

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

William Steven Gandee, D.C.)	
)	
Complainant,)	
v.)	Case No. 09-51-TP-CSS
)	
Choice One Communications of Ohio)	
Inc. d/b/a One Communications)	
)	
Respondent.)	
Brian Longworth, D.C.)	
)	
Complainant,)	
v.)	Case No. 09-52-TP-CSS
)	
Choice One Communications of Ohio)	
Inc. d/b/a One Communications)	
)	
Respondent.)	

**RESPONDENT'S REPLY TO
COMPLAINANTS' RESPONSE TO
MOTION TO DISMISS**

The Response that complainants William Steven Gandee and Brian Longworth ("Complainants' Response") filed in opposition to Choice One Communications of Ohio, Inc. d/b/a One Communications' ("One Communications") Motion to Dismiss only highlights the reasons that this Commission must grant One Communications' Motion to Dismiss. In order to prevail on their claims, Complainants must convince this Commission to ignore the applicable law, and instead impose a port request verification standard that courts, the Federal Communications Commission ("FCC"), and other state utility regulatory commissions have expressly rejected. Because Ohio Revised Code § 4905.72(D), and Rule 4901:1-5-09(A) of this Commission's own rules compel the

application of the FCC standards, Complainants demand the contravention of Ohio law. Complainants *must* convince this Commission to ignore the law in order to succeed on their claims because there is absolutely no dispute between the parties regarding any material fact, and those facts demonstrate that One Communications fully complied with all legal obligations.

I. The Material Facts

The facts as included in the Complainants' Response confirm that there are no factual disputes between the parties, and the only issue for the Commission to decide is the legal issue of whether One Communications complied with applicable law in submitting a port request concerning the two telephone numbers at issue to AT&T in November 2006. The Complainants confirm that sometime in 2006, they combined their chiropractic practices with that of One Communications' customer, Dr. Keith Unger, D.C., at Dr. Unger's location. Complainants' Response at 3. The Complainants confirm that in November 2006, Dr. Unger undertook to consolidate the telephone service to all the chiropractic practices providing services from that location with One Communications. Id. The Complainants confirm that Dr. Unger represented to One Communications— in a signed Letter of Agency ("LOA") – that he possessed the authority to allow One Communications to submit the port request to AT&T. Id. at Exh. G.

The Complainants confirm that *approximately 15 months later*, when the Complainants decided that their business relationship with Dr. Unger was no longer satisfactory and they therefore wished to dissolve that relationship, the Complainants contacted One Communications by telephone and asked that it remove "their" telephone

numbers from Dr. Ungar's account with One Communications. Complainants' Response at 4, Exhs. A ¶ 18 and B ¶ 17. The Complainants confirm that One Communications declined Complainants' request. Id. at 4. Also, the Complainants' confirm that neither Complainant had any business or contractual relationship with One Communications. Id.

II. Law and Argument.

The Complainants' sole argument is that One Communications was somehow required to conduct an independent investigation to confirm that Dr. Ungar had actual authority to make changes to their accounts with AT&T prior to submitting the port request to AT&T in November 2006. However, One Communications had no legal obligation to perform the investigation that Complainants demand, nor would it be possible for One Communications to have performed such an investigation. Therefore, Complainants have effectively conceded that One Communications acted at all times in compliance with FCC and Commission carrier change requirements. One Communications has done nothing wrong, and respectfully requests that this Commission dismiss the complaints against it.

A. One Communications Properly Relied on the LOA When It Submitted The Port Request to AT&T in November 2006

Together, Section 4905.72(D) of the Ohio Revised Code and Rule 4901:1-5-09(A), provide that "the rules prescribing procedures for verifying consumer consent [to changes in the provider of telecommunications services] shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 and 64.1150" as effective July 11, 2007. The applicable FCC rules provide for three methods of verification, one of which is a signed LOA that complies with 47 C.F.R. § 64.1130.

Complainants concede that One Communications acted on the basis of the LOA that Dr. Ungar signed and submitted to it, and they do not argue that the LOA failed in any respect to comply with 47 C.F.R. § 64.1130. Instead, Complainants point to the definition of "subscriber" found within 47 C.F.R. § 64.1100(h), and argue that Dr. Ungar did not meet that section's definition of the term "subscriber" for purposes of their accounts with AT&T. Complainants' Response at 10. They then argue: "In reviewing the records from AT&T it is easily determined that no authority over those numbers had been given to Ungar. A simple request to the subscriber Longworth or Gandee would have confirmed this." Id. at 11.

The fallacy to Complainants argument, of course, is that neither One Communications nor or any other carrier has access to the billing records of any other carrier, and thus One Communications could have no reason to know that the Complainants even existed. Therefore, the "simple request" to Longworth or Gandee which the Complainants say that One Communications should have made is impossible to make. Moreover, such a request is not legally required. Under applicable law, One Communications is legally permitted to rely upon the party requesting the carrier change to truthfully provide it with the information necessary to port telephone numbers from another carrier. AT&T Corp. v. Federal Communications Comm'n, 323 F.3d 1081 (D.C. Cir. 2003), ACN Communications Company, 19 FCC Rcd 9324, 9325-26 (2004), Communicate Technological Systems LLC, 20 FCC Rcd 15553, 15555 (2005) Communicate Technological Systems LLC, 21 FCC Rcd 3409, 3411 (2006). See also In re Thomas, 2005 WL 1677981, *2 (Mass. D.T.E. 2005), In re Dyer, 2007 WL 817388, *4 (Mass. D.T.E. 2007). One Communications cited each of these cases within its

Memorandum in Support of Its Motion to Dismiss, *all* of which support this fundamental proposition of law, and *Complainants fail to cite even one decision to the contrary, out of any court or agency, anywhere.*

In short, the "actual authority" test Complainants advocate was abandoned when the FCC held in Sprint Communications Company, 18 FCC Rcd. 24137, 24138-39 (2003):

Although we conclude that Sprint did not obtain the subscriber's actual authorization to change subscriber's preferred telecommunications carrier, the United States Court of Appeals, District of Columbia Circuit has interpreted Section 258 of the Telecommunications Act of 1996 to require only that a carrier follow the Commission's verification procedures and not to require actual authorization by the subscriber.

The fact that Dr. Ungar lacked "actual authority" therefore does not form a basis upon which any liability can be imposed on One Communications. One Communications complied with the rules of both the FCC and this Commission, and the complaints should be dismissed.

B. One Communications Properly Denied the Complainants' Request to Remove the Telephone Numbers from Dr. Ungar's Account.

Similarly, Complainants' demands that One Communications remove "their" telephone numbers from Dr. Ungar's account at the end of their business relationship with Dr. Ungar almost a year and a half later was a legal nullity. Neither Complainant was identified on the account as authorized to make service changes to the account. As a result, One Communications properly denied their demands.

Customer privacy rules do not permit carriers to release information or to make service changes to a customer's account based on telephonic requests from unauthorized individuals. The FCC's Customer Proprietary Network Information ("CPNI") rules are

designed to protect customers against the unauthorized use or disclosure of account information.¹ 47 C.F.R. §§ 64.2001 et seq. Every telecommunications carrier has a statutory duty to protect the confidentiality of its customers' accounts. See 47 U.S.C. § 222(a). In 2007, the FCC enacted specific rules which apply when an individual contacts a carrier by telephone regarding a customer account.² This Commission shares the FCC's view of the importance of customer privacy. Rule 4901:1-5-05(C) provides:

For purposes of this rule only, telecommunications providers in possession of [CPNI] shall protect customer information in accordance with 47 U.S.C. 222 and in accordance with the rules and procedures prescribed by the [FCC] at 47 C.F.R. 64.2001 to 64.2011, as effective on December 10, 2007.

Dr. Ungar did not authorize either Complainant to make any change to his account, or to use or have access to the services, telephone numbers or other CPNI related to that account. Accordingly, One Communications properly denied the Complainants' March 2008 request to change the services on One Communications' customer's account in conformance with the CPNI requirements. Again, the Complainants provide no citations to legal authority that would support a contrary result. Therefore, the complaints are properly dismissed.

Lastly, in Complainants' Response at 4-6, Complainants now insinuate – with absolutely no evidentiary support for the insinuation – that One Communications withheld the telephone numbers from them even after the Summit County Court

¹ CPNI is defined as “(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service, subscribed to by any customers of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.” 47 U.S.C. § 222(h)(1).

² See Telecommunications Carriers' Use of CPNI and Other Customer Information, CC Docket Nos. 96-115, WC Docket No. 04-46, Report and Order and Notice of Further Rulemaking, FCC 07-22, ¶¶ 13-20 (rel. April 2, 2007).

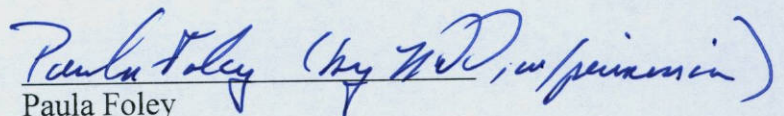
determined the issue of control against Dr. Ungar and in their favor. This is a gross misrepresentation of the facts. First, the Court's order does not address the "5521" number because Dr. Ungar disconnected that number even before the Court's hearing in May 2009. As a result Dr. Ungar no longer controlled that number within One Communications' system. The actual transfer of the "5521" number to Complainant Gandee remained dependent, nonetheless, upon the submission of a proper port change request by AT&T and the subsequent coordination of that request between AT&T and One Communications. This occurred in September 2009, in the ordinary course of business, after AT&T submitted a port request. As to Complainant Longworth and the "8500" number, it is true that the Magistrate's decision was filed with the Court on May 19, 2009. The Court did not adopt that decision and enter it as an order of the Court, however, until June 9, 2009. As the Complainants do acknowledge, the "8500" number was ported to AT&T in early July 2009 after AT&T submitted a port request.

III. CONCLUSION

For all the foregoing reasons, One Communications respectfully requests that the Complaints be dismissed with prejudice.

May 10, 2010

Respectfully submitted,

 (by W.D. W. Peirson)

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CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing Reply to Complainants' Response to Motion to Dismiss was sent by first class U.S. mail, postage prepaid, to the following persons this Monday, May 7, 2010.

Thomas A. Skidmore
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Michael D. Dortch

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Case No(s). 09-1026-EL-ATA, 09-0051-TP-CSS

Summary: Reply Respdent's Reply to Complainants' Response to Motion to Dismiss
electronically filed by Mr. Michael D. Dortch on behalf of Choice One Communications, dba,
One Communications