

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of)	
MARK KNOX and SHERYL KNOX against)	Case No. U-12182
COORDINATED BILLING SERVICES/LOTEL.)	
_____)	

At the April 24, 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

OPINION AND ORDER

On October 27, 1999, Mark and Sheryl Knox filed a complaint against LoTel, Inc., d/b/a Coordinated Billing Services (Coordinated), alleging that their toll service had been switched without authorization in violation of the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the Act).

A hearing was held on December 14, 1999 before Administrative Law Judge Stephen Goldstein (ALJ).¹ Mr. and Mrs. Knox, Coordinated, and the Commission Staff (Staff) participated. The record consists of 162 pages of transcript and 17 exhibits that were admitted into

¹The hearing was originally scheduled for November 16, 1999, but was adjourned at Coordinated's request to the later date.

evidence.² Coordinated, the Knoxes, and the Staff filed briefs on January 13, 2000, and reply briefs on January 31, 2000.

On March 17, 2000, the ALJ issued his Proposal for Decision (PFD) in which he found that Coordinated had violated the anti-slamming provisions of Section 505 of the Act, MCL 484.2505; MSA 22.1469(505). As a result of that finding, the ALJ recommended that the Commission order Coordinated to pay the Knoxes \$500 for actual time spent prosecuting this case. He further recommended that the Commission impose a \$10,000 fine on Coordinated for its violation of Section 502(b), MCL 484.2502(b); MSA 22.1469(502)(b), and Section 505(2), MCL 484.2505(2); MSA 22.1469(505)(2). The ALJ provided that exceptions, if any, must be filed by March 27, 2000 and replies to exceptions by April 6, 2000.

On March 22, 2000, the Staff filed exceptions to the PFD in which it seeks increased penalties for the violations of the Act established at the hearing.³ The Staff asserts that a more appropriate response to the violations would be to require Coordinated to reimburse the Knoxes \$2,326.41 and to pay the State of Michigan a \$20,000 fine. The Staff goes on to argue that the ALJ abused his discretion by finding Coordinated's voice identification witness qualified as an expert for purposes of this hearing.

On March 28, 2000, the Staff filed a letter dated March 27, 2000 from the Staff's counsel to Coordinated's counsel objecting to Coordinated's unreasonable position that the Commission's rules allow it to file exceptions 21 days after the issuance of the PFD, despite specific direction by

²The exhibit marked as R-16 was not admitted into evidence.

³The Staff also points out what appears to be a typographical error. The PFD states that Coordinated violated Section 505(2) of the Act. It appears that the ALJ probably intended to find a violation of Section 505(1), which prohibits switching an end user of a telecommunications provider to another provider without the authorization of the end user.

the ALJ that exceptions, if any, must be filed by March 27, 2000.⁴ R 460.17341(1) provides in part: “Unless otherwise provided, exceptions to a proposal for decision shall be filed within 21 days after service of the proposal for decision . . .” The Staff pointed out that the PFD “otherwise provided” a date that exceptions were due, a full two weeks prior to Coordinated’s self-chosen filing date. The Staff promised to object to any exceptions untimely filed.

On April 6, 2000, Coordinated filed replies to the Staff’s exceptions.

On April 10, 2000, Coordinated filed exceptions to the PFD. On that same date, the Staff filed a motion to strike Coordinated’s exceptions based on their tardiness.

On April 20, 2000, Coordinated filed a response to the Staff’s motion to strike. Coordinated restated its position that it filed exceptions in conformity with the rule and asserts that the PFD anticipated that a party might choose a later date.

Failure to file timely exceptions to the PFD waives any objection to its findings and conclusions. Attorney General v Public Service Commission, 174 Mich App 161, 164; 435 NW2d 640 (1988); Attorney General v Public Service Commission #1, 136 Mich App 52, 56; 355 NW2d 640 (1984). Timeliness of exceptions is particularly important in telecommunications cases in which the statutory period for Commission action is quite limited. In the present case, Coordinated filed exceptions after the date set for filing replies to exceptions. Thus, the parties have had no opportunity to respond to the issues raised. The Commission is not persuaded by Coordinated’s argument that the PFD allowed a later date when it stated “or within such further period as may be authorized for filing exceptions.” That phrase merely refers to the possibility of a party receiving a requested extension of the filing date. No such request was made. Contrary to the position taken

⁴The letter to which the Staff’s letter responds was filed for the first time on April 20, 2000 as an exhibit to Coordinated’s response to the Staff motion to strike.

by Coordinated, parties are not permitted to choose the most convenient of two or more possible filing dates. To interpret the language of the Commission's rules and the PFD in that manner is unreasonable. The Commission finds that Coordinated's exceptions should be given no consideration, and the case should be treated as if the company had not filed exceptions.

The Commission finds that the Staff's exception regarding the ALJ's acceptance of Coordinated's witness as an expert should be rejected as moot. Although the record reflects that Coordinated's witness Edward Primau compromised his credibility by producing a somewhat deceptive curriculum vitae⁵, the ALJ ultimately concluded that the credibility of Mrs. Knox's testimony outweighed the evidence provided by either of Coordinated's witnesses. Therefore, granting the Staff's exception would have no effect on the outcome of this proceeding.

The Staff further complains that the ALJ failed to recommend adequate compensation to the Knoxes, considering the record evidence of the losses arising out of Coordinated's activities. It states that, according to Section 506(2), whenever a violation of Section 505 has been established, the Commission shall order remedies and penalties to protect and make whole end users and other persons who have suffered damages as a result of the violation. The Staff states that Mrs. Knox testified that she had spent 10 hours and that her husband had spent about 40 hours working on this complaint case. Mrs. Knox stated that her current rate of pay as an Internet consultant is \$65 per hour. She further testified that Mr. Knox's wage is \$26 per hour. Additionally, the Staff points out that the Knoxes incurred reimbursable travel expenses to attend the hearing, including mileage,

⁵For example, the curriculum vitae indicates that Mr. Primau attended "University of Detroit – 5 years (communications major)." However, on cross-examination, Mr. Primau admitted that he had no degree from that university, or any other institution of higher education.

meal allowance, travel time, and time at the hearing, which the Staff states brings the total to \$2,380.64 to make the Knoxes whole.

Coordinated argues that the Commission should not increase the compensation granted to the Knoxes. It points to inconsistencies in the Knoxes' requests concerning the amount of time to be compensated and the rate to be paid. Coordinated states that the initial request in the Knoxes' original complaint (which was filed and withdrawn) asked for \$350 to compensate for 7 hours at \$50 per hour. Thereafter, the time changed to 80 hours and then to 40 hours. The requested rate changed to \$65 per hour and \$26 per hour. Coordinated argues the record does not support an award greater than \$500.

The Commission finds that the ALJ's assessment of damages that Coordinated should be required to pay the Knoxes should be modified. The Commission notes that the testimony is not entirely consistent with regard to the number of hours spent, the rate of pay applicable, which of the parties accomplished what tasks, and how long each of those tasks took. It appears that the Knoxes wrote at least four letters and participated in several phone calls. In addition, they traveled to the hearing in Lansing from their home in Ypsilanti and remained to participate. Based on the record, the Commission finds that the Knoxes should be reimbursed \$44.64 in mileage to the hearing, \$14.50 for meals on the hearing day, \$182 for travel time to the hearing, \$409.50 for attendance at the hearing, and \$585 for time spent outside of the hearing⁶, for a total of \$1,235.64.

The Staff further excepts to the ALJ's recommendation that the Commission impose the minimum \$10,000 fine on Coordinated for violation of Section 505 of the Act. In the Staff's view,

⁶The last figure was computed by assuming 20 hours for Mr. Knox and 1 hour for Mrs. Knox at their respective hourly rates of \$26 per hour and \$65 per hour, established on the record.

Coordinated's response to the complaint has been disingenuous at times, as reflected in the use of Mr. Primau as a purported expert, and Coordinated counsel's denial that Steven C. Clay acted as an agent for Coordinated, despite the fact that Mr. Clay appears on Commission records as Coordinated's customer service contact, among other things.

Coordinated argues that it should not be punished for vigorously defending its position. It argues that it needed the expert testimony of Mr. Primau to support its claim that Mrs. Knox's voice appeared on the verification tape. Further, it argues, Coordinated's counsel accurately stated that he did not know Mr. Clay.

The Commission concludes that the maximum allowable fine, \$20,000, is appropriate to furnish the incentive to eliminate slamming. There will be insufficient incentives if providers conclude that they can simply reimburse the out-of-pocket costs for those who complain and keep the toll revenues from those who do not complain. Consequently, fines are a necessary part of removing the economic incentives for slamming. In the present case, it is apparent that Coordinated has failed to institute policies that prevent slamming. Third-party verification is an acceptable method, but becomes virtually useless when the only customer responses appearing on the tape are short answers, some of which are not complete words. The Commission concurs with the ALJ that such a tape is wholly inadequate. Moreover, it appears that Coordinated failed to follow up this purported order for new service with a written confirmation as required by MCL 484.2502(d); MSA 22.1469(502)(d).

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 AACRS, R 460.17101 et seq.

b. Coordinated switched the Knoxes' toll service without authorization, in violation of Sections 502 and 505 of the Act and the Commission's anti-slamming procedures adopted in Case No. U-11900.

c. Coordinated should pay a fine of \$20,000 for its violation of the Act.

d. Coordinated should pay restitution of \$1,235.64.

e. Coordinated should cease and desist from further violations of the Act and the Commission's anti-slamming procedures.

THEREFORE, IT IS ORDERED that:

A. Within 30 days, LoTel, Inc., d/b/a Coordinated Billing Services, shall pay a fine to the State of Michigan in the amount of \$20,000 and shall pay Mark and Sheryl Knox \$1,235.64 for the violations addressed by this order.

B. LoTel, Inc., d/b/a Coordinated Billing Services, shall cease and desist from further violations of the Michigan Telecommunications Act and the Commission's anti-slamming procedures adopted in Case No. U-11900.

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 April 24, 2000.

/s/ Dorothy Wideman

Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated April 24, 2000 finding that LoTel, Inc., d/b/a Coordinated Billings Services, violated the anti-slamming provisions of the Michigan Telecommunications Act and the Commission’s orders in Case No. U-11900, imposing a fine of \$20,000, and requiring restitution of \$1,235.64, as set forth in the order.”