

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of William Steven Gandee,)	Case No. 09-51-TP-CSS
D.C.,)	
)	
and)	
)	
In the Matter of Brian Longworth, D.C.,)	Case No. 09-52-TP-CSS
)	
Complainants,)	
)	
v.)	
)	
Choice One Communications of Ohio,)	
Inc. dba One Communications,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the testimony and exhibits presented in this matter, the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES

Thomas Skidmore, National City Center, One Cascade Plaza, 12th floor, Akron, Ohio 44308, on behalf of the Complainants.

Michael Dortch, Kravitz, Brown, & Dortch, LLC, 65 East State Street, Suite 200, Columbus, Ohio 43215, on behalf of Choice One Communications of Ohio, Inc. dba One Communications.

I. HISTORY OF THE PROCEEDINGS

On January 22, 2009, William Steven Gandee, D.C. (Dr. Gandee) and Brian Longworth, D.C. (Dr. Longworth) (collectively, Complainants) filed complaints against Choice One Communications of Ohio, Inc. dba One Communications (One Communications). Complainants alleged that they began sharing an office with Dr. Keith Ungar (Dr. Ungar), a One Communications customer, early in 2006, and that in September 2006, at Dr. Ungar's request, One Communications unlawfully ported Complainants' telephone numbers from AT&T Ohio (AT&T) to Dr. Ungar's One

Communications account. Complainants further alleged that One Communications refused Complainants' March 2008 request to remove their telephone numbers from Dr. Ungar's account when Complainants moved from the premises that they shared with Dr. Ungar.

One Communications answered both complaints on February 11, 2009, by contending that it had obtained a verified letter of agency (LOA) from Dr. Ungar before submitting a port request to AT&T. One Communications also argued that Complainants were not listed as authorized to make changes to Dr. Ungar's account; therefore, Complainants' request to remove their telephone numbers from Dr. Ungar's account could not be accomplished until One Communications received a valid port request.

By entry issued February 13, 2009, the attorney examiner scheduled a prehearing conference for both Complainants on February 24, 2009. The parties met at that day and time but did not resolve matters.

One Communications filed a motion to dismiss and memorandum in support on April 9, 2010. One Communications asserted that it properly relied on Dr. Ungar's LOA, which complied with 47 C.F.R. 64.1130, when it submitted the port request to AT&T in November 2006. One Communications also emphasized that an actual-authorization requirement, as argued by Complainants, and under which One Communications would have to verify whether Dr. Ungar was indeed the subscriber for the ported telephone numbers, was rejected by the D.C. Circuit Court in *AT&T Corp. v. Federal Communications Comm'n*, 323 F. 3d 1081 (D.C. Cir. 2003), (*AT&T Corp.*) and has been applied by the Federal Communications Commission (FCC) in numerous subsequent decisions, including *Sprint Communications Company*, 18 FCC Rcd 24137, 24138-39 (2003), *ACN Communications Company*, 19 FCC Rcd 9324, 9325-26 (2004), *Communicate Technological Systems LLC*, 20 FCC Rcd 15553, 15555 (2005), and *Communicate Technological Systems LLC*, 21 FCC Rcd 3409, 3411 (2006).

In their May 3, 2010, response to the motion to dismiss, Complainants restated their contentions from the complaint. The Commission denied the motion to dismiss on October 4, 2010, by explaining that summary judgment is appropriate only if the undisputed facts and the laws make it clear that it is impossible for one party to prevail should the matter proceed to hearing. The Commission further stated that, upon review of the assertions made by both parties, summary judgment was not appropriate.

The attorney examiner issued an entry on November 24, 2010, scheduling a January 20, 2011 hearing. The hearing was conducted on January 20, 2011.

II. APPLICABLE LAW

One Communications is a public utility, as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of the Commission.

Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice affecting or relating to any service furnished is unjust or unreasonable. The Commission also notes that the burden of proof in complaint proceedings is on the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. Therefore, it is the responsibility of the complainant to present evidence in support of the allegations made in a complaint.

III. SUMMARY OF THE TESTIMONY

Dr. Longworth's Position

Dr. Longworth testified that he began operating as a sole practitioner in 1998 when he founded Health First Chiropractic (Health First), located at 3577 South Arlington Road in Akron. He added that the telephone number for Health First, since its inception, has been 330-896-8500, and that AT&T provided telephone service to Health First (Tr. at 8-9).

According to Dr. Longworth, in April 2006 he moved his practice to 2828 South Arlington Road in Akron and began operating out of the same premises with Dr. Ungar. Dr. Longworth added that Dr. Gandee also moved to 2828 South Arlington Road at that time. Together, the three chiropractors operated under the name of Dr. Ungar's practice, the Advanced Pain and Wellness Center dba Center for Natural Medicine (*Id.* at 27-29). Dr. Longworth explained that while he and his colleagues never formally established their combined business by filing corporate documents, expenses were paid out of a single account by an office manager or by Dr. Ungar (*Id.* at 29, 30-33, 37). As a result, stated Dr. Longworth, while at 2828 South Arlington Road, he did not examine his telephone bills prior to payment (*Id.* at 36-37).

Dr. Longworth stated that he forwarded telephone number 330-896-8500 to 2828 South Arlington Road when he joined Drs. Ungar and Gandee. While there, he asserted, he never authorized another person to change his telecommunications provider from AT&T to another carrier (*Id.* at 10-11).

Dr. Longworth testified that he returned to 3577 South Arlington Road in February 2008 because his financial relationship with Dr. Gandee had deteriorated (*Id.*

at 10-12, 37-39). Dr. Longworth confirmed that patients relied on the 330-896-8500 number to contact him, so when he returned to his initial address, he called AT&T and sought to transfer 330-896-8500 back to 3577 South Arlington Road (*Id.* at 11, 14). Dr. Longworth was then informed by AT&T that One Communications was the telecommunications provider for 330-896-8500 (*Id.* at 11-12). Dr. Longworth added that it was not until later, during proceedings in *Ungar v. Longworth, et al.*, No. CV-2008-02-1528 (C.P. Summit County, June 9, 2009) (judgment entry) (*Ungar*) did he realize that Dr. Ungar had arranged to have 330-896-8500 transferred to One Communications (*Id.* at 34; Complainants' Exhibit 5 at p. 4).¹ Dr. Longworth stated that, upon learning this, he asked Dr. Ungar to release the number, but Dr. Ungar never did so (Tr. at 41).

Next, stated Dr. Longworth, he contacted One Communications and explained that he had never authorized a change to One Communications from AT&T. In reply to his concerns, asserted Dr. Longworth, One Communications provided little assistance, and would only state that he "was not the authorizing individual for the phone number anymore" (*Id.* at 12-13, 15-16, 49). Consequently, he added, he had to quickly obtain an entirely new phone number at 3577 South Arlington Road (*Id.* at 21). In addition, testified Dr. Longworth, calls to 330-896-8500 were answered by Dr. Ungar's office; the calls were never referred to Dr. Longworth at 3577 South Arlington Road (*Id.* at 18-19, 41).

Dr. Longworth contended that One Communications did not release his telephone number even after a May 19, 2009, Summit County Magistrate's decision in *Ungar*, which was adopted by Summit County Judge Rowlands in a June 9, 2009, judgment entry, which concluded that Dr. Ungar had no authority to transfer Dr. Longworth's number, and ordered One Communications to transfer Dr. Longworth's number back to him (*Id.* at 16-17, 21-25). Even after the June 9, 2009, judgment entry in *Ungar*, asserted Dr. Longworth, Choice One "didn't help me, give any direction, nothing" (*Id.* at 26). Dr. Longworth added that in July or August 2009 he faxed the judgment entry in *Ungar* to AT&T, upon which 330-896-8500 was returned to him. He added that he called the Commission informally before filing the formal complaint but does not recall any more details (*Id.* at 71-72).

Dr. Gandee's Position

Dr. Gandee stated that he has operated the Gandee Chiropractic Life Center at 2050 South Arlington Road in Akron for about 30 years. He added that the 330-724-

¹ On February 20, 2008, in *Ungar*, Dr. Ungar filed a complaint against Complainants for breach of agreement. On April 15, 2008, Complainants answered the complaint and also filed a counterclaim against Dr. Ungar. The parties entered into a settlement agreement and release that covered all claims and counterclaims; the settlement agreement was incorporated into a final judgment entry by the Court on February 26, 2010.

5521 telephone number has been associated with his business since its inception and that AT&T provided his telephone service (*Id.* at 51-54).

Dr. Gandee testified that, in spring 2006, he moved his practice to 2828 South Arlington Road to join Drs. Ungar and Longworth at the Advanced Pain and Wellness Center. At that time, he contacted AT&T and requested the transfer of 330-724-5521 to his new location. Dr. Gandee asserts that he never authorized any person to change his telecommunications provider from AT&T to another carrier (*Id.* at 53-55, 60).

Dr. Gandee explained that he had trusted that nothing unexpected would happen when he joined Drs. Ungar and Longworth, so he was unaware of the transfer of 330-724-5521 to One Communications until spring 2008, when he left 2828 South Arlington Road and returned to his former location (*Id.* at 68). While moving back to 2050 South Arlington Road, he explained, he contacted AT&T seeking to transfer 330-724-5521, and was told that "I no longer managed that phone number. They didn't even have it any more" (*Id.* at 55-56, 62, 67-68). Upon learning that 330-724-5521 had been transferred to One Communications, he immediately called One Communications and was told that "my name was no longer the person that needed to make the decisions. . . . I had no control over my number" (*Id.* at 56-57, 61, 69). As a result, stated Dr. Gandee, from spring 2008 through September 2009, calls to 330-724-5521 were received at Dr. Ungar's office, and patients were directed to appointments with Dr. Ungar, who retained the patients for himself (*Id.*)

Dr. Gandee is unsure whether he ever contacted the Commission with an informal complaint before filing his formal complaint (*Id.* at 70-71). He added that when he learned that Dr. Ungar had transferred 330-724-5521 to One Communications, he asked Dr. Ungar to release the number, but Dr. Ungar would not provide a specific answer (*Id.* at 63). Dr. Gandee stated that he reacquired 330-724-5521 in September 2009 only after faxing a copy of the June 9, 2009, judgment entry in *Ungar* to AT&T (*Id.* at 69-70). He added that One Communications never explained why, prior to the June 9, 2009, judgment entry in *Ungar*, it never honored his request to relinquish 330-724-5521 (*Id.* at 56-57).

One Communications' Position

Richard Wheeler, Strategic Compliance Implementation Manager, testified on behalf of One Communications. Mr. Wheeler stated that Dr. Ungar opened his account with One Communications in June 2002 (*Id.* at 90; Ex. RW 1). In September 2006, Mr. Wheeler added, Dr. Ungar asked One Communications to place Complainants' telephone numbers 330-896-8500 and 330-724-5521 on Dr. Ungar's account. One Communications informed Dr. Ungar that an LOA was necessary for such a transfer (Tr. at 78). The LOA was then sent to Dr. Ungar by One Communications (*Id.* at 133-134).

Mr. Wheeler explained that One Communications requires a signed LOA as part of a "legal process that we have to follow in order to establish someone's authority." He added that, even if Dr. Ungar had sought to change his residential telephone number from another carrier to One Communications, One Communications would still require a written LOA. (*Id.* at 79). Mr. Wheeler explained that, under *AT&T Corp.*, Dr. Ungar's actual authority to request the transfer of Complainants' telephone numbers to One Communications is not required. Rather, asserted Mr. Wheeler, under *AT&T Corp.*, Dr. Ungar had apparent authority by providing a signed LOA that conformed with FCC standards (*Id.* at 81). In sum, Mr. Wheeler explained, under *AT&T Corp.*, the LOA is accepted at face value as valid (*Id.* at 133-134).

Mr. Wheeler observed that RW Exhibit 2, a copy of the LOA signed by Dr. Ungar, indicates that One Communications faxed the LOA to him on October 30, 2006, and that on October 31, 2006, Dr. Ungar faxed back the LOA (*Id.* at 96-97, 123-124; Ex. RW 1; Ex. RW 2). Mr. Wheeler does not know the exact date that Complainants' telephone numbers were ported to One Communications, but believes that it occurred during October or November 2006, following receipt of the LOA signed by Dr. Ungar. To Mr. Wheeler's knowledge, One Communications had no contact with Complainants before the numbers were ported from AT&T (Tr. at 102-103, 107-108). In Mr. Wheeler's words, "privacy rules" make it unlikely that AT&T provided Complainants' names to One Communications when Complainants' numbers were ported (*Id.* at 82, 85-86).

According to Mr. Wheeler, when Complainants notified One Communications that their telephone numbers were wrongfully ported from AT&T, One Communications investigated, and found Dr. Ungar's LOA authorizing One Communications to become the preferred carrier for Complainants' telephone numbers (*Id.* at 103-105). In addition, Mr. Wheeler observed, Ex. RW 1 contains a March 31, 2008, e-mail from the Commission's Call Center, indicating that Dr. Gandee had called to complain that, without his permission, Dr. Ungar had transferred Dr. Gandee's telephone number from AT&T to One Communications. Ex. RW 1 also contains a reply e-mail from Teresa Morey, Service Analyst at One Communications, to the Commission, indicating that One Communications' records contain a service agreement signed by Dr. Ungar transferring Complainants' telephone numbers to One Communications, and indicating that Dr. Ungar is the contact person for that account (*Id.* at 132-133; Ex. RW 1). Because One Communications' records state that Dr. Ungar and his office manager are the only persons authorized to discuss the account, Mr. Wheeler explained, One Communications discussed very little with Complainants when contacted by them (Tr. at 76-77, 132).

Mr. Wheeler testified that, aside from Complainants contacting One Communications, he was contacted by Complainants' counsel, who sought return of Complainants' telephone numbers and alleged that Dr. Ungar may have lacked

authority to sign the LOA (*Id.* at 76-77). Mr. Wheeler stated that there is no internal investigative committee at One Communications to speak with all parties during such an allegation; rather, One Communications relies on a valid LOA, as established in *AT&T Corp.* (*Id.* at 105-106). Further, Mr. Wheeler added, no evidence was provided by Complainants regarding Dr. Ungar's alleged lack of authority (*Id.* at 76-77). In sum, stated Mr. Wheeler, while he and One Communications were aware of the alleged wrongful porting from AT&T, it was only "an allegation. We had no way to verify" its validity (*Id.* at 103-105).

Mr. Wheeler did not know whether, following the June 9, 2009, judgment entry in *Ungar*, any attempt was made by One Communications to inform Complainants directly, via means such as a letter, that a porting request was needed from AT&T to re-obtain their telephone numbers (*Id.* at 118-120). However, contended Mr. Wheeler, when Dr. Ungar gave up his claim to Dr. Gandee's number just before the May 19, 2009, Magistrate's decision in *Ungar*, One Communications disconnected Dr. Gandee's number, and then "on several occasions . . . One Communications informed Dr. Gandee's counsel that it could transfer his number to AT&T only after One Communications received a port request to do so" (Ex. RW 1 at 13-14). Further, Mr. Wheeler asserted, given One Communications' awareness that (1) Dr. Ungar had released Dr. Gandee's number and that (2) the June 9, 2009, judgment entry in *Ungar* had ordered the return of Dr. Longworth's number to him, One Communications "held" Complainants' numbers until receipt of a port request from AT&T (Tr. at 128-129). Mr. Wheeler explained that One Communications "held" Complainants' numbers to ensure return of their numbers to them (*Id.* at 133). As stated by Mr. Wheeler, "we need a port order . . . to make sure that the party's wishes are carried out and it [the telephone number at issue] gets to the proper place. A court order is not a porting request" (*Id.* at 112, 118). He added that, unless a carrier receives a porting request in addition to the LOA, One Communications cannot transfer a number, because the port request provides information ensuring that One Communications "has all the service numbers properly ordered" (*Id.* at 126-127). If One Communications were to disconnect a number and not coordinate with another carrier, he added, that number could be released into the general pool, which would allow any party to obtain that number (*Id.* at 111-112, 127).

According to Mr. Wheeler, despite One Communications' informing Complainants' counsel that an AT&T port order was needed for Dr. Gandee to re-obtain his number, One Communications did not receive a port request from AT&T until September 2009, at which time the number was returned to AT&T (Ex. RW 1 at 14; Tr. at 110, 112-113). Regarding Dr. Longworth's telephone number, Mr. Wheeler testified that a port order from AT&T was received, and that number was transferred back to AT&T within 30 days of the June 9, 2009, judgment entry in *Ungar* (*Id.* at 110, 112-113, 133; Ex. RW 1 at 16).

IV. DISCUSSION AND CONCLUSIONS

As noted in Part II of this Opinion and Order, in complaint proceedings the burden of proof is on the complainant. For reasons explained below, we find that there is insufficient evidence to support a conclusion that One Communications acted unreasonably, or in violation of any tariff, rule, regulation, law, or accepted standard or practice in the telecommunications industry. Therefore, based on the record in this proceeding, Complainants have failed to sustain their burden of proof.

The Commission does not overlook Complainants' contentions that they never authorized Dr. Ungar to transfer their telephone numbers to One Communications (*Id.* at 10-11, 16, 53-55, 60). Still, the Commission takes notice that One Communications had obtained an LOA from Dr. Ungar that complied with 47 C.F.R. 64.1130 and that, under *AT&T Corp.*, while a carrier must follow FCC verification procedures, establishing actual authorization of the subscriber is not required. Further, the record contains no evidence that, at the time the numbers were ported, AT&T provided Complainants' names to One Communications, or that One Communications had access to AT&T records to confirm to whom the numbers at issue were assigned (*Id.* at 82, 85-86). In sum, the Commission finds a lack of sufficient record support to establish that One Communications acted unreasonably or violated any rule or law during the porting of Complainants' telephone numbers to One Communications. It is the Commission's belief, however, that AT&T was likely in a better position to confirm, upon receipt of a port request from One Communications that was initiated by Dr. Ungar's LOA, whether Dr. Ungar was indeed the customer to whom the 330-896-8500 and 330-724-5521 numbers were assigned. In the future, a carrier receiving an LOA should check its records to determine whether the person listed on the LOA as the customer is the customer to whom the number is assigned.

Next, the Commission examines One Communications' actions after Complainants left the location shared with Dr. Ungar, returned to their former addresses, and, in addition to their counsel, contacted One Communications, alleging that their numbers were ported without their permission. The record indicates that, upon hearing the concerns of Complainants and their counsel, One Communications investigated and found a valid LOA from Dr. Ungar, and confirmed that the only contact persons for said numbers were Dr. Ungar and his office secretary (*Id.* at 103-105, 132-133; Ex. RW 1). The Commission also notes that, while Complainants and their counsel expressed objection to One Communications regarding the porting, no evidence was provided pertaining to Dr. Ungar's alleged lack of authority (Tr. at 76-77). Given the preceding factors, the Commission determines that One Communications did not act unreasonably or violate any rule or law in its actions taken while investigating Complainants' allegations.

Finally, the Commission focuses upon One Communications' actions concerning Complainants' numbers just prior to, and immediately following, proceedings in Ungar. The Commission takes notice that, just before the Magistrate's May 19, 2009, decision in *Ungar*, Dr. Ungar released any claim to Dr. Gandee's telephone number (*Id.* at 113-117). The Commission is aware that One Communications did not return Dr. Gandee's number immediately upon Dr. Ungar's release of that number. However, the Commission finds significant that One Communications disconnected Dr. Gandee's number when Dr. Ungar relinquished his claim to that number, thereby preventing Dr. Ungar from receiving further calls from Dr. Gandee's patients (Tr. at 114, Ex. RW 1 at 13). In addition, the Commission observes, One Communications informed Complainants' counsel that a port request from AT&T was needed for Dr. Gandee's number to be transferred back to AT&T, and that, until receipt of AT&T's September 2009 port request, One Communications "held" that number to prevent its release into the general number pool (Tr. at 110, 112-113, 128-129; Ex. RW 1 at 13-14).

Next, the Commission notes that the June 9, 2009, judgment entry ordered One Communications to immediately return Dr. Longworth's number to him (Complainants' Ex. 6). The record is not clear whether One Communications disconnected Dr. Longworth's number after June 9, 2009. However, the Commission observes that Dr. Longworth's number was returned to AT&T in July 2009, approximately one month after the judgment entry, and just as with Dr. Gandee's number, One Communications did not release Dr. Longworth's number to the general number pool, but retained the number until receipt of an AT&T port order (Tr. at 71-72, 110-118, 126-129, 133).

Upon review of the record in this proceeding, the evidence does not support Complainants' assertions. We find nothing in the record to indicate that the steps taken by One Communications violated any tariff or state law, or that One Communications acted unreasonably or in violation of the Commission's rules and regulations, state laws, or accepted standards and practices in the telecommunications industry (1) upon receipt of the LOA signed by Dr. Ungar, (2) upon being contacted by Complainants and their counsel, who were attempting to re-obtain 330-896-8500 and 330-724-5521 after leaving the premises shared with Dr. Ungar, (3) when Dr. Ungar released claim to Dr. Gandee's number just before the May 19, 2009, Magistrate's decision in *Ungar*, and (4) following the June 12, 2009, judgment entry in *Ungar*, which ordered One Communications to transfer 330-896-8500 back to Dr. Longworth. The Commission emphasizes, however, that while the record is not clear whether One Communications disconnected Dr. Longworth's number after June 9, 2009, it is the Commission's expectation that immediate disconnection should have occurred, and must occur in similar future circumstances. Accordingly, lacking evidence demonstrating that One Communications has violated any rule, regulation, law, or acted unjustly or unreasonably, the Commission finds that Complainants have failed to sustain their burden of proof and the complaint should be dismissed.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) On January 22, 2009, William Steven Gandee, D.C., and Brian Longworth, D.C. (Complainants) filed complaints against Choice One Communications of Ohio, Inc. dba One Communications (One Communications), alleging that in September 2006, at the request of Dr. Keith Ungar (Dr. Unger), One Communications unlawfully ported Complainants' telephone numbers from AT&T to One Communications and Dr. Ungar's account. Complainants further alleged that One Communications refused Complainants' March 2008 request to remove their telephone numbers from Dr. Ungar's account when Complainants moved from the premises that they shared with Dr. Ungar.
- (2) One Communications answered both complaints on February 11, 2009, by contending that it had obtained a verified LOA from Dr. Ungar before submitting a port request to AT&T. One Communications also argued that Complainants were not listed as authorized to make changes to Dr. Ungar's account, so Complainants' request to remove their numbers from his account could not occur until One Communications received a valid port request.
- (3) By entry issued February 13, 2009, the attorney examiner scheduled a prehearing conference for both Complainants on February 24, 2009. The parties met at that day and time but did not resolve matters.
- (4) One Communications filed a motion to dismiss and a memorandum in support on April 9, 2010, stating that it properly relied on an LOA signed by Dr. Ungar when it submitted a port request to AT&T.
- (5) Complainants responded to the motion to dismiss on May 3, 2010, by restating their contentions from the complaint.
- (6) The Commission denied the motion to dismiss on October 4, 2010.
- (7) By entry issued November 24, 2010, this matter was scheduled for hearing on January 20, 2011. The hearing was held as scheduled.

- (8) One Communications is a public utility, as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of the Commission.
- (9) In a complaint case, the burden of proof is on the complainant. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189.
- (10) There is insufficient evidence to support a finding that One Communications' actions violated any tariff or state law, or that One Communications has acted unjustly or unreasonably or in violation of any rule, regulation, or law, or that any practice affecting or relating to any service furnished was unjust or unreasonable.
- (11) Based on the record in this proceeding, Complainants have failed to sustain their burden of proof and the complaint should be denied.

ORDER

It is, therefore,

ORDERED, That the complaint be denied. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

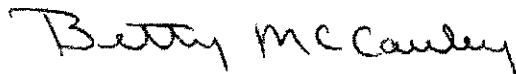

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MAY 25 2011


Betty McCauley
Betty McCauley
Secretary