

**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 MEMORANDUM CONTRA
COMPLAINANTS' APPLICATION FOR REHEARING**

I. INTRODUCTION

In their Application for Rehearing, Complainants William Gandee, D.C. and Brian Longworth, D.C. ("Complainants") necessarily concede that Choice One Communications of Ohio, Inc. d/b/a One Communications ("One Communications") had no obligation to determine whether Complainants' business partner at the time, Keith Ungar, D.C. ("Dr. Ungar"), possessed actual authority to execute the letter of agency ("LOA") that authorized One Communications to request that AT&T port the telephone numbers previously assigned to Complainants' AT&T account (the "Telephone Numbers") to Dr. Ungar's One Communications account. This concession is apparent from Complainants' Application because they now urge this Commission

to create new customer care standards and impose new investigatory requirements on telephone companies regarding service transfers and then find that One Communications violated those newly imposed standards and requirements. A consumer complaint case, however, is not the appropriate forum for this Commission to promulgate new rules. Moreover, even if this Commission believed it appropriate to implement the unspecified rules Complainants urge, it could not, as Federal Communications Commission (“FCC”) rules and regulations would preempt them.

Complainants also seek rehearing to introduce additional evidence in support of their Complaints. Complainants, however, had ample time to prepare for the hearing in this matter, had the evidence they now proffer in their possession well in advance of the hearing, and, with reasonable diligence, could have presented this evidence at hearing. Therefore, rehearing is not appropriate. See Ohio Rev. Code §4903.10.

II. DISCUSSION

A. This Commission’s Decision Is a Correct Application of the Body of Telecommunications Law that Governs Carrier Service Changes & Customer Account Privacy

Complainants first argue that this Commission’s finding that “while a carrier must follow FCC verification procedures, establishing actual authorization of the subscriber is not required” is an unreasonable and unlawful finding. The Commission’s decision, however, is a correct application of the law that controls the duties of a submitting carrier (One Communications in this case) vis-à-vis subscriber carrier change requests. The relevant carrier change regulations provide that a submitting carrier has no duty to investigate or establish whether a subscriber has actual authorization to execute an LOA to request the porting of a telephone number. See, e.g., AT&T Corp. v. Federal Communications Comm’n, 323 F.3d 1081 (D.C. Cir. 2003); and Sprint

Communications Company, 18 FCC Rcd. 24137, 24138-39 (2003). Complainants do not contend that the Commission erroneously applied the FCC carrier change regulations to this case, or, in fact, even cite to those regulations or AT&T Corp. and its progeny. Thus, Complainants fail to demonstrate why this Commission's decision is an unreasonable and unlawful application of existing telecommunication law, and, therefore, are not entitled to rehearing.

Complainants also appear to contend that this Commission's application of the FCC's Customer Proprietary Network Information privacy regulations in its decision was unreasonable. Those regulations do not permit a carrier to make changes to an account based on the request of an individual not authorized on that account. See 47 C.F.R. §§64.2001 et seq. Complainants, however, again fail to offer any analysis as to why the Commission did not properly apply the FCC's privacy regulations to this case. Therefore, they also fail to establish that they are entitled to rehearing on this ground.

Instead of offering legal argument as to why this Commission's decision does not comport with FCC regulations and AT&T Corp., Complainants advocate that this Commission adopt new customer care standards and impose upon telephone companies new investigatory requirements regarding carrier change requests. Complainants, however, do not offer any suggestion as to what these new rules should be. Moreover, establishing new customer care standards and investigatory requirements on telephone companies would, at a minimum, require a full notice and comment rulemaking, if not authorization from the General Assembly to engage in the same. What is more, Ohio has expressly adopted the FCC's subscriber authorization verification rules and procedures. Ohio Admin. Code §4901:1-6-18(A). Thus, even if this Commission believed it appropriate to implement the undefined rules Complainants urge, it

could not, as the FCC's subscriber authorization verification rules and procedures would preempt the same.

Complainants also argue that their suggested rulemaking is necessary because they believe that this Commission's decision leaves them without any recourse to recover their alleged damages for the alleged improper transfer of the Telephone Numbers from their AT&T accounts to Dr. Ungar's One Communications account. Complainants, however, forget that they have every right, and in fact did, pursue tort claims against the person who actually lacked authorization to request the service transfer: Dr. Ungar. It was Dr. Ungar who executed the LOA without authorization—as the Summit County Court of Common Pleas found—not One Communications. Moreover, this Commission suggested that AT&T, not One Communications, might have some duty to verify that Dr. Ungar had actual authority to request that the Telephone Numbers be ported to his One Communications account. In the Matter of William Steven Gandee, D.C. et al. v. Choice One Communications of Ohio, Inc., PUCO Nos. 09-51-TP-CSS & 09-52-TP-CSS, Opinion & Order, at 8 (May 25, 2011). Plainly, then, the existing FCC carrier change rules, as adopted by Ohio, do not leave Complainants without redress for any damages they allege they incurred as a result of Dr. Ungar's unauthorized carrier change request. Therefore, Complainants' policy argument fails to demonstrate that they are entitled to rehearing.

B. Complainants' "New Evidence" Could Have Been Presented at Hearing if Complainants Had Exercised Reasonable Diligence

Complainants also seek rehearing because they contend that the Commission failed to provide evidentiary support for its factual finding that One Communications informed Complainants' counsel that an AT&T port request was required before One Communications could transfer the telephone number previously assigned to Dr. Gandee's AT&T account back to that account. Complainants' allegation is simply untrue. To support this evidentiary finding, the

Commission cited to Mr. Wheeler's direct testimony filed on January 13, 2011, in this case, at page fourteen, wherein Mr. Wheeler testifies that One Communications informed Complainants' counsel that a port request was necessary for it to be able to transfer the telephone number previously assigned to Dr. Gandee's AT&T account back to that account. Therefore, Complainants' assertion the record did not support this Commission's factual finding is baseless and provides no ground for rehearing.

Complainants also seek rehearing to introduce new evidence to contradict Mr. Wheeler's direct testimony that One Communications informed Complainants' counsel that a port request was necessary for it to be able to transfer the telephone number previously assigned to Dr. Gandee's AT&T account back to that account. This evidence consists of correspondence from Complainants' counsel to One Communications or its counsel and a subpoena issued to One Communications. Complainants themselves generated all of these documents well over a year before the hearing in this matter. Complainants therefore had the evidence they now proffer in their possession well in advance of the hearing and provide no reason as to why they could not have offered it at the hearing. Thus, with reasonable diligence, Complainants could have presented this evidence at hearing. See Ohio Rev. Code §4903.10 ("The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.") Therefore, Complainants are not entitled to introduce the evidence they now proffer, which they allege contradicts Mr. Wheeler's direct testimony.

III. CONCLUSION

For the foregoing reasons, One Communications respectfully requests that this Commission deny Complainants' Application for Rehearing.

Respectfully submitted,

CHOICE ONE COMMUNICATIONS OF
OHIO INC. d/b/a ONE COMMUNICATIONS,
By its Attorneys

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CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing was sent via electronic mail to the following persons this 5th day of July, 2011.

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Summary: Memorandum Respondent's Memorandum Contra Complainants' Application for Rehearing electronically filed by Mr. Michael D. Dortch on behalf of Choice One Communications of Ohio