

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)	
Communication Options, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 04-658-TP-CSS
)	
ValTech Communications LLC,)	
)	
Respondent.)	

SECOND ENTRY ON REHEARING

The Commission finds:

- (1) On September 13, 2006, the Commission issued its opinion and order in this case finding that, based on the record in this proceeding, the actions of agents for ValTech Communications LLC (ValTech) failed to comply with the Minimum Telephone Service Standards (MTSS) set forth in Rules 4901:1-5-07, and 4901:1-5-08, Ohio Administrative Code (O.A.C.), which were adopted in accordance with Sections 4905.231 and 4905.72, Revised Code.
- (2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (3) On October 12, 2006, ValTech filed an application for rehearing. ValTech's application raised seven assignments of error associated with the Commission's September 13, 2006, opinion and order which are addressed below.
- (4) On October 23, 2006, the complainant, Communication Options, Inc. (COI), filed a motion for an extension of time until November 6, 2006, to respond to ValTech's application for rehearing. By attorney examiner entry issued October 24, 2006, COI was granted an extension of time until October 25, 2006, to file its response to ValTech's application. On October 24, 2006, COI filed a memorandum contra ValTech's application. In its

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memorandum contra, COI argued that ValTech has not raised any arguments that warrant rehearing. In an entry on rehearing issued on November 8, 2006, the Commission granted rehearing in order to further consider the matters specified in the application for rehearing.

- (5) In its first assignment of error, ValTech claims that the Commission erred as a matter of law in holding that the requirement to refer alleged unauthorized carrier changes to the Commission is not a mandatory precondition to filing a formal complaint under Section 4905.26, Revised Code. ValTech asserts that Rule 4901:1-5-08(C), O.A.C., requires the exhaustion of the informal complaint procedures and remedies prescribed by the Federal Communications Commission (FCC) before filing a formal complaint pursuant to Rule 4901:1-5-08(D), O.A.C. ValTech maintains that, in this instance, COI did not exhaust its informal complaint remedies before filing this formal complaint under Section 4905.26, Revised Code. Therefore, the Commission had no jurisdiction to consider this as a formal complaint.

Rehearing is denied on ValTech's first assignment of error. Initially, we note that the issue of Commission jurisdiction under the circumstances presented in the complaint has been thoroughly briefed and addressed by the Commission on more than one occasion. The Commission first affirmed its jurisdiction over this complaint on May 18, 2005, in denying an interlocutory appeal of an attorney examiner's ruling on jurisdiction. The Commission next addressed this issue on pages 14 and 15 of the September 13, 2006, opinion and order in this matter where we found in part that "[E]ach of the statutes and rules referenced by ValTech were developed to provide consumer protection from an unauthorized change in service providers, not to establish prerequisites to the filing of a formal complaint under Section 4905.26, Revised Code." Notwithstanding having already addressed the issue of jurisdiction as least twice previously, we will, again, address the jurisdiction issue below.

We find nothing in either the FCC's rules or in the MTSS that requires the exhaustion of informal procedures before filing a formal complaint under Section 4905.26, Revised Code. In fact, were we to determine that such a prerequisite exists, we would

be treating those entities alleging instances of unauthorized provider changes more stringently than any other complaint proceeding brought before the Commission which could have the undesired effect of discouraging entities from pursuing allegations of unauthorized provider changes and thereby improperly rewarding telecommunications providers for unauthorized conduct.

Rule 4901:1-5-08(C), O.A.C., clearly does not make compliance with this rule a prerequisite to filing a formal complaint under Section 4905.26, Revised Code. Rule 4901:1-5-08(C), O.A.C., stated, in relevant part, that "[A]ny telecommunications provider that is informed by a subscriber or the commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the federal communication commission for the resolution of informal complaints of unauthorized changes..." (Emphasis added). Rule 4901:1-5-08(C), O.A.C., clearly applies the FCC's informal complaint procedures for an unauthorized provider change when a telecommunications provider is informed by a subscriber or by the Commission that an unauthorized provider change has occurred. Procedurally, this case was not brought by a subscriber or by the Commission but rather by another carrier that believed itself to be the authorized carrier for the involved subscribers. Therefore, Rule 4901:1-5-08(C), O.A.C., had no applicability to this proceeding.

Rule 4901:1-5-08(D), O.A.C., also does not establish any prerequisite that must be met before filing a complaint under Section 4905.26, Revised Code. Rule 4901:1-5-08(D), O.A.C., merely states that "[A]ny subscriber or telecommunications provider whose complaint cannot be resolved informally may file a formal complaint under section 4905.26 of the Revised Code..." (Emphasis added). There is no reference in this rule back to the informal procedures identified in either Rule 4901:1-5-08(C), O.A.C., or to the informal complaint procedures and remedies prescribed by the FCC. Thus, an authorized telecommunications provider, such as COI in this instance, could pursue either informal mediation of its complaint with the Commission outside the setting of a formal complaint proceeding or within the formal complaint at a prehearing settlement conference held specifically in an effort to resolve the complaint without going to a formal hearing as the

Commission schedules in nearly all formal complaint cases. As a final matter regarding this assignment of error, we note that any ambiguity caused by prior MTSS rules pertaining to unauthorized carrier changes has been addressed by the Commission in the new MTSS in paragraphs (C) and (D) of Rule 4901:1-5-09, O.A.C.

- (6) The Commission next erred, according to ValTech, by applying the evidence of fraudulent and deceptive sales practices as evidence of an unauthorized provider change violation, under Rule 4901:1-5-08, O.A.C., when COI made no such allegations. ValTech continues that the Commission impermissibly combined two separate and distinct sets of prohibited conduct into a single violation and applied sanctions and penalties reserved for proof of an unauthorized change in carrier to purported circumstances involving fraudulent and deceptive sales practices.

Rehearing on ValTech's second assignment of error is denied. Even assuming, *arguendo*, that the Commission's decision went beyond the scope of COI's complaint, ValTech was provided ample notice that the Commission would consider "whether or not ValTech has violated any statute or rule is the issue to be determined" by this complaint (May 18, 2005, Commission entry ruling on ValTech's interlocutory appeal, finding 15, at page 7). The Commission then went on to discuss specifically, in the May 18, 2005 entry, Rules 4901:1-5-07 and 4901:1-5-08, O.A.C. Thus, ValTech clearly had notice that the Commission would be evaluating the evidence presented in this complaint not only under the slamming provisions of Rule 4901:1-5-08, O.A.C., but also under the consumer safeguard provisions against unfair, deceptive, and unconscionable practices set forth in Rule 4901:1-5-07, O.A.C.

ValTech also infers that it was error for the Commission to have applied evidence demonstrating that ValTech's sales agents used multiple tactics to mislead, or at best confuse, customers of COI to find that an unauthorized change in provider had occurred under Rule 4901:1-5-08, O.A.C. As we noted in the September 13, 2006, opinion and order, public policy demands that the Commission not only look at the form of the letter of authorization (LOA) itself, but also scrutinize the manner in which the LOA's were obtained by ValTech. If the

LOA's are obtained through deception and duress, the Commission stated that verified consent does not exist and slamming has occurred. Applying ValTech's logic to the facts of this case would allow ValTech, or any telecommunications provider, to avoid liability under Section 4905.72, Revised Code, simply by producing a signed authorization form whether valid or fraudulent. Such a result can not be countenanced. Rehearing is, therefore, denied.

- (7) In its third assignment of error, ValTech claims that its motion for sequestration of witnesses, under Ohio Evidence Rule 615, was denied improperly. Therefore, the testimony of subpoenaed witnesses was inherently unreliable and prejudicial to ValTech.

Ohio Evidence Rule 615 does require the exclusion of witnesses so long as the witness is not party to the proceeding and Section 4903.22, Revised Code, generally requires the rules of evidence to apply to Commission proceedings as the rules would apply to proceedings in civil actions. Nonetheless, the Ohio Supreme Court, in *Chesapeake & RY. Co. v. Pub. Util. Comm.* (1955), 163 Ohio St. 252, 263, recognized that the Commission, being an administrative body, is not and should not be inhibited strictly by the rules of evidence which prevail in courts regarding the admissibility of evidence. Moreover, as the Ohio Supreme Court found in *Elyria Telephone Co. v. Pub. Util. Comm.* (1953), 158 Ohio St. 353, the Commission has very broad discretion in the conduct of its proceedings. The Ohio Supreme Court has likewise held that the court will not reverse an order of the Commission as unreasonable or unlawful so long as the error did not prejudice the party seeking such reversal. See, *Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353.

In this instance, the Commission finds that the ruling of the examiner at hearing, even if in error, did not prejudice ValTech. Counsel for ValTech made his motion for exclusion of witnesses very early in the proceeding before opening statements and before the first witness testified (Tr. I at 6-7). The attorney examiner stated that she was holding a ruling in abeyance until such time as she heard some of the witnesses' testimony. In so ruling, however, the attorney examiner cautioned the witnesses that their testimony should be limited

to their interaction and not what they heard from other parties (Id. at 7-8). Counsel for ValTech renewed his motion during the opening statement of COI's counsel. The attorney examiner instructed counsel for COI to limit or eliminate any arguments of potential testimony that might be presented by the witnesses so as not to influence such witness testimony (Id. at 12-13). ValTech's counsel never again made his motion nor did he object to the admission of the witnesses' testimony. Moreover, ValTech's counsel had a full and complete opportunity to cross-examine each witness on the witnesses' testimony. Under these circumstances, we find no prejudice to ValTech in not favorably ruling on counsel's request for sequestration of witnesses.

- (8) ValTech next argues that the Commission erred in failing to require clear and convincing proof of fraudulent misrepresentation in this matter. ValTech maintains that, because the remedies set forth in the September 13, 2006, opinion and order involve rescission of the LOA's signed by subscribers and reformation of the service agreements thereby authorized, it was error to apply the less demanding preponderance of the evidence standard. Moreover, ValTech submits, the Commission could only find fraudulent misrepresentation if all elements of fraudulent misrepresentation had been proven by clear and convincing evidence. COI's proof falls woefully short of meeting the clear and convincing evidence standard applicable here ValTech asserts.

ValTech's fourth assignment of error is denied. The FCC's procedures for resolution of unauthorized preferred carrier changes, 47 C.F.R. §64.1150, clearly provides that it is the obligation of the alleged unauthorized carrier, ValTech in this case, that has the burden of producing valid verification of a preferred carrier change through clear and convincing evidence. Based on the evidence of record, we found, at page 26 of the September 13, 2006, opinion and order, that ValTech had failed to provide clear and convincing evidence of valid authorized carrier changes involving certain customers. Thus, we utilized both the appropriate evidentiary standard and applied that evidentiary standard to the proper party. Rehearing is, therefore, denied.

- (9) ValTech next contends that the Commission's September 13, 2006, opinion and order is manifestly against the weight of the evidence adduced at the hearing in this matter. Moreover, ValTech submits that the recitation of evidence as to the subscriber witnesses is replete with generalizations, oversimplifications, and simple misstatements of the testimony. We disagree. The Commission thoroughly summarized, in its 40-page opinion and order, the evidence of record and set forth findings of fact that supported the ultimate decisions rendered in the September 13, 2006, opinion and order. ValTech's argument presumes that a complete recitation of the entire evidentiary record would result in a different outcome. ValTech has failed to point to any statute or case law to support its proposition. In fact, the relevant statutes and case law, as discussed below, support the Commission.

Section 4903.09, Revised Code, requires that, in all contested cases heard by the Commission, a complete record of the proceedings be made of all testimony and all exhibits and the Commission must set forth findings of fact and written opinions setting forth the reasons for the decisions arrived at based upon said findings of fact. The Ohio Supreme Court found in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, (1988) 38 Ohio St. 3d 266, that the purpose of Section 4903.09, Revised Code, is to enable the Ohio Supreme Court to review an action of the Commission without reading the voluminous records in Commission cases. The Ohio Supreme Court has also found that the purpose of this statute governing written opinions filed by the Commission in all contested cases is to provide the court with sufficient details to enable the court to determine how the Commission reached its decision. See *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, (1994) 70 Ohio St. 3d 202. The Commission's September 13, 2006, opinion and order satisfies the requirements of Section 4903.09, Revised Code, as well as the applicable case law. Rehearing is, therefore, denied.

- (10) In the company's sixth assignment of error, ValTech maintains that the Commission's determinations of technical non-compliance with the FCC rules on format and content of an LOA do not justify a determination that the submitted LOAs are invalid.

In making this argument, ValTech ignores the applicable provision of 47 C.F.R. §64.1130 which establishes the appropriate form and content of an LOA. As pointed out in the September 13, 2006, opinion and order at page 27, the FCC has determined that an LOA that does not conform with 47 C.F.R. §64.1130 is invalid. Tellingly, ValTech did not challenge, on rehearing, the Commission's discussion of how the involved LOAs failed to comply with the applicable provisions of 47 C.F.R. §64.1130. Accordingly, there was no error in the Commission's determination that the LOAs discussed in the September 13, 2006, opinion and order were invalid. ValTech's sixth assignment of error is denied.

- (11) In its last assignment of error, ValTech claims that the Commission's September 13, 2006, opinion and order assesses remedies, penalties, and forfeitures that are improper as a matter of law. Regarding forfeitures, ValTech claims that the sanctions imposed by the Commission are disproportionate and improper because the record lacks competent evidence of a pattern of violations to justify the imposition of a \$25,000 penalty against ValTech. The Commission fully discussed at pages 33-34 of the September 13, 2006, opinion and order the justification for the \$25,000 forfeiture in this matter. In fact, as the Commission noted, the forfeiture could have been as high as \$150,000 based on a forfeiture of \$1,000 per day, over an average of 30 days, for each of the 5 business customers who testified in this matter. The Commission emphasized, however, that the forfeiture should be large enough to deter the practice of slamming, not so small that a company would consider it a cost of doing business, yet not so large as to put a company at financial risk. After weighing each of these factors, the Commission settled on an amount of approximately \$166.66 per day for each of the instances of slamming determined in the September 13, 2006, opinion and order. The Commission's determination of the forfeiture was fully discussed and justified; therefore, rehearing is denied.
- (12) In its second argument in support of this last assignment of error, ValTech maintains that it was clearly erroneous to afford COI a post-hearing opportunity to supplement the record to provide information concerning lost revenues. While the Commission did, indeed, afford COI a 60-day opportunity to file documentation pertaining to lost revenues for the

customers who testified in the proceeding, a review of the docket reveals that COI presented no such documentation. Therefore, the issue is moot and need not be further addressed on rehearing.

- (13) ValTech's final argument in support of its last assignment of error, is that the Commission's directive for ValTech to publish newspaper notice is not authorized as a remedy under the Commission's rules and regulations, is overly broad, unjust, and unreasonable. Moreover, ValTech asserts that a more effective notification would be direct notification to the involved subscribers. Pointing to record testimony and exhibits presented at the hearing, ValTech claims that such direct customer notification has already taken place. First, we do not agree with the premise of ValTech's argument that the Commission's authority to remedy acts of slamming is limited to the remedies outlined in Section 4905.73, Revised Code. Rather, Section 4905.381, Revised Code, affords the Commission, after hearing, ample authority to determine the rules, regulations, and practices that should be adopted and observed by a utility going forward. Thus, we find that it was not unreasonable for us, at the time, to have directed ValTech to notify other similarly situated subscribers that they could contact the Commission if they believed they may have been improperly switched between March and December 2004.

We now note, however, that under the FCC rules, records to document verification of subscriber carrier changes need only be maintained for two years after obtaining such verification. Given that more than three years, and in some cases four years, have passed since the circumstances that gave rise to this publication requirement occurred, it is highly unlikely that records documenting any perceived improper switch of service providers is still available to verify that an unauthorized switch occurred. Therefore, we will not require ValTech to fulfill the publication of notice requirement outlined in the September 13, 2006, opinion and order.

- (14) Finally, the Commission determines that any remaining assignments or allegations of error not specifically addressed in this entry on rehearing are denied.

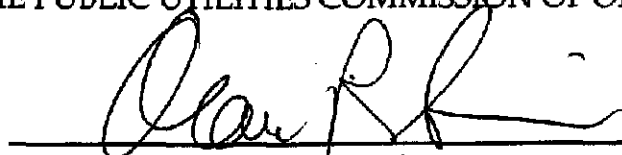

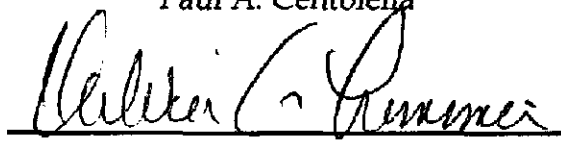
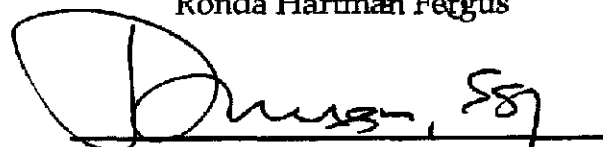
ORDER:

It is, therefore,

ORDERED, That ValTech's application for rehearing is denied as discussed herein.
It is, further,

ORDERED, That a copy of this second entry on rehearing be served upon all parties
of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman
Paul A. Centolella
Ronda Hartman Fergus
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JRJ/vrm

Entered in the Journal

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Renee J. Jenkins
Secretary