

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

WILLIAM STEVEN GANDEE, D.C.)	
)	
Complainant,)	
)	
v.)	CASE NO. 09-51-TP-CSS
)	
CHOICE ONE COMMUNICATIONS, INC.)	
d/b/a ONE COMMUNICATIONS,)	
)	
Respondent.)	
)	
)	
BRIAN LONGWORTH, D.C.,)	
)	
Complainant,)	
)	
v.)	CASE NO. 09-52-TP-CSS
)	
CHOICE ONE COMMUNICATIONS, INC.)	
d/b/a ONE COMMUNICATIONS,)	
)	
Respondent.)	

COMPLAINANT’S POST HEARING BRIEF

Complainants, Brian Longworth, D.C. (hereinafter “Longworth”) and William Steven Gandee, D.C. (hereinafter “Gandee”) hereby submit the following Post Hearing Brief which purpose is to supplement the testimony and arguments presented at the Hearing held on January 20, 2011. Complainant’s hereby request that the Public Utilities Commission of

Ohio find in their favor as against the Respondent, Choice One Communications, Inc. d/b/a One Communications (hereinafter “One Communications”) and enforce any and all remedies available under the statutes.

Respectfully submitted,

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/s Thomas A. Skidmore, Esq.

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POST TRIAL MEMORANDUM

I. STATEMENT OF PROCEEDINGS

On January 22, 2009 William Steven Gandee, D.C. and Brian Longworth, D.C. (hereinafter Complainants) filed their respective complaints against the Respondent Choice One Communications (hereinafter Respondent). Respondent answered the Complainants' Complaint on February 11, 2009. On April 9, 2010 the Respondent filed a Motion to Dismiss the Complainants' Complaint asserting that it properly relied on a Letter of Authority which was presented at the Hearing on this matter as "Exhibit 2". The Commission denied the Respondent's Motion to Dismiss, stating that when considering all materials in a light most favorable to the party opposing the motion, dismissal would be inappropriate. (See Entry dated October 4, 2010 Page 2, paragraph 6).

This matter came to be heard on January 20, 2011 at 1:00 p.m. before Attorney Examiner Jim Lynn, presiding. Both Longworth and Gandee were present and testified. In addition to testimony, the Complainants introduced a number of Exhibits into evidence. The Respondent also introduced testimony through representative Richard Wheeler.

A transcript of proceedings was filed for the record on February 7, 2011. Exhibits which were accepted into evidence were filed for record on February 8, 2011.

II. STATEMENT OF THE FACTS

The Complainants, Longworth and Gandee, are currently licensed chiropractors in the State of Ohio. Brian Longworth, D.C. has been the sole shareholder and principal officer of Health First Chiropractic Clinic, Inc. (hereinafter "Health First") for more than 10 years. (See Longworth Affidavit attached as "Exhibit A"; See Hearing Transcript – Page 9).

William Gandee, D.C. is the sole shareholder and principal officer of Gandee Chiropractic Life Center (hereinafter “Gandee Chiropractic”) and has been practicing for more than 27 years. (See Gandee Affidavit attached as “Exhibit B”; See Hearing Transcript – Page 65).

In 2006, Longworth, Gandee, and Keith Ungar, D.C. (hereinafter “Ungar”) entered into discussions about combining their respective practices. Prior to any formal agreement, Longworth and Gandee moved their chiropractic practices into space shared with Ungar at 2828 S. Arlington Road, Akron, Ohio. (Hearing Transcript – Page 10).

Shortly after moving their respective practices, Longworth and Gandee found themselves in significant disagreement with Ungar and expressed their intent and desire to leave the premises. Ungar filed suit in the Summit County Court of Common Pleas entitled **Keith Ungar v. Brian Longworth, et al.**, Case No. CV-2008-07-5109 (later merged into Case No. CV-2008-02-1528 and hereinafter the “Summit County Litigation”) and sought a Temporary Restraining Order and Preliminary Injunction to prevent them from leaving. In March 2008, Judge Gallagher denied the Temporary Restraining Order and Preliminary Injunction. Longworth and Gandee were free to leave.

During the course of his thirty years of practice, Gandee held the phone number (330) 724-5521. (Hearing Transcript – Page 52). Gandee had call-forwarded his number to the shared location. (Hearing Transcript – Page 54). Since 1998, Longworth held the phone number (330) 896-8500. (Hearing Transcript – Page 52). He also had call-forwarded his number to the shared location. (Hearing Transcript – Page 10). When Gandee and Longworth requested their numbers be forwarded back to their location, they found that Ungar had illegally directed that their respective phone numbers be ported over to his

telecommunications provider the Respondent, One Communications. (Hearing Transcript – Page 12).

Neither Gandee nor Longworth ever authorized any change of the representative for their phone accounts with AT&T. (Hearing Transcript – Page 13, 54-55). Longworth and Gandee learned that their patients were being directed to Ungar for appointments. Other patients were being informed that Longworth and Gandee were no longer at that location and that there was no forwarding information. (Hearing Transcript – Page 18). Adding insult to injury, Longworth and Gandee paid for advertising referencing their own phone numbers and the patient calls were going to Ungar. (Hearing Transcript – Page 14).

Simultaneously with their departure from 2828 S. Arlington Road, Akron, Ohio, both Longworth and Gandee contacted AT&T and then One Communications requesting that their phone numbers be forwarded to their new location. (Hearing Transcript – Page 13). Richard Wheeler, Strategic Compliance Implementation Manager for One Communications Corp, the parent entity of One Communications acknowledged in his affidavit that both Longworth and Gandee had requested the return of their phone numbers beginning in March 2008. (See Wheeler Affidavit, page 2, paragraph 7). Mr. Wheeler further testified that counsel for Complainants had direct communications with him in the Spring of 2008 and discussed the return of the phone numbers. One Communications refused their request. (See Wheeler Affidavit, page 2, paragraph 12). One Communications claimed that the numbers were ported to Ungar in reliance upon Ungar's representations and via a Letter of Authority signed by Ungar. (Hearing Transcript – Page 78). Admittedly prior to porting these phone numbers, One Communications received no such authority directly from Longworth or Gandee. In fact, neither Longworth nor Gandee had any business or

contractual relationship with One Communications. One Communication had only a contractual relationship with Ungar or his company, “Center for Natural Medicine” (see Exhibit “C” attached). (See Wheeler Testimony – Hearing Transcript – Page 81).

In the Summit County Litigation, Magistrate Shoemaker held a hearing on May 14, 2009 specifically to address the issues of ownership and/or control of these phone numbers. Gandee’s phone number was not in contention at the hearing. It was acknowledged by Ungar and Attorney Michael Dortch just prior to the hearing that Ungar had given up ownership claims to Gandee’s number of 330-724-5521. (See Magistrates Decision, Page 2, paragraph 4, Claimants Exhibit “5”).

Magistrate Shoemaker made the following Conclusions of Law:

“(1) It is first of all concluded that though other matters pend [sic] in this matter, the sole issue for the Magistrate for ruling on the limited Order of Reference and the hearing conducted before him on May 14, 2009 was whether or not the transfer of the phone number 330-896-8500 by the letter of agency described above was authorized by Dr. Longworth and that Dr. Ungar has complete authority to sign the document and otherwise represent to the phone carriers that he was empowered to make such transfer.

(2) It is specifically concluded that Dr. Keith S. Ungar was never authorized, directly or indirectly, in writing or by any oral agreement between himself and Brian Longworth wherein Brian Longworth, directly or indirectly, authorized Keith S. Ungar to transfer Dr. Longworth’s phone number of 330-896-8500 into the name of The Center for Natural Medicine as was accomplished by the false representations made by Keith S. Ungar in the letter of agency described above.

(3) In evaluating this matter, including the testimony of the two chiropractic physicians, it is concluded that Dr. Ungar’s testimony on the specific subject of the transfer of the phone number lacks significant credibility and at other times appears to be contrived.

(4) As such, it is specifically concluded that there was no authority for the transfer of 330-896-8500 from the control and ownership of Brian Longworth into the name of Keith S. Ungar as was done, and that both Dr. Ungar and his business entities, The Center for Natural Medicine and/or Advanced Pain and Wellness Center, Inc., in any fashion or combination, have no right or claim

to such phone number. As a result, the party known as Choice One Communications, Inc., the phone carrier in this matter, is ordered and otherwise directed to forthwith transfer the ownership on the records of such entity and to physically allow a change of such phone number, that being 330-896-8500, into the name of Brian Longworth and to ensure that the corporate records of such business entity show that Keith S. Ungar, or any of the aforementioned two business entities, has no ownership interest in such name. Further, such business records of Choice One Communications, Inc. shall reflect that the actual owner of 330-896-8500 is Brian Longworth, to be used by him at whatever address Brian Longworth forthwith determines he wishes to present to Choice One Communications, Inc. for recordkeeping purposes. Such entity known as Choice One Communications, Inc. shall forthwith effectuate all matters referred to above to allow the change in records and the change in control and ownership of the above-mentioned phone number, and shall file a notice with the Court when such acts have been accomplished.” (See Magistrates Decision page 4-5)

Although Ungar had made no further claims to Gandee’s phone number 330-724-5521, One Communications continued to hold the number and failed to immediately transfer it back to Gandee. It was not until September 2009 that Gandee reacquired his phone number. The phone number had been wrongfully withheld for approximately 18 months. Gandee no doubt lost patients and thousands of dollars in revenue. (See Transcript – Pages 57, 69-71).

When One Communications continued to refuse to return Longworth’s phone number even after the Magistrate’s Decision, Longworth requested that AT&T, his telecommunications carrier, port his phone number back to him. He had to provide them with a copy of this Court’s decision. Finally via that request, Brian Longworth received his phone number back in July 2009 approximately 15 months after his original request. Longworth also no doubt lost patients and thousands of dollars in revenue. (Hearing Transcript – Page 44). Even though the Court had made in clear that the numbers belonged to the Complainants and that the numbers were to be immediately returned, Mr. Wheeler

testified that the further delay in obtaining the phone numbers was because the Respondent now lacked a "port request." (Hearing Transcript – Page 112).

III. LAW AND ARGUMENT

A. TELECOMMUNICATIONS CARRIER SUBSCRIPTION/SLAMMING

"Slamming" is the switching of a customer's service provider without the customer's prior authorization. To address this problem, the Ohio General Assembly enacted Sub. H.B. 177. This Act became effective on May 17, 2000, and addressed "slamming" by prohibiting the change of a consumer's provider of telecommunications service, without obtaining the consumer's prior, verified consent. Sections 4905.72, 4905.73, 4905.74, Revised Code, were enacted, and Section 4905.99(D), Revised Code, was amended to vest the Commission with express authority regarding the unauthorized switch of public telecommunications service providers.

The Commission's enforcement authority arose from its existing rules and the above act, which requires that the Commission order a public utility that has slammed a consumer to undertake various actions to make the consumer whole. Section 4905.72, Revised Code, provides, in pertinent part:

(B)(1) No public utility shall request or submit, or cause to be requested or submitted, a change in the provider of ... public telecommunications service to a consumer in this state, without first obtaining, or causing to be obtained, the verified consent of the consumer in accordance with the rules adopted by the public utilities commission pursuant to division (D) of this section.

(B)(2) No public utility shall violate or fail to comply with any provision of a rule adopted by the commission pursuant to division (D) of this section or any provision of an order issued by the commission pursuant to division (B) or (C) of section 4905.73 of the Revised Code.

(D) The Commission shall adopt competitively neutral rules prescribing procedures necessary for verifying the consent of a consumer for purposes of

division (B)(1) of this section and any procedures necessary for the filing of a security under division (C)(5) of section 4905.73 of the Revised Code, and may adopt such other competitively neutral rules as the commission considers necessary to carry out this section and section 4905.73 of the Revised Code. With respect to 04-658-TP-CSS-7- public telecommunications service only, the rules prescribing procedures for verifying consumer consent shall be consistent with the rules of the federal communications in 47 C.P.R. 64.1100 and 64.1150.

Rule 4901:1-5-08(A)(2), O.A.C., provides that, before a telecommunications provider can submit a change request on behalf of the subscriber, verification of that authorization must be completed in accordance with the verification procedures prescribed by the FCC and in effect at the time of the change. FCC Rule 47 C.F.R. Section 64.1120 provides the verification procedures, which state, in pertinent part:

(a) No telecommunications provider shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the verification procedures prescribed in this subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services.

(1) No submitting carrier shall submit a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining:

(i) Authorization from the subscriber, and

(ii) Verification of that authorization in accordance with the verification procedures prescribed in this section. The submitting carrier shall maintain and preserve records of verification of subscriber authorization for a minimum of two years after obtaining such verification.

...

(b) Where a telecommunications carrier is selling more than one type of telecommunications service (e.g., local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be made within the same solicitation. Each authorization must be verified in accordance with the verification procedures prescribed in this part.

(c) No telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of the following procedures:

(1) The telecommunications carrier has obtained the subscriber's written or electronically signed authorization in a form that meets the requirements of § 64.1130; or

...

(4) Any State-enacted verification procedures applicable to intrastate preferred carrier change orders only.

(d) Telecommunications carriers must provide subscribers the option of using one of the authorization and verification procedures specified in § 64.1120(c) in addition to an electronically signed authorization and verification procedure under 64.1120(c)(1).

The above FCC rule provides for three methods of verification, one of which is a signed letter of authorization from the subscriber.. This written or electronic authorization must comply with the requirements of 47 C.F.R § 64.1130. This current rule provides, in pertinent part:

(a) A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization and/or verification of a subscriber's request to change his or preferred carrier selection. A letter of agency that does not conform with [to] this section is invalid for purposes of this part. (Alterations added.)

(b) The letter of agency shall be a separate document (or an easily separable document) or located on a separate screen or webpage containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a preferred carrier change. The letter of agency must be signed and dated by the subscriber to the line(s) requesting the preferred carrier change.

...

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be covered by the preferred carrier change order;

(2) The decision to change the preferred carrier from the current telecommunications carrier to the soliciting telecommunications carrier;

(3) That the subscriber designates [insert the name of the submitting carrier] to act as the subscriber's agent for the preferred carrier change;

(4) That the subscriber understands that only one telecommunications carrier may be designated as the subscriber's interstate or interLATA preferred interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional preferred carriers (e.g., local exchange, intraLATA/intrastate toll, interLATA/interstate toll, or international interexchange) the letter of agency must contain separate statements regarding these choices, although a separate letter of agency for each choice is not necessary; and

(5) That the subscriber may consult with the carrier as to whether a fee will apply to the subscriber's change in the subscriber's preferred carrier.

...

(j) A telecommunications carrier shall submit a preferred carrier change order on behalf of a subscriber within no more than 60 days of obtaining a written or electronically signed letter of agency. However, letters of agency for multi-line and/or multi-location business customers that have entered into negotiated agreements with carriers to add presubscribed lines to their business locations during the course of a term agreement shall be valid for the period specified in the term agreement.

Rule 4901:1-5-08(C), O.A.C., provides that any telecommunications provider who is informed by a subscriber or the Commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the FCC. The current FCC rule that addresses informal complaint procedures is 47 C.F.R. § 64.1150, which states, in pertinent part:

(b) Referral of Complaint. Any carrier, executing, authorized, or allegedly authorized, that is informed by a subscriber or an executing carrier of an unauthorized carrier change shall direct that subscriber either to the state commission or ... to the Federal Communications Commission's Consumer & Governmental Affairs Bureau, for resolution of the complaint. Carriers shall also inform the subscriber that he or she may contact and seek resolution

from the alleged unauthorized carrier and, in addition, may contact the authorized carrier.

...

(d) Proof of verification. Not more than 30 days after notification of the complaint, or such lesser time as is required by the state commission if a matter is brought before a state commission, the alleged unauthorized carrier shall provide to the relevant government agency a copy of any valid proof of verification of the carrier change. This proof of verification must contain clear and convincing evidence of a valid authorized carrier change, as that term is defined in §§ 64.1150 through 64.1160. The relevant government agency will determine whether an unauthorized change, as defined by § 64.1100(e), has occurred using such proof and any evidence provided by the subscriber. Failure by the carrier to respond or provide proof of verification will be presumed to be clear and convincing evidence of a violation.

Section 4905.73, Revised Code, grants the Commission jurisdiction regarding any public utility violation of Section 4905.72(B), Revised Code. This section also provides for remedies and penalties to address the violations. The statute provides, in pertinent part, as follows:

(A) The public utilities commission, upon complaint by any person or complaint or initiative of the commission, has jurisdiction under section 4905.26 of the Revised Code regarding any violation of division (B) of section 4905.72 of the Revised Code by a public utility.

(B) Upon complaint or initiative under division (A) of this section, if the commission finds, after notice and hearing pursuant to section 4905.26 of the Revised Code, that a public utility has violated section 4905.72 of the Revised Code, the commission, by order, shall do all of the following:

(B)(1) Rescind the aggrieved consumer's change in service provider;

(B)(2) Require the public utility to absolve the aggrieved consumer *of any* liability for any charges assessed the consumer, or refund to the aggrieved consumer any charges collected from the consumer, by the public utility during the thirty-day period after the violation or failure to comply occurred or, where appropriate, during such other period after that occurrence as determined reasonable by the commission;

(B)(3) Require the public utility to refund or pay to the aggrieved consumer any fees paid or costs incurred by the consumer resulting from the change of the consumer's service provider or providers, or

from the resumption of the consumer's service with the service provider or providers from which the consumer was switched;

(B)(4) Require the public utility to make the consumer whole regarding any bonuses or benefits ... to which the consumer is entitled, by restoring bonuses or benefits the consumer lost as a result of the violation or failure to comply and providing bonuses or benefits the consumer would have earned if not for the violation or failure to comply, or by providing something of equal value.

(C) In addition to the remedies under division (B) of this section, if the commission finds, after notice and hearing pursuant to section 4905.26 of the Revised Code, that a public utility has violated section 4905.72 of the Revised Code, the commission, by order, may impose any of the following remedies or forfeitures:

(C)(1) Require the public utility to comply or undertake any necessary corrective action;

(C)(2) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched in the amount of all charges the consumer would have paid that particular service provider for the same or comparable service had the violation or failure to comply not occurred;

(C)(3) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched for any costs that the particular service provider incurs as a result of making the consumer whole as provided in division (B)(4) of this section or of effecting the resumption of the consumer's service;

(C)(4) Assess, upon the public utility forfeitures of not more than one thousand dollars for each day of each violation or failure to comply. However, if the commission finds that the public utility has engaged or is engaging in a pattern or practice of committing any such violations or failures to comply, the commission may assess upon the public utility forfeitures of not more than five thousand dollars for each day of each violation or failure.

(C)(5) Require the public utility to file with the commission a security deposit payable to the state in such amount and upon such terms as the commission determines necessary to ensure compliance and payment of any forfeitures assessed pursuant to division (C)(4) of this section;

(C)(6) Rescind the public utility's authority to provide natural gas service or public telecommunications service within the state.

B. FEDERAL COMMUNICATIONS COMMISSION RULES AND REGULATIONS – TELECOMMUNICATIONS

Section 258 of the Telecommunications Act of 1996 (47 U.S.C. Section 258(a), Pub.L. No. 104-104, 110 Stat. 56 (1996)) prohibits any telecommunications carrier from submitting or executing an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service. This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies.

There are a number of Federal Communication Commission Orders which govern "slamming," the last which was adopted on February 28, 2003 and is entitled "Third Order On Reconsideration and Second Further Notice of Proposed Rulemaking" released March 17, 2003. Contained within the lengthy Order are certain definitions which apply here.

When the Commission released the Second Report and Order, it recognized that additional revisions to the slamming rules could further improve the preferred carrier change process and prevent unauthorized changes. In the Third Order the Commission addressed a request which was seeking reconsideration of the Commissions Rules prohibiting carriers that effect requests for subscriber carrier changes submitted by other carriers from "re-verifying" such requests before executing the requested changes. See Rural LECs, Petition for Reconsideration, CC Docket No. 94-129, at 3-10 (filed March 18, 1999); National Telephone Cooperative Association, Petition for Reconsideration, CC Docket No. 94-129, at 4-18 (filed March 18, 1999).

In re-verification of carrier change requests by executing carriers it is important to define terminology. It is equally important to understand what is expected. In the Second Report and Order, the Commission set forth general distinctions between “submitting carriers” and “executing carriers” in the context of carrier change requests. A “submitting carrier” is defined as any telecommunications carrier that (1) requests on the behalf of a subscriber that the subscriber’s telecommunications carrier be changed; and (2) seeks to provide retail services to the end user subscriber. (See 47 C.F.R. Section 64.1100(a); Second Report and Order, 14 FCC Rcd at 1564-65, Paragraph 92).

An “executing carrier” is defined as any telecommunications carrier that affects a request that a subscriber’s telecommunications carrier be changed. (See 47 C.F.R. Section 64.1100(b); Second Report and Order, 14 FCC Rcd at 1565-66, Paragraph 94). The Commission clarified that an executing carrier has actual physical responsibility for making the change to the subscriber’s service, as opposed to merely forwarding a carrier change request on behalf of a subscriber.

In the Second Report and Order, the Commission affirmed its tentative conclusion that submitting carriers should be responsible for verification of carrier change requests and, regardless of the solicitation method used, should employ one of three verification of carrier change requests and, regardless of the solicitation method used, should employ one of three verification options (written letters of agency (LOA’s), electronic authorization, or third party verification). (See Second Report and Order, 14 FCC Rcd at 1567, paragraph 97). In a subsequent order, the Commission added a fourth verification option – The Internet LOA (Third Report and Order, 15 FCC Rcd 15996, at paragraphs 6-21). The Commission further concluded that an executing carrier may not “re-verify” the submitting carrier’s initial

verification of a change request. The Commission agreed with parties that such re-verification would be expensive, unnecessary, and duplicative.

In the Third Report and Order, the Commission concluded that a script for third-party verification should elicit, at a minimum, the identity of the subscriber; confirmation that the person on the call is authorized to make the carrier change; confirmation that the person on the call wants to make the change; the names of the carriers affected by the change; the telephone numbers to be switched; and the types of service involved (i.e., local, in-state toll, out-of-state toll, or international service). (See Third Report and Order at paragraph 40.)

C. 1345.02 UNFAIR OR DECEPTIVE ACTS OR PRACTICES

Ohio Revised Code Section 1345.02(E)(1) sets for the following language:

“(E)(1) No supplier, in connection with a consumer transaction involving . . . public telecommunications service to a consumer in this state, shall request or submit, or cause to be requested or submitted, a change in the consumer's provider . . . of public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of Section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.”

D. 4905.72 UNAUTHORIZED CHANGE IN CONSUMER'S PROVIDER OF NATURAL GAS OR PUBLIC TELECOMMUNICATIONS SERVICES

Ohio Revised Code Section 4905.72 sets for the following language:

(A)(2) “Public telecommunications service” means the transmission by a telephone company, by electromagnetic or other means, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing, but does not include a system, including its

construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

...

(B)(1) No public utility shall request or submit, or cause to be requested or submitted, a change in the provider of natural gas service or public telecommunications service to a consumer in this state, without first obtaining, or causing to be obtained, the verified consent of the consumer in accordance with rules adopted by the public utilities commission pursuant to division (D) of this section.

...

(D) The commission shall adopt competitively neutral rules prescribing procedures necessary for verifying the consent of a consumer for purposes of division (B)(1) of this section and any procedures necessary for the filing of a security under division (C)(5) of section 4905.73 of the Revised Code, and may adopt such other competitively neutral rules as the commission considers necessary to carry out this section and section 4905.73 of the Revised Code. With respect to public telecommunications service only, the rules prescribing procedures necessary for verifying consumer consent shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 and 64.1150.

E. ARGUMENT

Respondent, One Communications' argument suffers from significant and fatal threshold flaws. First, Respondent concedes that only Ungar asked it to port Longworth and Gande's phone numbers and that he executed an LOA in order to verify. The Respondent further concedes that it must meet the requirements of verification set forth by the Federal Communications Commission in 47 C.F.R. Section 64.1130. This proposition is the Respondent's only apparent defense.

First §64.1130(e)(1), requires that the letter of agency must contain clear and unambiguous language that confirms the subscriber's billing name and address and each

telephone number to be covered by the preferred carrier change order. Herein lies the first fatal flaw of their argument. The Respondent, One Communications is correct in identifying that Ungar is a “subscriber” as defined under Section 64.1100 for his own phone lines and account with the Respondent. 47 C.F.R. 64.1100 defines subscriber as follows:

(h) The term subscriber is any one of the following:

- (1) The party identified in the account records of a common carrier as responsible for payment of the telephone bill;
- (2) Any adult person authorized by such party to change telecommunications services or to charge services to the account; or
- (3) Any person contractually or otherwise lawfully authorized to represent such party.

Longworth’s local telephone account was with AT&T for the phone number (330) 896-8500 and he was the “subscriber” for purposes of his account. Ungar admittedly was not.

Gandee’s local telephone account was also with AT&T for the phone number (330) 724-5521 and he was the “subscriber” for purposes of that account. Ungar admittedly was not.

The crux of the Respondent’s argument is based upon Ungar being the “subscriber” for the telephone numbers (330) 896-8500 and (330) 724-5521. Ungar never was. In order for One Communications argument to be accepted the Commission would have to determine Ungar to be the “subscriber” of both Longworth and Gandee’s phone numbers prior to the Spring of 2006. Both Complainants testified and executed affidavits indicating that Ungar was not. (See Longworth Affidavit ¶15 and Gandee Affidavit ¶15 attached to their Response to Respondents Motion to Dismiss filed May 3, 2010). The Respondent, One Communication provided no evidence or testimony to the contrary.

Second, One Communications has provided no record which would indicate that Ungar was identified in the account records of AT&T as responsible for payment of Longworth or Gandee's telephone bill under 47 C.F.R. 64.1100 (h)(1). Contrary to such an assertion Longworth and Gandee's phone bills are attached evidencing the name and numbers on the accounts. (See Exhibits "E" and "F")

Third, under Section 64.1100 (h)(2) the Summit County Common Pleas Court already issued a Judgment Entry adopting Magistrate Shoemaker's Decision in which he found that Ungar transferred the telephone number (330) 896-8500 from the control and ownership of Longworth without authority. Without authority, Ungar cannot be the subscriber to Longworth or Gandee's account nor meet the requirements under 64.1100 (h)(2).

Fourth, Respondent, One Communication presented no evidence to meet the verification requirement under (h)(3) that Ungar was contractually or otherwise lawfully authorized to represent either Longworth or Gandee.

One Communications basically relies upon the argument that it should be absolved from liability because Ungar presented them with an undated Letter of Authority which contained misrepresentations. Review of the Letter of Agency identifies the "Subscriber's billing name" as Center for Natural Medicine. Further the Letter of Agency identifies the Subscriber's billing address as 2828 S. Arlington Road, Akron, Ohio 44313. (See Letter of Agency attached hereto as Exhibit "G"). The problem is that Longworth and Gandee's phone numbers were both with AT&T under their names. (See AT&T bills attached as Exhibits "E" and "F" to Response to Respondents Motion to Dismiss filed May 3, 2010).

Additional and prolonged violations continued by Respondent. Testimony clearly indicated that in March of 2008, the Complainants made direct requests to Respondent to port their phone numbers over to their new address. Longworth testified that he initially made a request to AT&T to call forward his telephone number to his new location. He was informed that his phone number had been ported to the Respondent, Choice One. (Hearing Transcript – Page 20). Richard Wheeler testified that according to the Respondents customer service record and unbeknownst to the Complainants, the actual porting procedure changing authority over the phone numbers appears to have been completed sometime in October – November, 2006. (Hearing Transcript – 102).

Longworth then contacted the Respondent and was informed that he had no authority over the telephone number and that the number could not be transferred. (Hearing Transcript – Page 49). Gandee also testified in the spring of 2008 he also contacted AT&T and was informed that his phone number had been ported. He also contacted the Respondent and was informed that he had no authority to direct any changes to his phone number. He also informed them that Ungar was never granted authority to port his phone number. (Hearing Transcript – Page 55 - 58). Richard Wheeler testified that the Respondent really most likely would not even discuss the status of these phone numbers with the Complainants due to privacy issues. (Hearing Transcript – Page 87).

Even though the Respondent had received Notice of a fraudulent letter of authority, it failed to relinquish the numbers to the Complainants. Richard Wheeler testified that there was basically no internal investigative mechanism which was triggered to determine whether the phone numbers had been ported without proper authority. (Hearing Transcript – Page 106). He testified that basically there was no further investigation and that the onus

essentially falls upon the Complainant to provide additional proof that the letter of authority was a fraud.

Facing catastrophic patient and financial losses, the Complainants filed litigation in the Summit County Court of Common Pleas. The specific issue over the authority for these phone numbers was submitted to a Magistrate. A hearing was held and the Magistrate issued an Order which was adopted by the Court which found:

“... it is specifically concluded that there was no authority for the transfer of 330-896-8500 from the control and ownership of Brian Longworth into the name of Keith S. Ungar as was done, and that both Dr. Ungar and his business entities, The Center for Natural Medicine and/or Advanced Pain and Wellness Center, Inc., in any fashion or combination, have no right or claim to such phone number. As a result, the party known as Choice One Communications, Inc. the phone carrier in this matter, is ordered and otherwise directed to forthwith transfer the ownership on the records of such entity and to physically allow a change of such phone number, that being 330-896-8500, into the name of Brian Longworth and to ensure that the corporate records of such business entity show that Keith S. Ungar, or any of the aforementioned two business entities, has no ownership interest in such name. Further, such business records of Choice One Communications, Inc. shall reflect that the actual owner of 330-896-8500 is Brian Longworth, to be used by him at whatever address Brian Longworth forthwith determines he wishes to present to Choice One Communications, Inc. for recordkeeping purposes. Such entity known as Choice One Communications, Inc. shall forthwith effectuate all matters referred to above to allow the change in records and the change in control and ownership of the above-mentioned phone number, and shall file a notice with the Court when such acts have been accomplished.” See Magistrate’s Order filed May 19, 2009 – Page 5. (Exhibit 5).

Even though the Court ordered that the Respondent “... shall forthwith effectuate all matter referred to above to allow the change in records and the change in control and ownership of the above-mentioned phone number,” the Respondent did nothing. It was not until the Complainants faxed the Order to AT&T and directed it to attempt to get their numbers in August 2009 that they finally got their phone numbers back. (Hearing Transcript – Page 26). Complainants testified that even after receiving the Magistrate’s

finding dated May 19, 2009, the Respondent never voluntarily offered any assistance in obtaining the phone numbers.

The timeline of events is summarized below:

1981	Gandee originally obtains phone number (330) 724-5521
1998	Longworth originally obtains phone number (330) 896-8500
April 2006	Gandee/Longworth call forward their phone numbers with AT&T
Sept. 2006	Verbal Port Request by Ungar for (330) 724-5521 and (330) 896-8500
2006	Ungar executes an undated Letter of Authority
Nov/Dec. 2006	Phone numbers ported over
Feb. 2008	Longworth contacts AT&T informed numbers had been ported to Choice One Communications
Feb./March 2008	Longworth initially contacts Choice One and denied return of number
Feb./March 2008	Gandee initially contacts Choice One and denied return of phone number
May 19, 2009	Magistrate's Order return of Longworth's phone number forthwith
August 2009	Phone numbers returned

CONCLUSION

Respondent's entire argument centers on the premise that because Ungar is a "subscriber" then he had the right to authority over Longworth and Gandee's phone number. Longworth and Gandee never gave Ungar any authority over their respective phone numbers.

The authority to make a porting request in this case could only come from Longworth for his phone number and Gandee for his. 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.

Simply put, One Communications failed to verify the authority represented in the original porting request made by Ungar. The numbers were illegally obtained and ported to Ungar and Advanced Pain and Wellness. One Communications refused to return the phone numbers to either Longworth or Gandee in violation of the relevant statutes set forth above.

WHEREFORE, Complainants, Longworth and Gandee hereby request that the Commission find that the Respondent violated the statutes and impose all remedies available under the statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent via regular U.S. Mail, postage prepaid this 1st day of March, 2011 to:

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Summary: Brief Post-Hearing Brief on Behalf of Complainants Dr. William Gandee, D.C. and Dr. Brian Longworth, D.C. electronically filed by Mr. Thomas A Skidmore on behalf of Gandee, William Steven Mr. and Longworth, Brian Mr.