

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of)	
SEAWAY PAINTING, L.L.C., against)	Case No. U-13024
MCI WORLDCOM COMMUNICATIONS, INC.)	
<hr/>)	

At the June 6, 2002 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
 Hon. David A. Svanda, Commissioner
 Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

Administrative Law Judge Lauren G. Van Steel (ALJ) served a Proposal for Decision (PFD) on February 19, 2002, in which she recommends that the Commission grant a motion by MCI WorldCom Communications, Inc., (WorldCom) to dismiss the third amended complaint filed against it by Seaway Painting, L.L.C. (Seaway). The PFD states that Seaway's complaint does not provide adequate factual allegations to state a prima facie case of unauthorized switching or slamming under Section 505 of the Michigan Telecommunications Act (MTA), MCL 484.2505. Because Seaway had already used several opportunities to amend its complaint with respect to Section 505, the PFD further recommends that the slamming allegations be dismissed with prejudice. To the extent that the complaint alleges violations of Section 502, MCL 484.2502, or any other provision of the MTA, the PFD recommends dismissal without prejudice.

Seaway and WorldCom filed exceptions and replies to exceptions.

Before addressing the specific issues raised in the exceptions, it is important to note the unusually convoluted development of this case. Both parties adversely affected the complaint process by raising procedural matters of dubious significance, and neither can be commended for assisting the Commission's efforts to adjudicate this case efficiently and fairly. The complaint process is geared toward an expedited resolution of relatively simple factual disputes over the telecommunications service that a customer receives from a provider. The strict time requirements imposed by the MTA do not accommodate opportunities to participate in gamesmanship over litigation tactics. See MCL 484.2203(11).

This docket began on July 3, 2001, when Seaway filed a complaint.¹ On August 14, 2001, WorldCom filed a motion to dismiss the complaint on the grounds that (1) Thomas C. DeWard, Seaway's designated representative, is not licensed to practice law, and (2) the resold Centrex service that WorldCom was providing to Seaway is unregulated under the MTA. WorldCom further requested Mr. DeWard's disqualification from acting on Seaway's behalf. On August 23, 2001, Seaway filed a response, and the ALJ conducted a prehearing conference. After taking WorldCom's motion to dismiss under advisement, the ALJ issued a written ruling, in which she directed Seaway to file an amended complaint to restate more definitely allegations under

¹ Before this date, Seaway had filed another complaint concerning the same dispute with WorldCom in Case No. U-12863. On June 5, 2001, the Commission issued an order dismissing the complaint without prejudice at Seaway's request. Relying on the provision in Section 506(1)(a) of the MTA, MCL 484.2506(1)(a), that "[h]earings shall be conducted in a manner as to optimize expediency, convenience, and the ability of end-users to bring and prosecute, without the assistance of counsel, complaints alleging violations of section 505 or 507 [which prohibits cramming]," the order further stated that Seaway need not retain a licensed attorney when proceeding under those sections.

Sections 505 or 507² of the MTA and to remove all other allegations,³ and stayed the proceeding pending the Commission's ruling on WorldCom's then pending petition for rehearing in Case No. U-12863.⁴ Seaway filed an application for leave to appeal the stay, and WorldCom filed a response. On October 29, 2001, the Commission issued an order denying WorldCom's petition for rehearing in Case No. U-12863, remanding the complaint in this docket for a hearing, and otherwise affirming the ALJ's rulings. WorldCom filed a claim of appeal from the October 29, 2001 order in the Michigan Court of Appeals, which later dismissed it for lack of jurisdiction. MCI Worldcom Communications Inc v MPSC, unpublished order of the Court of Appeals, issued Jan. 29, 2002 (Docket No. 238097).

On November 30, 2001, WorldCom filed another motion to dismiss or stay the complaint. In addition to its previous grounds for dismissal, WorldCom asserted that the complaint could not proceed before the Commission during the pendency of WorldCom's appeal before the Court of Appeals. Seaway filed a response. The ALJ conducted a prehearing conference on December 12, 2001 and subsequently issued a written ruling, which determined that an amended complaint filed by Seaway on December 18, 2001 complied with the procedural requirements discussed at the prehearing conference, that December 18, 2001 commenced the 180-day period provided in MCL 484.2203(11) for resolving the complaint case, and that the motion for a stay pending judicial review should be denied. Both Seaway and WorldCom filed applications for leave to appeal the ALJ's prehearing determinations and responses to each other's applications. In an order

² MCL 484.2507.

³ The ALJ's ruling in effect excluded Mr. DeWard from representing Seaway with respect to claims arising under provisions of the MTA other than Sections 505 or 507. On August 30, 2001, Seaway filed an amended complaint to comply with the ALJ's ruling.

⁴ See supra note 1. WorldCom's petition for rehearing challenged the statements in the June 5, 2001 order in Case No. U-12863 concerning non-attorney representation under Sections 505 to 507, among other things.

issued on January 22, 2002, the Commission rejected the arguments raised by both parties and further directed them to “refrain from litigating peripheral issues.” Order at 3.

WorldCom raised the issue presented in this order on December 26, 2001 when it filed a third motion to dismiss. The motion, in addition to restating some previous grounds, asserted that the complaint’s allegations were inadequate to support a prima facie case of slamming under Section 505 of the MTA, even though Seaway had already amended it three times.⁵ Seaway filed a response. The ALJ conducted a hearing on the motion on January 25, 2002 and served her PFD recommending dismissal on February 19, 2002.

In its exceptions, Seaway explains that it attempted to switch its zone and long distance service from WorldCom to Long Distance of Michigan, Inc., d/b/a LDMI, in November 2000 during a three-way call among itself and representatives of the two toll carriers, that LDMI thereafter began to carry some of Seaway’s traffic, but that WorldCom either continued to issue bills or did not actually make the switch for seven of Seaway’s telephone numbers. Seaway says that it received bills from LDMI for a small amount of toll traffic, but that WorldCom continued to bill it for the majority of the traffic and resisted changing toll providers on the ground that the WorldCom toll service was part of a bundled package of Centrex services provided under contract. Although Seaway had initially intended to retain WorldCom for local service, it attempted in April 2002 to switch its Centrex service to Ameritech Michigan, but, even then, it says, WorldCom continued to bill it for local and toll service, and it also received bills from Ameritech Michigan. Seaway’s basic contention is that WorldCom “held Seaway as a captive customer [for both local

⁵ In addition to the amended complaints filed on August 30 (see *supra* note 3) and December 18, 2001, Seaway also filed a short pleading on July 31, 2001, in which it stated that it was deleting references to Section 502 of the MTA, MCL 484.2502, from its initial complaint in response to a letter from Margaret Wallin, an attorney in the Commission’s Regulatory Affairs Division, indicating that the non-attorney representation provisions in Section 506(1)(a) do not apply to claims arising under Section 502.

and toll service] and refused to relinquish the intralata toll and long distance service to LDMI.”
Seaway’s exceptions at 2.

Acknowledging that its complaint does not incorporate boilerplate slamming language, Seaway says that even though the circumstances are unique, they fall within the category of conduct that the Legislature intended to prohibit in Section 505. Seaway says that the ALJ is, in effect, construing Section 505 to allow a provider to refuse legitimate requests to switch an existing service and to continue to render bills for that service.

As for the inadequacy of the facts alleged in its complaint, Seaway explains that it took a cautious approach in drafting the complaint because not all of the facts were obvious at the outset and it sought to avoid misstatements. It says that it instead relied on the discovery process to secure the hard evidence necessary to make out a slamming case with specificity. However, it claims, WorldCom delayed discovery and prevented it from obtaining vital information until January 22, 2002, three days before the motion hearing that resulted in the PFD’s recommendation of dismissal. It says that it is now in possession of evidence that supports its claim that WorldCom switched the service back to itself without authorization, but that the ALJ rejected Seaway’s efforts to bring the evidence to her attention. Seaway says that the ALJ further erred in requiring its third amended complaint to be filed before it obtained the discovery.

Seaway contends that the Commission should clear away all of the remaining procedural hurdles so that it can have its long-awaited day in court. Seaway requests rulings in its favor on the other grounds raised by WorldCom in its most recent motion to dismiss. In the alternative, Seaway requests leave to file a new complaint under Section 507 and to include all of the discovery requests from this case in the record of the new docket.

In reply, WorldCom says that, notwithstanding five prior attempts to draft a complaint (including Case No. U-12863), Seaway cannot yet state a prima facie slamming case. According to WorldCom, a violation of Section 505 requires a carrier to switch a customer's service without authorization. Thus, it says, ignoring a customer's request to relinquish the service to another carrier or continuing to send bills after receiving a request to change carriers may violate some provision of the MTA, but it is not slamming under Section 505.

WorldCom contends that Seaway's dissatisfaction with the pace of WorldCom's responses to discovery requests is unjustified. WorldCom says that Seaway is confusing the adequacy of a complaint with the discovery process, but that it is necessary to plead a prima facie case before a complainant can begin to offer evidence. In any event, WorldCom says, the more than 200 discovery requests that Seaway has submitted (some with multiple parts) were unduly burdensome in light of the limited scope of discovery that is permissible in a slamming case. WorldCom references a prior Commission ruling addressing discovery sought by a provider from the Commission Staff, as follows:

The Commission wishes to emphasize that discovery in slamming cases should be limited in scope. The issues in such cases are narrow, and discovery should be correspondingly narrow. The parties, and the administrative law judges when the issue is placed before them, should limit discovery to matters that are directly relevant to the case and shall further limit discovery to avoid undue burdens. A request that requires 21 hours to answer is unduly burdensome if the information sought has nothing to do with whether the complainants' service provider was changed without authorization and nothing to do with whether the respondent can establish a defense.

December 16, 1999 order in Canales v LCI International Telecom Corp, Case No. U-12031, at 9, aff'd in part and rev'd in part In re Canales Complaint, 247 Mich App 487 (2001). WorldCom says that it took well in excess of 21 hours to respond to discovery in this case.

WorldCom objects to Seaway's suggestion that it could file a new complaint under Section 507 in an attempt to maintain its ability to pursue the dispute without licensed counsel. It says that Seaway has had ample opportunity to plead a cramming claim, but that it has not chosen to do so and should not have yet another opportunity to manufacture allegations. WorldCom further urges the Commission to dismiss the entire complaint with prejudice in light of Seaway's repeated, missed opportunities to plead a proper complaint.

The Commission agrees with the ALJ's determination that Seaway has not filed a complaint that makes adequate factual allegations of either slamming or cramming. When read in a light most favorable to Seaway, the amended complaint, as filed on December 18, 2002, alleges that WorldCom refused to allow a change in service providers to go forward after Seaway requested it (first to LDMI for toll service only, later to Ameritech Michigan for Centrex service). The complaint implicitly acknowledges that the service that WorldCom provided to Seaway was authorized at the outset. The essence of a slamming complaint is that a provider obtains the customer's telecommunications business without obtaining the customer's authorization to execute the switch.⁶ The complaint in this case does not allege an unauthorized switch; it alleges that a switch that the customer desired did not occur.

⁶ Section 505's basic prohibition is succinct: "An end user of a telecommunications provider shall not be switched to another provider without the authorization of the end user." MCL 484.2505(1). As required in Section 505(2), the Commission has issued detailed "Procedures for Changing Telecommunications Service Providers" in a series of orders in Case No. U-11900. The approved "Procedures" do not contemplate treating a failure to implement a request for a change in providers as a slamming violation. To use the terminology in the "Procedures," a switch of toll service occurs when a change order is executed (usually by the incumbent provider controlling the facilities used to provide the customer's local service). A violation occurs when the provider submitting the change order does not secure the customer's authorization or comply with the approved verification procedures.

Because the complaint did not contain factual allegations that would be adequate to support a claim of slamming under Section 505, it is subject to dismissal under the Commission's Rules of Practice and Procedure. A complaint may be dismissed under Rule 513 if it "fails to state a prima facie case," R 460.17513, which, as defined in R 460.17101(j), means "a case in which, assuming all the facts in the complaint are true, the complainant is requesting a remedy that is within the jurisdiction of the commission to grant." A complaint is similarly subject to dismissal under Rule 323 if "there has been a failure to state a claim for which relief can be granted." R 460.17323. The complaint in this case, when read with all inferences construed in favor of Seaway, does not state a slamming claim under Section 505, and consequently the Commission cannot grant relief under that section. Because Seaway disclaims that it is relying on other provisions of the MTA as a basis for relief, the Commission need not address whether Seaway could proceed under any statutory provision other than Section 505.

The Commission does not agree that Seaway should be permitted to amend its complaint yet again in another effort to allege facts that state a claim under Section 505 or other provisions of the MTA.⁷ The parties and the ALJ have already litigated the adequacy of Seaway's complaint at length, and Seaway has had several opportunities to make appropriate amendments. As set forth in MCL 484.2203(11), the 180-day deadline for issuing a final order in this case expires on June 17, 2002. It does not provide for extensions of time if the parties engage in procedural disputes that delay the progress of the case or if the complainant has difficulty in filing an appropriate complaint. Therefore, dismissal of the complaint is an adjudication of the dispute on

⁷ The Commission further agrees with WorldCom that it would be improper for Seaway, at this late stage in the proceedings, to attempt to transform its slamming complaint into a cramming complaint under Section 507. Seaway has long been on notice that it had the opportunity to bring forward any cramming allegations, but it has not attempted to do so. The allegations it has made to date are not remotely consistent with a theory of relief based on Section 507. Any attempt to amend or refile the complaint to allege cramming would be futile.

its merits. The Commission adopts the ALJ's recommendation to impose dismissal with prejudice.

In its exceptions, WorldCom argues that the ALJ should have also recommended dismissal of Seaway's non-slamming allegations with prejudice. WorldCom argues that Seaway has caused undue delay by filing a number of amended complaints and that it made a voluntary decision to waive any non-slamming claims it might have in order to proceed without an attorney. Under the circumstances, WorldCom says, the Commission should foreclose Seaway from filing any further complaints.

Seaway responds that WorldCom caused the delay by filing numerous motions, several applications for leave to appeal the ALJ's rulings, and one claim for judicial review. Seaway also claims that WorldCom is attempting to take unfair advantage of its own delay in withholding discovery.

The Commission finds that the entire complaint should be dismissed with prejudice. Although the present complaint, as amended, is limited to slamming and does not rely on other provisions of the MTA, that is the result of Seaway's decision to proceed without counsel. Thus, this order adjudicates the entire dispute on its merits, and any potential, but unasserted claims that arise from the same dispute should also be barred as a basis for filing a future complaint with the Commission.

In light of the dismissal of the complaint, it is not necessary to address the remaining issues in WorldCom's exceptions.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACRS, R 460.17101 et seq.
- b. The complaint, as amended, should be dismissed with prejudice.

THEREFORE, IT IS ORDERED that the complaint filed by Seaway Painting, L.L.C., against MCI WorldCom Communications, Inc., as amended, is dismissed with prejudice.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of June 6, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The complaint, as amended, should be dismissed with prejudice.

THEREFORE, IT IS ORDERED that the complaint filed by Seaway Painting, L.L.C., against MCI WorldCom Communications, Inc., as amended, is dismissed with prejudice.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of June 6, 2002.

Its Executive Secretary

In the matter of the complaint of)
SEAWAY PAINTING, L.L.C., against)
MCI WORLDCOM COMMUNICATIONS, INC.)
_____)

Case No. U-13024

Suggested Minute:

“Adopt and issue order dated June 6, 2002 dismissing the complaint filed by Seaway Painting, L.L.C., against MCI WorldCom Communications, Inc., as amended, with prejudice, as set forth in the order.”