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DETROIT, MICHIGAN

MICHIGAN PUBLIC SERVICE
FILED
JUN 14 2001
COMMISSION

June 14, 2001

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48909

Re: In the Matter of the Complaint of Covenant House Michigan and Great Lakes Telecom Against American Telephone & Telegraph Company, et al
MPSC Case No. U-12759

Dear Secretary Wideman:

Enclosed for filing are Complainants' Reply to Respondents' Exceptions to the Proposal for Decision and Proof of Service.

Thank you.

Sincerely yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Frederick M. Baker, Jr.

FMB/als
Enclosures
cc (w/encls): Mr. Anthony J. LeVasseur
Mr. John J. Reidy, III
Mr. Michael Nickerson
Honorable James N. Rigas

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Complaint of COVENANT HOUSE MICHIGAN and GREAT LAKES TELECOM, INC. against AMERICAN TELEPHONE AND TELEGRAPH COMPANY (a/k/a AT&T Corp., AT&T, Inc.), TELEPORT COMMUNICATIONS GROUP, INC. (a/k/a Teleport Communications, TCG Detroit, and TCG Detroit Holdings, I, Inc.)	)	MPSC Case No. U-12759

COMPLAINANTS' REPLY TO RESPONDENTS' EXCEPTIONS TO THE PROPOSAL FOR DECISION

Complainants Covenant House Michigan and Great Lakes Telecom, Inc. ("Complainants"), through their attorneys, submit the following reply to Respondents' Exceptions to the Proposal for Decision ("PFD") issued by the Honorable James N. Rigas, Administrative Law Judge ("ALJ") on May 24, 2001.

I. RESPONDENTS' EXCEPTION TO THE ALJ'S FINDING THAT MTA SECTION 502(1)(c) WAS VIOLATED IS MERITLESS.

Oddly enough, Complainants agree with Respondents that the ALJ's finding on this issue was incorrect, although for reasons very different from the frivolous ones Respondents advance. For the reasons set forth in Complainants' Exceptions to the PFD, which are incorporated here, Complainants submit that the ALJ erred in finding that Section 502(1)(c) applied, because the proper basis for imposing sanctions under the MTA is Respondents' violation of MTA Section 507(1).

Assuming, arguendo (and in the alternative), that the proper basis for concluding that Respondents' relentless billing for unordered remote call forwarding services over a period of 11 months (through the time of hearing, and continuing to this date) is conduct that violates Section 502(1)(c), as the ALJ concluded, Complainants submit that such a finding is legally permissible and within the scope of the Complaint.

The Complaint included, at paragraph 19(f), the allegation that Respondents' conduct, as alleged (and as proved at the hearing and found by the ALJ) violated MTA Section 305(1)(n), which provides that "a provider of basic local exchange services shall not...perform <u>any act that has been prohibited by this act</u> or an order of the Commission." If, as the ALJ found, Respondents' continued billing for unordered services, despite Complainants' innumerable requests that remote call forwarding not be provided on 76 lines for which it was not ordered, constituted continued charging for service after Complainants had sought to cancel the service, with the "effective date the service was cancelled" being, at the latest, September 2000, the date on which Mr. Minnis himself testified he had attempted to cancel the service and grant credits for the service "falsely billed," a violation of Section 502(1)(c) can be found. Certainly, the record amply warrants a finding that Complainants began attempts to cancel this unordered service as to the 76 lines on which it was being provided, in May 2000 and a further finding that Respondents continued to bill for that service even after Respondents themselves admittedly attempted to cancel the service and cancel the improper billing!

It passes understanding that Respondents have the effrontery to maintain, as they do in their Exceptions, that some "ambiguity" exists in the MTA that would render their unconscionable and admitted conduct in this case anything other than a plain violation of the MTA. Claiming merely that "the error continued due to a 'glitch' in the billing system," Respondents' Exceptions, at 3, Respondents urge that "these facts do not amount to a violation," because "there is no dispute that Covenant House wanted Respondents to continue to provide a service."

The undisputed facts, established beyond any doubt in this case and admitted by Respondents themselves, are that Covenant House ordered remote call forwarding service on nine lines, but was provided with remote call forwarding service on 85 lines, and, when Complainants requested that this service be discontinued (along with the billing for it) on the 76 lines for which it had not been ordered, Respondents failed and refused to do so. The result was thousands of dollars in billings, over an 11 month period (from May 2000 up to the time of hearing in March 2001, and continuing to date) for a service that had never been ordered, which had been provided despite repeated attempts to secure its cancellation.

For Respondents to claim that they are entitled to a safe harbor against any finding of a violation of the MTA on the ground that "the issue is not the provision of a service after the effective date the service had been cancelled, but, rather, a dispute regarding a mathematical error in calculating the total amount of a bill" is simply outrageous. Any violation of the MTA that results from cramming and slamming can be characterized as a mere "mathematical error," but only if the Commission turns a blind eye to the fact that it was done knowingly, month after month, even after the "mathematical error" was identified, acknowledged, and (supposedly) rectified.

With respect to Respondents' contention that they were denied "due process" because Complainants did not plead the violation of MTA Section 502(1)(c) that the ALJ found and recommended in his PFD, Complainants would observe, first, that Respondents carefully omitted from their recitation of the violations enumerated in the Complaint the violation of MTA Section 507(1) that Complainants plead. Respondents' Exceptions, at 4. For the reasons advanced by Staff in its Exceptions to the PFD, in which Complainants join, and for the reasons urged in Complainants' Exceptions to the PFD previously incorporated here by reference, Complainants submit that the proper section under which to impose sanctions in this case is MTA Section 507(1).

Nevertheless, having plead, as well, Respondents' violation of MTA Section 305(1)(n), quoted above, rendering Respondents' conduct a violation of the MTA because it is conduct prohibited by the MTA (whether under Section 502(1)(c) or under Section 507(1)), Respondents can hardly be heard to claim that they have been denied notice or due process. No doubt it was recognition of this that prompted Respondents also to omit from their recitation of the claims Complainants asserted the violation of MTA Section 305(1)(n). Respondents' Exceptions, at 4.

It is a well-settled principle of law that when, as here, a correct result has been reached, even for the wrong reasons, the result may be affirmed for the correct reason. See e.g., Hall v McRea Corporation, 238 Mich App 361, 369; 605 NW2d 354 (1999) ("We affirm because the trial court reached the right result, albeit for the wrong reason."), People v Chavies, 234 Mich App 274, 284; 293 NW2d 655 (1999) (Same holding, in a criminal context). In this case, the ALJ has reached the correct result, finding that Respondents' conduct constitutes a violation of the MTA, even though Complainants believe that the ALJ did so for the wrong reason. The result the ALJ recommends in the PFD ought to be adopted, but with the violation found to arise under MTA Section 507(1).

In the alternative, however, even if the Commission concludes that the ALJ's finding that the violation arises pursuant to Section 502(1)(c), the result may be affirmed in light of the ample evidence establishing the conduct alleged in the Complaint, which Respondents admitted at the hearing, and the showing, based upon that evidence, that such conduct constituted a violation of MTA Section 305(1)(n), prohibiting a provider of basic local exchange services to perform any act prohibited by the MTA or an order of this Commission. Conduct prohibited by MTA Section 502(1)(c) is clearly conduct to which MTA Section 305(1)(n) applies. Should the Commission conclude that the proper categorization of Respondents' conduct is to class it as a violation of MTA Section 502(1)(c), sanctions may be imposed based upon that finding, pursuant to MTA Section 305(1)(n). This is not a case in which the Commission would be exercising a "doubtful power;" on the contrary, the MTA confers certain power upon this Commission to sanction the unconscionable conduct in which Respondents admittedly engaged in this case, and a duty to make Complainants whole. MTA Section 601.

II. RESPONDENTS' EXCEPTIONS TO THE PFD'S RECOMMENDATION THAT A FINE BE IMPOSED FOR EACH OF NINE VIOLATIONS, IN THE AMOUNT OF $20,000, ARE ILL-TAKEN.

Incredibly, Respondents, components of the largest telecommunications company in the world, claim, based upon a self-serving response they submitted to a Commission survey, that they have fewer than the threshold 250,000 "access lines" necessary to support imposition of fines in the amount of $20,000 for each violation, as recommended by the PFD. See MTA Section 601(a) and (b). It is true that the PFD cites MTA Section 601(b) as authority for imposing the higher fine of $20,000 prescribed by MTA Section 601(a), but this reflects no "error" on the ALJ's part: Section 601(b) is the MTA section that prescribes the threshold on which the determination of the proper amount of the fine must be based. It provides that "if the provider has less than 250,000 access lines, the provider [shall be ordered] to pay a fine for the first offense of not less than $200 or more than $5,000 per day," and a higher fine for each subsequent offense of "not less than $500 or more than $1,000 per day." Only if this threshold is satisfied do the higher fine amounts prescribed by MTA Section 601(a) apply. Thus, the PFD's recommendation that the amount of the fine imposed be that prescribed by MTA Section 601(a), i.e., $20,000 per violation, reflects a proper determination, pursuant to MTA Section 601(b), that the requirement that Respondents have more than the 250,000 access lines is met, and that the higher fine authorized by MTA Section 601(a) is both authorized and appropriate. Thus, the PFD properly references the threshold prescribed by MTA Section 601(b) as the basis for awarding fines in the amount recommended ($20,000).

With respect to Respondents' absurd contention that they have fewer than 250,000 access lines, in support of which they cite the self-serving response they filed to a Commission survey that is not part of the record, Complainants would observe that, in advancing this contention, Respondents are guilty of both logical inconsistency and a disregard for the MTA's definition of "access line."

The logical inconsistency of Respondents' argument is apparent. The Commission will recall that Respondents have urged that MTA Section 507(1) could not possibly apply in this case because it speaks in terms of "services" rather than "lines." Thus, Respondents argued, merely because a service was added to 76 "lines," Section 507(1) was not violated, because a "line" is not a "service." Because Covenant House had ordered the "service" of remote call forwarding, Respondents contended, they could not complain that the service had been added to lines for which it had not been ordered. In so arguing, Respondents recognized that an access line is an individual extension to which a discrete telephone number is assigned.

In advancing the argument that they do not have a sufficient number of "access lines" to satisfy the threshold prescribed by MTA Section 601(b), Respondents overlook the fact that the self-serving survey response on which they rely does not reflect the number of "access lines" they serve. Rather, it quantifies the number of customer connections, business and residential, AT&T serves. The term "access lines," as it is used in the survey response, is not in accord with the MTA's definition of "access lines," nor is it in accord with Respondents' proper use of that term in advancing their meritless argument that "lines" (i.e., individually numbered access lines) are not "services."

The MTA, Section 102(n) defines "access line" as follows:

> "Line" or "access line" means the medium over which a telecommunication user connects into the local exchange.

In this case, as the PFD found, Covenant House ordered number blocks comprising 1,019 "access lines," each one of which can be and is used to connect with the local exchange. Similarly, Molly Maid ordered a total of 800 access lines. Together, these two small AT&T

customers have a total of 1,819 "access lines." If AT&T's contention, based upon its self-serving survey report, that it serves a total of only 101,292 "access lines" were correct, then Covenant House, a small non-profit social service agency in Detroit, and Molly Maid, a house-cleaning service with offices in Ann Arbor, would represent nearly 2% of AT&T's total customer base in Michigan! The annual revenues they represent ($6,500 for Molly Maid and $15,000 for Covenant House) would, by hypothesis, represent approximately 2% of AT&T's total Michigan revenues from local access service. If that were so, i.e., if the $21,500 combined annual revenues from the Covenant House and Molly Maid contracts represented approximately 2% of AT&T's total annual Michigan revenues from local access services it provides as a CLEC, AT&T's approximate total annual Michigan revenues would amount to no more than $1,075,000. Obviously, that is not the case, as this Commission certainly can establish from its own specialized knowledge and expertise, and records available to it.

As the PFD describes, a T-1 trunk (used to establish the connection to the local exchange for a user with multiple "access lines") can carry signals for up to 24 "access lines" at a time. In this case, each customer, Covenant House and Molly Maid, ordered a T-1 connection to their PBX systems to service the 1,019 and 800 "access lines," respectively, that they ordered. Each of those discretely numbered "access lines" was the medium over which they connected to the local exchange. Of the 101,292 lines reported on AT&T's survey response, 32,051 are residential access lines; the balance, 69,241, are business access accounts. Certainly this Commission is not so gullible as to conclude that little Covenant House and Molly Maid and their 1,819 access lines, represent 2.6% of all of AT&T's business access lines in Michigan. If that were so, AT&T could hardly generate sufficient revenue to pay even the salaries of the witnesses who appeared on its behalf at the hearing in this case!

Obviously, what AT&T reported in its response to the survey was something other than the number of "access lines," i.e., the number of telephone lines serving as a medium connecting customers to the local exchange that AT&T provides to its customers. Assuming that Covenant House and Molly Maid are typical of Respondents' business customers, and that Respondents' 69,241 business customers (or a substantial percentage of them), have been assigned number blocks in comparable quantities, and are provided service on T-1 trunks, it is obvious that Respondents satisfy the 250,000 access line threshold prescribed by MTA Section 601(b). Indeed, if each of Respondents' 69,241 business customers average only 4 telephone numbers (as opposed to the 1,019 that Covenant House was assigned and the 800 that Molly Maid was assigned), the threshold requirement is met.

That Respondents would come before this Commission and blatantly misrepresent the number of access lines they provide in the State of Michigan in an effort to evade their responsibilities – and liability -- under the MTA speaks volumes in support of imposing the maximum possible sanctions in this case.

Finally, even assuming that this Commission were so naïve as to believe that Respondents do not satisfy MTA Section 601(b)'s 250,000 access line threshold, Complainants submit that, properly calculated, even if the fines imposed in this case are calculated at the lower rate prescribed by Section 601(b) for which Respondents contend, they would be substantially greater than those Respondents have calculated (a maximum of $4,500). Thus, in the alternative, even if the Commission concludes that sanctions should be imposed at the "below the threshold" rates prescribed for providers with fewer than 250,000 access lines by MTA Section 601(b), if each billing for each line constitutes a violation, and Respondents billed eleven times for remote call forwarding services on 76 lines for which such service was never ordered, the amount of the fines authorized would range from a low of $395,200 to a high of $775,200. Thus, having billed relentlessly for unordered remote call forwarding services on 76 lines for a period of 11 months, from May 2000 through the date of the hearing (and, as noted in Complainants' Exceptions, continuing beyond that date), if the first billing is sanctioned at the rate of $200 per line, and subsequent billings are sanctioned at the rate of $500 per line (the minimum fines prescribed by Section 601(b)), the fine for the first billing would be $15,200, and for the 10 subsequent billings $380,000, for a total of $395,200.

If the first billing is sanctioned at the rate of $200 per line, and the 10 subsequent billings are sanctioned at the maximum rate for second and subsequent offenses of $1,000 per line, the total is $775,200 ($15,200 for the first billing and $760,000 for the billings for months 2 through 11).

Regardless of which approach this Commission deems to be appropriate, under MTA Section 601(a) or (b), Complainants urge that the maximum sanctions be imposed.

III. THE AWARD OF ATTORNEY FEES TO COMPLAINANTS IS PROPER.

Respondents first urge that because Great Lakes is not a "ratepayer" it cannot benefit from an award of attorney fees in this case. Respondents are wrong. MTA Section 601 provides that if the Commission finds a violation "the Commission shall order remedies and penalties to protect and make whole ratepayers <u>and other persons</u> who have suffered an economic loss as a result of the violation, including...(f)...attorney fees and actual costs <u>of a person</u>...." (Emphasis added).

Great Lakes is a "person" as that term is defined in MTA Section 102(v): "'Person' means an individual, corporation, partnership, association, governmental entity, or any other legal entity."

Great Lakes dealt with Respondents as a fully disclosed agent of Covenant House; indeed, Great Lakes' agency authorization was incorporated in and made a part of the Covenant House contract and Great Lakes executed the agreement. As the "person" responsible for procuring telecommunications services for Covenant House and for remedying any problems that arose in securing those services on Covenant House's behalf, Great Lakes has sustained economic loss by being forced to incur attorney fees and commence these proceedings to secure relief that has been recommended for award against Respondents, companies so dysfunctional that they are unable or unwilling to cease and desist from violating the MTA even when they have admitted those violations and promised to discontinue them!

This ground has been plowed thoroughly in the extensive briefs submitted by Complainants in opposition to Respondents' motions for summary disposition in this case and in Molly Maid, a copy of which is attached to and incorporated in Complainants' post-hearing reply brief as Exhibit A, and is here incorporated once again by reference. So, to, has Respondents' alternative argument, at page 10 of their Exceptions, advancing their now shop-warn "real party in interest" argument.

The ALJ properly rejected those arguments in his ruling on Respondents' motions for summary disposition, and the Commission is urged to do so, as well, for the reasons set forth in Complainants' brief in opposition to the motion for summary disposition.

IV. RESPONDENTS' CONTENTION THAT ATTORNEY FEES ARE NOT AWARDABLE BECAUSE COMPLAINANTS ADVANCED

"FRIVOLOUS" CLAIMS IS UTTERLY MERITLESS AND BASED UPON WILLFUL MISCHARACTERIZATION OF THE RECORD.

Respondents assert that "while the Complaint in this case raised a multitude of claims all have proven to be groundless." Respondents also assert that "some were so devoid of merit they were ultimately withdrawn during cross-examination at the hearing."

As the PFD notes, Complainants advanced three claims. On two, the first and second, the ALJ concluded that violations had been shown, but on the first the ALJ (erroneously) concluded that the record did not establish the amount of the claim with sufficient specificity to award relief.

Complainants would observe, first, that one reading the PFD, which contains a recommendation that this Commission impose $180,000 in fines based upon Respondents' violations of the MTA, would be surprised at Respondents' assertion that "all" of Complainants' claims have "proven to be groundless." The PFD's additional recommendation that attorney fees be awarded to Complainants based upon the violations of the MTA found also at least "tends" to belie Respondents' frivolous assertion that "all" of Complainants' claims were "groundless."

Second, as to the first claim that Complainants asserted, the PFD actually found that the violations alleged were confirmed by the record, and merely withholds relief on the (erroneous) ground that the precise amount of the economic loss Complainants sustained as a result of those violations cannot be determined by reference to a single page of a 121 page exhibit detailing that claim. For the reasons set forth in Complainants' exceptions to this finding, detailing the evidence contained in Exhibit C-1 from which the precise amount of the economic loss can be determined, it is clear that this claim, also, was not only not groundless, but proved with sufficient specificity to compel an award in the amount Complainants claimed.

Third, Complainants did not waive "some" of their claims at the hearing. Rather, they waived only a small portion ($189) of the total amount ($2,400) of the economic loss sustained as a result of the first claim they asserted. Complainants did so after learning, in the course of discovery, after their Complaint was filed, that, contrary to their belief when the Complaint was filed, AT&T was not responsible for the non-delivery of the handsets that made certain lines unusable. That <u>reduction in the total amount of economic loss</u> resulting from their first claim hardly rendered the balance of that claim "groundless."

Indeed, the <u>only</u> claim that the PFD did not find to be meritorious was the third claim relating to number block charges, which, for the reasons articulated in Complainants' post-hearing brief, reply brief, and exceptions, Complainants still believe to be meritorious.

The amount of attorney fees recoverable must, Complainants agree, ultimately be determined by the Commission in light of its ultimate disposition of the three claims asserted. Complainants prevailed <u>completely</u> on the remote call forwarding charge issue, with respect to which Respondents <u>admitted</u> their violation on the record and promised (so far a promise unfulfilled) to remedy it. Complainants also established that, with respect to their first claim, "the record also tends to show that billing system errors in these accounts continued after this time," including "billing for lines ordered disconnected and voicemail for which disconnection had been requested," PFD at p. 8, (the economic loss resulting from which violations <u>can</u> be quantified from the evidence contained in the record for the reasons detailed in Complainants' exceptions and post-hearing briefs). Therefore, Complainants submit, an award of attorney fees is both supported by the record and necessary to make Complainants whole for the economic loss they have sustained as a result of Respondents' conduct. Respondents' exceptions on this issue, too, must, therefore, be rejected.

CONCLUSION

For the foregoing reasons, and those advanced in Complainants' post-hearing brief, reply brief, and exceptions, the findings and recommendations of the PFD should be adopted, as modified in accordance with Complainants' arguments, and Complainants awarded the relief they requested in their post-hearing brief and post-hearing reply brief.

Dated 6-14-01

Respectfully Submitted,
Honigman Miller Schwartz and Cohn LLP

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MICHIGAN PUBLIC SERVICE
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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Complaint of COVENANT HOUSE MICHIGAN and GREAT LAKES TELECOM, INC. against AMERICAN TELEPHONE AND TELEGRAPH COMPANY (a/k/a AT&T Corp., AT&T, Inc.), TELEPORT COMMUNICATIONS GROUP, INC. (a/k/a Teleport Communications, TCG Detroit, and TCG Detroit Holdings, I, Inc.)	MPSC Case No. U-12759

PROOF OF SERVICE

Anne Scherman, being first duly sworn, deposes and says that on the 14th day of June, 2001, a copy of Complainants' Reply to Respondents' Exceptions to the Proposal for Decision were served (as specifically indicated on attached list) upon the individuals listed on the attached List of Parties via first class mail, proper postage affixed, addressed and deliverable as captioned above.

Anne Scherman

Anne Scherman

Subscribed and sworn to before me
this 14th day of June, 2001

Frederick M. Baker, Jr., Notary Public
Ingham County, Michigan
My Commission Expires: 11/02/04

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