reason to believe that AudioText was using AT&T's service in violation of section 2.2.4.B. of the tariff.[114] Consequently, AT&T was not authorized under section 2.9.6.A. to demand assurances that AudioText was not violating section 2.2.4.B. as a condition for reinstating AudioText's service. Thus, we conclude that AT&T's refusal to reinstate AudioText's service violated section 203(c)(3) of the Act,[115] by imposing conditions on the service that were not specified in the tariff.[116]

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108 Complaint at 48-49, ¶¶ 304-312.

109 AT&T Ex. 58, § 2.9.6.A. *See* Joint Statement at 32, ¶ 173.

110 Complaint at 48-49, ¶¶ 306-09.

111 AT&T Answer at 105-06, ¶¶ 306-09.

112 AT&T Answer, Legal Analysis at 46, ¶ 126.

113 AT&T Ex. 58, § 2.9.6.A.

114 *See* discussion at paragraphs 23-27, *supra*.

115 47 U.S.C. § 203(c)(3).

116 Because our ruling on Count VI provides AudioText with all the relief to which AudioText is entitled for AT&T's refusal to reinstate service, we need not address AudioText's claim in Count VII that AT&T's refusal to reinstate service also violated section 201(a) of the Act, 47 U.S.C. § 201(a). *See* Complaint at 49-50, ¶¶ 313-20. We therefore dismiss without prejudice AudioText's claim under Count VII of the Complaint.

C. AT&T's Unauthorized Demand For A Security Deposit And For Payment Of Current Charges Violated The Tariff And Thus Section 203(c)(3) Of The Act.

39. In Counts IX and XI of the Complaint, AudioText alleges that AT&T violated section 203(c)(3) of the Act by demanding that AudioText pay a security deposit,[117] and pay current charges not yet due,[118] when such demands were not authorized by the governing tariff. For the reasons set forth below, we conclude that AT&T did in fact make unauthorized demands for a security deposit and for payment of current charges in violation of section 203(c)(3) of the Act.

40. The facts relevant to these claims are largely undisputed. On September 20 and/or September 25, 2000, AT&T manager Adam Panagia faxed a letter to AudioText's president, James Hausman, informing AudioText that its account with AT&T had "a past due amount of $41,202.13 with current charges of $126,383.67," and stating that "AT&T is requesting that the total $167,585.80 be paid in full to bring the account current."[119] The Demand Letter stated further: "If it is your intention to continue to do business with AT&T, we are requesting a deposit of $828,923.00 based on the recent and unexpectedly large amount of traffic that AudioText . . . is generating."[120] As both parties agree, the past due amount of $41,202.13 identified in AT&T's letter was apparently inaccurate, since AT&T's records showed on September 20, 2000 that AudioText's account had a past due amount of either $22,946.88 or $24,077.13.[121]

1. AT&T's Demand For A Security Deposit In The Amount Of $828,923 Was Unauthorized.

41. We address first AT&T's demand for a security deposit of $828,923.00. AT&T contends that its demand for a security deposit was authorized by section 2.5.6.A. of Tariff No. 1, and thus was just and reasonable under Section 203(c)(3) of the Act.[122] Section 2.5.6.A. of Tariff No. 1 permits AT&T to require a security deposit from a customer "(1) who has a proven history of late payments to the Company or (2) whose financial responsibility is not a matter of record . . . ."[123] To determine the "financial responsibility" of a customer for purposes of 2.5.6.A., AT&T "will rely on commercially reasonable factors to assess and manage the risk of nonpayment,"[124] including "payment history for telecommunications service, the number of

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117 *See* Complaint at 51-52, ¶¶ 333-40 (Count IX, alleging unauthorized demand for a security deposit in violation of section 203(c)(3) of the Act).

118 *See* Complaint at 53-54, ¶¶ 347-59 (Count XI, alleging unauthorized demand for payment in violation of section 203(c)(3) of the Act).

119 Complaint App. at 320; 322 ("Demand Letter"); Joint Statement at 29-30, ¶ 164.

120 Complaint App. at 320; 322; Joint Statement at 29-30, ¶ 164. *See* Complaint at 33, ¶ 197; AT&T Answer at 72, ¶ 197. *See also* Complaint at 52, ¶ 337 (contains apparent typographical error identifying the deposit amount as $828,933 instead of $828,923); AT&T Answer at 112, ¶ 337 (same).

121 *See* Joint Statement at 29, ¶ 161; Complaint App. at 309, 330, 332, 375.

122 AT&T Answer at 127, ¶ 392.

123 AT&T Ex. 59 § 2.5.6.A.; Joint Statement at 32, ¶ 175.

124 AT&T Ex. 59 § 2.5.6.A.1.; Joint Statement at 32, ¶ 176.

years in business, history of service with AT&T, bankruptcy history, current account treatment status, financial statement analysis, and commercial credit bureau rating."[125] Section 2.5.6.A. further provides that the amount of the deposit "will not exceed three times the sum of the estimated average monthly usage charges and/or the monthly service charges."[126]

42. AudioText contends in Count IX that AT&T's demand for a deposit was unauthorized because section 2.5.6.A. of Tariff No. 1 did not permit AT&T to demand a deposit in the amount of $828,923.[127] As noted above, Section 2.5.6.A. provides that the amount of the deposit "will not exceed three times the sum of the estimated average monthly usage charges and/or the monthly service charges."[128] AT&T concedes that, at the time it demanded a deposit of $828,923, AudioText's highest monthly usage and service charges totaled less than $119,000, which covered the period August 7 to September 6, 2000.[129] Under the standards set forth in section 2.5.6.A., a demand for a deposit in the amount of $828,923 would have been justified only if AudioText's estimated average monthly usage and service charges totaled at least $276,307 ($828,923 ÷ 3).[130] AT&T admits that there is no basis on which it could have determined that the sum of AudioText's estimated average monthly usage and service charges was as high as $276,307.[131] Thus, section 2.5.6.A. did not authorize AT&T to demand a deposit in the amount of $828,923.

43. AT&T nevertheless attempts to justify its demand for a deposit of $828,923 by arguing that this figure was "negotiable," and that AT&T "was willing to consider a figure much lower" than that amount.[132] We reject this argument for at least two reasons. First, we are not persuaded by AT&T's assertion that the amount of the security deposit was negotiable. That assertion, which is supported by a declaration from former AT&T in-house lawyer, Schlafly, [133] is undermined by the contemporaneous record of events. Specifically, the letter that AT&T manager Adam Panagia sent to AudioText on September 20 and/or September 25, 2000 indicated that payment of the $828,923 deposit was a condition of restoring AudioText's suspended service, stating: "If it is your intention to continue to do business with AT&T, we are requesting a deposit of $828,923.00 . . . ."[134] Further, it is clear from AudioText's

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125 AT&T Ex. 59 § 2.5.6.A.1.; Joint Statement at 32-33, ¶ 176.

126 AT&T Ex. 59 § 2.5.6.A.; Joint Statement at 33, ¶ 177.

127 Complaint at 52, ¶¶ 335-39.

128 AT&T Ex. 59 § 2.5.6.A.; Joint Statement at 33, ¶ 177.

129 *See* Complaint at 52, ¶ 335; AT&T Answer at 112, ¶ 335. *See also* Joint Statement at 21-22, ¶ 128-29.

130 *See* AT&T Ex. 59 § 2.5.6.A. (providing that the amount of the security deposit "will not exceed three times the sum of the estimated average monthly usage charges and/or the monthly service charges.")

131 Complaint at 52, ¶ 338; AT&T Answer at 113, ¶ 338.

132 AT&T Answer at 113, ¶ 338; *see id.* at 72, ¶ 198.

133 AT&T Ex. 88, Schlafly Decl. at 4, ¶ 15.

134 Complaint App. at 320; 322. *See* Complaint at 33, ¶ 197; AT&T Answer at 72, ¶ 197. Because AT&T made it clear that payment of a deposit of $828,923 was a condition for restoring service, we find no significance in the fact that the Demand Letter stated that AT&T was "requesting" a deposit of $828,923, rather than stating that AT&T was "demanding" such a deposit. Complaint App. at 320; 322. The Demand Letter left no doubt that this was a "request" that AudioText could not refuse if it wished to continue doing business with AT&T. Further, in a subsequent letter to AudioText, AT&T's own counsel referred to AT&T's prior "demand" for payment of a deposit,

(continued....)

contemporaneous correspondence with AT&T that AudioText did not understand AT&T to have made a "negotiable" demand for a deposit. A September 25, 2000 letter that AudioText's counsel, Stephen Burns, sent to Schlafly recounted that "on September 22nd . . . AT&T demanded a deposit of $828,923 as a condition of restoring service."[135] In response, Schlafly sent a letter to Burns the following day stating that AT&T had previously sent AudioText a "demand" for payment of "a deposit based on the recent usage."[136] Nowhere in the letter did Schlafly indicate that the amount of the deposit was negotiable.[137] On September 26, 2000, Burns sent Schlafly another letter in which he stated that AT&T's "demand for a security deposit of $828,923 is patently ridiculous and impossible to comply with" and asking Schlafly to provide "some justification for this number. . . ."[138] The record contains no responding letter from AT&T advising AudioText that the $828,923 amount was negotiable, or explaining how it was calculated.[139]

44. More importantly, the tariff did not authorize AT&T to demand that AudioText pay a deposit amount that exceeds the dollar limits set forth in section 2.5.6.A., regardless of whether AT&T was willing to negotiate a lesser deposit in the event AudioText balked at paying the $828,923. Indeed, to allow AT&T to demand that customers pay deposits in amounts that exceed the limits set forth in section 2.5.6.A. of Tariff No. 1, and then negotiate different deposit amounts that might or might not fall within the scope of the Tariff, would undermine the antidiscriminatory policy that lies at "'the heart of the common-carrier section of the Communications Act.'"[140] This we decline to do. We therefore conclude that AT&T violated section 203(c)(3) of the Act by demanding a deposit in the amount of $828,923, which could not be justified under the dollar limits set forth in section 2.5.6.A. of the Tariff.[141]

(...continued from previous page)
apparently finding no significance in the fact that the earlier letter referred to a 'request.' *See* Complaint App. at 327.

135 Complaint App. at 323-24.

136 Complaint App. at 327. In view of Schlafly's September 26, 2000 assertion that AT&T had sent AudioText a "demand" for payment of a deposit calculated based on the recent usage," it is unclear why Schlafly had earlier advised AudioText's counsel that "AudioText needs to provide an estimate of its extraordinarily [sic] usage so that an adequate deposit amount may be established." Complaint App. at 321; Joint Statement at 26, ¶ 150. As AT&T apparently had its own records regarding AudioText's "recent usage," we do not understand why AT&T would have needed AudioText to provide an estimate of its usage in order to establish an appropriate deposit amount.

137 Complaint App. at 327.

138 Complaint App. at 329.

139 Further, nothing in the language of Section 2.5.6. of Tariff No. 1 would have suggested to AudioText that AT&T's demand for a $828,923 deposit was negotiable. Section 2.5.6. states that "When a deposit is required, [AT&T] will provide a written notification of the amount of the deposit and an explanation of the reason(s) for the deposit requirement." Complaint App. at 5. The Tariff does not suggest that AT&T will notify a customer of the requirement to pay a deposit by proposing a deposit amount that will then be subject to negotiation.

140 *American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. at 223 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,* 512 U.S. 218, 229 (1994)).

141 Because our ruling on Count IX provides AudioText with all the relief to which AudioText is entitled for AT&T's unauthorized demand for a security deposit, we need not address AudioText's claims in Count VIII and X of the Complaint that AT&T was not authorized to demand a security deposit of any amount under Tariff No. 1

(continued....)

2. AT&T's Demand For Payment Of Current Charges Was Unauthorized.

45. In addition to requesting payment of a deposit of $828,923, the Demand Letter that AT&T sent to AudioText on September 20 and/or September 25, 2000 asked AudioText to pay $167,585.80 "in full to bring [its] account current."[142] AT&T admits that, as of September 15, 2000, its counsel, Schlafly, knew that the current portion of AudioText's bill was $126,383.67, and that portion was not due until October 7, 2000.[143] AT&T further admits that its records showed on September 20, 2000 that AudioText's account had a past due amount of either $22,946.88 or $24,077.13.[144]

46. Section 2.5.4. of Tariff No. 1 provides that "any amounts for which payment has not been received within 30 calendar days of the invoice date will be considered delinquent."[145] AudioText alleges in Count XI that AT&T did not act in accordance with the Tariff, and thus violated 203(c)(3) of the Act, when it demanded payment of $167,585.80 from AudioText when payment of that amount was not yet due.[146] We agree.

47. In defense of Count XI, AT&T merely asserts that "[b]ecause AudioText had past charges due on September 15, 2000, AT&T was entitled under the tariff to require payment of past due charges on AudioText's account."[147] AT&T argues that "neither Section 203(c)(3) of the Act or the tariff itself prohibit AT&T from 'requesting' payments that are already overdue."[148] This argument, however, does not explain how AT&T's demand for immediate payment of $167,585.80 was authorized under the Tariff when, according to AT&T's own records, less than $25,000 of that amount was past due. We therefore reject AT&T's defense to Count XI and find that AT&T violated section 2.5.4. of the Tariff, and thus section 203(c)(3) of the Act, by demanding immediate payment of $167,585.80, when most of that amount was not yet due.

(...continued from previous page)
because AudioText did not have a proven record of late payments to AT&T, and its financial responsibility was a matter of record (Count VIII), and because the tariff did not permit AT&T to demand a deposit based upon the volume of traffic a customer generates (Count X). *See* Complaint at 50-51, ¶¶ 321-32; *id*. at 52-53, ¶¶ 341-46. We therefore dismiss without prejudice AudioText's claims under Counts VIII and X of the Complaint.

142 Complaint App. at 320; 322; Joint Statement at 29-30, ¶ 164; Complaint at 33, ¶ 196; AT&T Answer at 72, ¶ 196. As noted above, the Demand Letter also stated that AudioText's account was past due in the amount of $41,202.13. This was apparently an error. *See supra* at ¶ 40.

143 Complaint at 54, ¶ 351; AT&T Answer at 116, ¶ 351.

144 *See* Joint Statement at 29, ¶ 161.

145 Complaint App. at 5.

146 Complaint at 54, ¶ 359.

147 AT&T Answer at 127, ¶ 393.

148 AT&T Answer, Legal Analysis at 53, ¶ 139. We find no legal significance in the fact the Demand Letter stated that AT&T was "requesting" that AudioText pay $167,585.80 in full "to bring the account current," rather than stating that AT&T was "demanding" that AudioText pay that amount. Complaint App. at 320; 322. Indeed, AT&T admitted, in response to AudioText's claim in Count XI, that it had "demanded that AudioText bring its account current. . . ." *See* AT&T Answer at 118, ¶¶ 356-57; Complaint at 54, ¶¶ 356-57.

IV. CONCLUSION

48. For the forgoing reasons, we conclude that AT&T violated section 203(c)(3) of the Act by suspending and refusing to restore AudioText's service in September 2000, and by demanding that AudioText provide a security deposit of $828,923, and pay current charges not yet due. We find that these actions were not authorized or lawful under the Tariff then governing AT&T's provision of service to AudioText.[149]

V. ORDERING CLAUSES

49. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208 and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 203, that the formal Complaint filed by AudioText International, Ltd. against AT&T Corporation IS GRANTED in part as follows:

a) Counts IV, V, VI, IX and XI of the Complaint are GRANTED; and

b) Counts VII, VIII and X of the Complaint are DISMISSED without prejudice.[150]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[149] As noted *supra* at n.83, our ruling herein does not address the lawfulness of AT&T's conduct following amendment of Tariff No. 1 in October 2000.

[150] We make no ruling on Counts I, II, III, and XII of the original Complaint because AudioText has withdrawn these counts. *See supra* at ¶ 18.