

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of	)	
ATUL C. AGRAWAL, M.D., against	)	
CEO TELECOMMUNICATIONS, INC.,	)	Case No. U-11994
f/k/a LD SERVICES, INC.	)	
_____	)	

At the June 5, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman  
Hon. David A. Svanda, Commissioner  
Hon. Robert B. Nelson, Commissioner

**ORDER DENYING REHEARING**

On June 1, 1999, Atul C. Agrawal, M.D., filed a complaint against CEO Telecommunications, Inc., f/k/a LD Services, Inc., (CEO) alleging that CEO slammed<sup>1</sup> his toll service in violation of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq. (the Act). Pursuant to due notice, and following an adjournment granted at the request of CEO, an evidentiary hearing was conducted on August 5, 1999 before Administrative Law Judge James N. Rigas (ALJ). In addition to Dr. Agrawal and CEO, the Commission Staff (Staff) participated in the proceedings.

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<sup>1</sup> Slamming refers to switching one or more of an end-use customer's telecommunications services from one provider to another without that customer's permission.

In accordance with the schedule established by the ALJ, CEO and the Staff filed briefs and reply briefs on September 9 and 17, 1999 respectively. The Commission subsequently agreed to read the record, thus dispensing with the need for a proposal for decision (PFD), exceptions, and replies to exceptions.

On September 28, 1999, the Commission issued an order (the September 28 order) granting Dr. Agrawal's complaint. Specifically, it found that CEO violated Section 505(2) of the Act by switching Dr. Agrawal's toll service without first complying with the applicable verification requirements. It also found that CEO violated Section 502(b) of the Act by imposing monthly service fees and primary interexchange carrier charges on Dr. Agrawal for a subscribed service that he had never affirmatively ordered. The Commission therefore ordered CEO to cease and desist from all further violations of the Act, to pay Dr. Agrawal \$10,000 in restitution, and to pay fines totaling \$39,400--of which \$19,400 related to CEO's violation of Section 502(b) and \$20,000 arose from its violation of Section 505(2).

On October 28, 1999, CEO filed a petition for rehearing in which it claimed that the Commission's award of restitution to Dr. Agrawal and its imposition of fines against CEO constituted legal error. The Staff filed its response in opposition to that petition on November 18, 1999.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

CEO's claims of error fall into three categories. First, CEO contends that it was improper for the Commission to award Dr. Agrawal \$10,000 because his complaint failed to specifically request restitution and because no evidence was offered that could support such an award. According to CEO, Section 203(2) of the Act demands that "Dr. Agrawal's record in this case must be limited to what was alleged in the complaint, and that the relief must be limited to the relief requested in the complaint." Petition for rehearing, p. 4. Second, CEO asserts that the Commission must reverse its decision to impose a \$19,400 fine for violating Section 502(b), which was computed by assessing CEO \$200 per day for the 97-day period between when Dr. Agrawal's service was switched to CEO (on December 3, 1998) and when it was switched back to his authorized carrier (on March 9, 1999). In support of that assertion, CEO argues that no violation of Section 502(b) was alleged in the complaint. Moreover, CEO continues, any fine assessed for that alleged violation should cover only the 9 days between when Dr. Agrawal first received a bill for the unauthorized service (on February 28, 1999) and when his service was switched back. Third, CEO contends that the Commission erred in imposing a \$20,000 fine for CEO's alleged violation of Section 505(2). Among other things, CEO claims that (1) a \$20,000 fine is excessive for a first offense, (2) the alleged violation arose from a "bona fide error" and, as a result, cannot serve as a basis for imposing a fine under the Act, and (3) the decision to complete the evidentiary hearing in a single day and to dispense with the PFD constitutes a violation of due process.

With regard to CEO's first claim of error, the Staff asserts that Section 203(2) of the Act (upon which CEO bases a majority of its arguments) merely intends that the respondent be reasonably apprised of the nature of the complaint and the evidence to be relied upon by the complainant. According to the Staff, that occurred in this case. Specifically, the Staff notes that Dr. Agrawal's complaint alleged that CEO switched his toll service without authorization and indicated that he

had spent significant time attempting to resolve the matter. The Staff went on to assert that Section 203(2) in no way limits the Commission's authority to award all relief necessary to protect or make whole any end-use customer whose telephone service was slammed. It further contends that although Dr. Agrawal testified with regard to both his hourly earnings and the amount of time that he and his wife invested in this case, CEO asked him no questions about the extent of his damages and offered no rebuttal testimony regarding the issue of damages.

As for CEO's second claim of error, the Staff again contends that information initially submitted by the complainant (particularly, the phone bills attached to the complaint) adequately apprised CEO of Dr. Agrawal's belief that he had been charged for services that he never requested. Thus, the Staff concludes, Section 203(2) of the Act did not preclude the Commission from finding that CEO violated Section 502(b). The Staff further asserts that it was proper for the Commission to base the computation of the fine for this violation on the entire 97-day period during which CEO's records listed Dr. Agrawal as one of its customers, instead of restricting the fine to the 9 days between its first submission of the bill to Dr. Agrawal and the date upon which his service was switched back to his authorized carrier.

With regard to CEO's third claim of error, the Staff notes that whenever a violation of Section 505 occurs, the Act mandates imposing "a fine for the first offense of not less than \$10,000.00 or more than \$20,000.00." MCL 484.2506; MSA 22.1469(506). Because the \$20,000 fine assessed by the Commission for CEO's violation of Section 505(2) was within that statutorily-established range, the Staff asserts, no rational basis exists for finding that its imposition constituted an abuse of discretion. As for the company's contention that it should be exempt from liability on the grounds that the violation arose from a "bona fide error," the Staff argues that CEO applies an overly broad interpretation of what constitutes such an error. Finally, the Staff points

out that CEO exercised its right to cross-examine all of the witnesses who were called to testify in this case and did not seek to submit rebuttal evidence. Thus, the Staff claims that CEO was not denied the opportunity to fairly present a defense and that any failure to offer exculpatory evidence (assuming such evidence did exist) arose solely from “a strategic decision [by CEO] in its presentation of the evidence.” Staff’s response, p. 5.

The Commission agrees with the Staff and concludes that each of CEO’s three claims of error should be rejected.

As noted by the Staff, Section 203(2) of the Act (which requires the submission of supporting information in conjunction with the filing of the complaint) is merely designed to ensure that each respondent to a telecommunications complaint is reasonably apprised of the nature of the complaint and the evidence to be relied upon in an attempt to prove the complaint’s allegations. It is not intended, and thus should not be used, to preclude the Commission’s enforcement of Sections 502 and 505 of the Act. Rather, as indicated in previous orders,<sup>2</sup> the Commission’s decisions regarding which provisions of the Act were violated and what remedies are warranted must be based exclusively upon the facts presented in the course of the hearing. Moreover, the information submitted with Dr. Agrawal’s complaint did apprise CEO of the fact that he was charged for service that he never requested.

The record in this case indicates that (1) CEO switched Dr. Agrawal’s toll service without first complying with the applicable verification requirements, (2) Dr. Agrawal spent considerable time--

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<sup>2</sup> For example, on page 8 of its December 16, 1999 order in Case No. U-12031, the Commission ruled that a party’s “position on the amount of the fine is not determinative of the fine that the Commission may impose.” Likewise, it has been held that “the Commission is empowered, if not required, to evaluate whether [the respondent] knowingly violated Section 505 or raised frivolous defenses, regardless of when or if [one of the other parties] raises those issues.” January 19, 2000 order in Case No. U-12114, p. 8.

estimated by the complainant to be at least 20 hours--getting his toll service switched back to his authorized carrier and pursuing his complaint against CEO, and (3) Dr. Agrawal earns \$1,000 per hour as a surgeon. This evidence supports the Commission's conclusion that CEO violated Section 505(2) of the Act and that, as a result, CEO should pay Dr. Agrawal substantial restitution.<sup>3</sup> The Commission therefore finds that CEO's first claim of error (challenging the Commission's decision to award Dr. Agrawal \$10,000) should be rejected.

The record further reflects that (1) on December 3, 1998, Dr. Agrawal's toll service was switched to CEO without his knowledge and consent, (2) Dr. Agrawal incurred primary inter-exchange carrier charges and CEO's monthly service fees throughout the 97-day period from December 3, 1998 until March 9, 1999, and (3) on March 9, 1999, CEO ceased serving Dr. Agrawal and switched him back to his authorized toll provider. This evidence supports the Commission's finding that CEO should be fined \$19,400 for violating Section 502(b).<sup>4</sup> The Commission thus finds that CEO's second claim of error should also be rejected.

Turning to CEO's third and final claim of error, the Commission concludes that imposing a \$20,000 fine for CEO's violation of Section 505(2) was entirely proper. As pointed out by the

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<sup>3</sup> In its September 28 order, the Commission specifically noted that "it is not certain how many of those 20 hours would actually have been spent performing surgeries. Thus, the most equitable resolution of this issue would be to reduce the Staff's recommended economic damage figure of \$20,000 by half, to \$10,000." September 28 order, pp. 16-17. In its petition, CEO cites no newly discovered evidence supporting imposition of a lesser amount of restitution.

<sup>4</sup> In reaching this conclusion, the Commission finds unpersuasive CEO's assertion that a provider's liability for violating Section 502(b) should not arise until it physically delivers to the customer a bill for the unwanted service. Rather, this section is more reasonably interpreted as imposing liability once the provider begins accumulating charges for a service that the customer never requested. Because CEO began imposing primary interexchange carrier charges and monthly service fees on Dr. Agrawal as of December 3, 1998 and continued assessing those charges and fees until March 9, 1999, its violation of Section 502(b) covered that entire 97-day period.

Staff, this fine falls within the relatively narrow range mandated by the Legislature for a provider's first offense. Moreover, CEO is incorrect in asserting that its violation arose from a "bona fide error" and is thus excused under the Act. Section 506(3) of the Act states that "bona fide errors" consist of such things as "clerical, calculation, computer malfunction, programming, or printing errors." MCL 484.2506(3); MSA 22.1469(506)(3). As previously noted by the Commission:

In this case, the unauthorized switch of Dr. Agrawal's long distance service did not arise from some alleged clerical or printing error. Rather, . . . CEO violated Section 505(2) by switching Dr. Agrawal's service despite its failure (1) to seek and obtain his oral consent and (2) to provide him with the required information package. Because failures of this nature fall well beyond the range of "bona fide errors" like those described in Section 506(3), the fines contained in Section 506(2)(a) of the Act may be imposed.

September 28 order, pp. 15-16 (footnote omitted). Furthermore, the Commission finds unpersuasive CEO's assertion that completing the evidentiary hearing in one day and dispensing with the PFD somehow violated the provider's right to due process. CEO took full advantage of the opportunity to prepare and present its own testimony and to cross-examine the other parties' witnesses. At no time did it express a desire to present rebuttal testimony. Rather, at the close of the record, it specifically indicated that the record was "sufficient for the Commission to make a decision under the law as it exists today." Tr. 103-104. Finally, it filed comprehensive briefs and reply briefs.

For all of these reasons, the Commission agrees with the Staff and finds that CEO's request for rehearing of the September 28 order should be rejected.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.;

MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101)

et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS,  
R 460.17101 et seq.

b. CEO's petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing filed on October 28, 1999 by  
CEO Telecommunications, Inc., f/k/a LD Services, Inc., is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after  
issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of June 5, 2000.

/s/ Dorothy Wideman  
Its Executive Secretary

b. CEO's petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing filed on October 28, 1999 by CEO Telecommunications, Inc., f/k/a LD Services, Inc., is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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By its action of June 5, 2000.

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Its Executive Secretary

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Case No. U-11994

Suggested Minute:

“Adopt and issue order dated June 5, 2000 denying the petition for rehearing filed by CEO Telecommunications, Inc., f/k/a LD Services, Inc., as set forth in the order.”