

Before the
Federal Communications Commission
Washington, D.C. 20554

DA 95-2333

In the Matter of)
)
WATS International Corporation,)
Plaintiff)
)
v.) File No. ENF-94-05
)
Group Long Distance (USA), Inc.,)
National Independent Carrier)
Exchange, James J. McKeef, and)
Sprint Communications Company)
L.P.,)
Defendants)
)
Request for Declaratory Ruling)

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1995; Released: November 9, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This matter came to us on referral from the United States District Court for the Eastern District of Pennsylvania (District Court)¹ pursuant to the doctrine of primary jurisdiction.² The

¹ See Omni Transport, Inc. v. Group Long Distance (USA), Inc., Civil Action No. 93-CV-3816, Order issued March 31, 1994 (District Court Order).

² The doctrine of "primary jurisdiction" is properly invoked whenever the enforcement of a claim, which is cognizable in the courts, requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. Western Union Telephone Co. v. Graphic Scanning Corp., 360 F.Supp. 593, 595 (D.C.N.Y. 1973). There are two principal reasons for requiring a private litigant to resort to the administrative process before pursuing his damage claim: the litigation may involve issues of fact that are beyond the conventional experience and expertise of judges, or the decision may require the exercise of administrative discretion under broad statutory standards. Far East Conference v. United States, 342 U.S. 570 (1952). The requirement of preliminary decision by the agency also serves the goal of national uniformity in regulatory programs. If courts were free to decide unresolved matters of law

complainant, WATS International Corporation (WIC), filed the District Court action against Group Long Distance (USA), Inc. (GLD), National Independent Carrier Exchange (NICE), James J. McKeeff, and Sprint Communications Company, L.P. (Sprint), alleging, among other things, that the defendants have violated this Commission's prohibitions against the unauthorized change of an end user's primary interexchange carrier (PIC).³ The District Court did not specifically delineate the communications issues to be decided by the Commission, but instead directed that "[a]ny party may submit such issues to the Common Carrier Bureau by April 15, 1994."⁴ On April 15, 1994, the defendants in the District Court proceeding submitted to the Bureau copies of the briefs the parties had submitted to the District Court.

2. On May 31, 1994, the Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau, held a conference with counsel for the parties to identify and discuss material issues contemplated by the District Court Order.⁵ As a result of that conference, the parties agreed to file briefs setting forth their views on the issues contemplated by the District Court.⁶ For the reasons stated below, we grant in part and deny in part WIC's

and policy without benefit of the agency's position, the possibilities of inconsistent or wrong decisions might increase. See, e.g., Texas & Pac. R. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

³ See 47 C.F.R. § 64.1100; Policies and Rules Concerning Long Distance Carriers, 7 FCC Rcd 1038 (1992), recon. denied, 8 FCC Rcd 3215 (1993) (PIC Change Order); see also Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985) (Waiver Order). The Commission recently adopted further amendments to its PIC change rules. Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, 10 FCC Rcd 9560 (1995) (LOA Order).

⁴ District Court Order at 1.

⁵ See Letters from Thomas D. Wyatt, Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau, to Denis V. Brennan, Esq., Thomas J. Fullam, Esq., Michael J. Fingerhut, Esq., Kenneth E. Hardman, Esq., and David H. Moskowitz, Esq., dated May 13 and June 2, 1994.

⁶ The plaintiff, WIC, filed a "Memorandum of Law Re Federal Communications Law Issues" on July 11, 1994 and the defendants filed a "Reply to Plaintiff's Memorandum of Law Re Federal Communications Law Issues" on July 25, 1994.

request for a ruling that the defendants violated Commission rules and orders governing PIC changes, and other provisions of the Communications Act. We conclude that WIC has not established a cognizable violation of our PIC rules, but that it has demonstrated that GLD/NICE violated Section 201(b) of the Act.

II. BACKGROUND

3. The material facts underlying the parties' dispute are largely undisputed. GLD is a switchless reseller of interexchange services, which during the period at issue, was initially reselling AT&T's Software Defined Network (SDN) service. WIC is a sales agent whose principal business involves soliciting end-user customers on behalf of telecommunications companies, including interexchange carriers (IXCs), through direct sales and telemarketing. On February 6, 1991, WIC entered into an agreement with GLD in which it agreed to obtain customers for GLD's resold AT&T SDN service in return for a commission for each customer.⁷

4. In April 1992, GLD began to receive a series of letters from AT&T reflecting difficulties with GLD's resale account.⁸ The letters were notices to GLD that it was behind in payments and that AT&T would refuse service to new GLD end-user customers and terminate service to existing GLD customers if the accounts were not made current.⁹

5. Apparently under the threat that AT&T would discontinue providing SDN service to GLD's customers, James J. McKeef and other principals of GLD formed a new company in December 1992. The new company, NICE, acquired all of the stock in GLD and then proceeded to change the underlying carrier serving GLD's customers from AT&T to Sprint. NICE made this change without informing GLD's end-user customers, although those same customers were apparently informed that NICE had acquired GLD stock. Sprint accommodated the PIC changes requested by NICE under the assurance by NICE that GLD's customers had authorized the change and that NICE had the documentation to prove such authorization.¹⁰

6. WIC, upon facing the prospect of losing commissions for all of GLD's customers assigned to NICE because of their conversion to Sprint, filed suit in the United States District Court for the Eastern District of Pennsylvania. The suit alleges that the

⁷ WATS International Corporation's Memorandum of Law Re Federal Communications Law Issues, at 2 (WIC Memorandum).

⁸ WIC Memorandum at Exhibits L-P.

⁹ Id. at Exhibit P.

¹⁰ WIC Memorandum at 3-4.

defendants violated the Communications Act of 1934, as amended, (the Act)¹¹ and the Civil RICO Act,¹² and engaged in tortious interference with contractual relations, conversion, and breach of contract. The U.S. District Court has referred those issues pertaining to the alleged unauthorized PIC changes to the Commission for resolution.

III. DISCUSSION

A. The Commission's PIC Change Rules and Orders.

7. In its Allocation Order and subsequent Reconsideration Order and Waiver Order,¹³ the Commission set forth rules and procedures for implementing equal access¹⁴ and customer presubscription¹⁵ to an IXC.¹⁶ The Commission's original allocation plan required IXCs to have on file a letter of agency (LOA) signed by the customer before submitting PIC change orders to the local exchange carrier (LEC) on behalf of the customer.¹⁷ After considering claims by certain IXCs that this requirement would stifle competition because consumers would not be inclined to

¹¹ 47 U.S.C. § 151, et. al.

¹² 18 U.S.C. § 1961.

¹³ See note 2, supra.

¹⁴ Equal access for IXCs is that which is equal in type, quality and price to the access to local exchange facilities provided to AT&T and its affiliates. United States v. American Tel. & Tel., 552 F. Supp. 131, 227 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (Modification of Final Judgment or "MFJ"). "Equal access allows end users to access facilities of a designated [IXC] by dialing '1' only." Allocation Order, 101 FCC 2d at 911.

¹⁵ Presubscription is the process by which each customer selects one PIC from among several available carriers, for the customer's phone line(s). Allocation Order, 101 FCC 2d at 911, 928. Thus, when a customer dials "1," the customer accesses only the primary IXC's services. An end user can also access other IXCs by dialing a five-digit access code (10XXX). Id. at 911.

¹⁶ Pursuant to the MFJ, the Bell Operating Companies (BOCs) were ordered to provide, where technically feasible, equal access to their customers by September 1986. Id.

¹⁷ An LOA is a document, signed by the customer, which states that the customer has selected a particular carrier as that customer's primary long distance carrier. Allocation Order, 101 FCC 2d at 929.

execute the LOAs even though they agreed to change their PIC, the Commission later modified the requirement to allow IXCs to initiate PIC changes if they have "instituted steps to obtain signed LOAs."¹⁸ In 1992, the Commission again revised its rules because it continued to receive complaints about unauthorized PIC changes.¹⁹ Specifically, while the Commission recognized the benefits of permitting a telephone-based industry to rely on telemarketing to solicit new business, it required IXCs to institute one of the following four confirmation procedures before submitting PIC change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the PIC change order.²⁰ Hence, the Commission's rules and orders require that IXCs either obtain a signed LOA or, in the case of telemarketing solicitations, complete one of the four telemarketing verification procedures before submitting PIC change requests to LECs on behalf of consumers.

8. Because of its continued concern over unauthorized PIC changes, the Commission recently prescribed the general form and content of the LOA used to authorize a change in a customer's primary long distance carrier.²¹ The Commission's recent rules prohibit the potentially deceptive or confusing practice of combining the LOA with promotional materials in the same document.²² The rules also prescribe the minimum information required to be included in the LOA and require that the LOA be written in clear and unambiguous language.²³ The rules prohibit all "negative option" LOAs²⁴ and require that LOAs and any accompanying promotional materials contain complete translations if they employ

¹⁸ Waiver Order, 101 FCC 2d at 942.

¹⁹ PIC Change Order, 7 FCC Rcd at 1038-39.

²⁰ See 47 C.F.R. § 64.1100; PIC Change Order, 7 FCC Rcd at 1045.

²¹ See LOA Order, 10 FCC Rcd at 9560-61.

²² Id. at 9575.

²³ Id. at 9565-66.

²⁴ Id. at 9566-67. Negative option LOAs require some action on the part of the consumer to show that the consumer has not authorized that his PIC be changed.

more than one language.²⁵

B. Contention of the Parties.

9. In the instant case, WIC alleges that GLD, NICE, and Sprint have violated the Commission's PIC verification rules²⁶ by changing the underlying carrier providing service to GLD customers -- from AT&T to Sprint -- without first informing GLD's customers.²⁷ In support of this contention, WIC asserts that the customers it obtained for GLD specifically contracted to use AT&T's SDN service.²⁸ WIC points to the fact that the customers WIC had solicited for GLD had signed LOAs that specifically mentioned WIC and AT&T, but make no reference to GLD.²⁹ According to WIC, the unlawful nature of the defendants' actions is made more apparent by the fact that GLD attempted to obtain LOAs from these same customers subsequent to the change from AT&T to Sprint by using a misleading notice.³⁰ The notice was misleading, WIC contends, because GLD customers were told that their signatures were needed so that GLD and NICE could update their records, but were never informed of the switch from AT&T to Sprint.³¹ Sprint's culpability, WIC adds, stems from the fact that it failed to ask NICE to prove that GLD's customers had requested the change from AT&T.³² Implicit in WIC's contentions regarding Sprint is the argument that Sprint had some affirmative duty under the Act and the Commission's PIC change requirements to obtain verification that GLD's customers had approved the switch. Finally, WIC disputes the defendants' contention, described below, that GLD, and not AT&T, was the PIC for the customers at issue. WIC avers that the Commission does not recognize switchless resellers as PICs for purposes of its PIC verification rules.³³

²⁵ Id. at 9582.

²⁶ 47 C.F.R. § 64.1100.

²⁷ WIC Memorandum at 6-7.

²⁸ Id. at 7.

²⁹ Id. Specifically, the LOAs include language stating that the customer "hereby appoints WATS International Corporation as agent for all telecommunications services associated with AT&T's programs." Id.

³⁰ Id. at 8-9.

³¹ Id.

³² Id. at 10-11.

³³ Id. at 12.

10. As a threshold matter, the defendants argue that under the Commission's rules, WIC does not have standing to complain about the switch from AT&T to Sprint because it is not one of GLD's or NICE's customers subject to the switch.³⁴ Defendants GLD, NICE, and Sprint next argue that WIC misunderstands the Commission's PIC verification rules.³⁵ The defendants assert that the Commission's verification rules apply only to those customers that have been illegally switched as a result of telemarketing and not, as in this case, where a switchless reseller has changed the underlying carrier.³⁶

11. The defendants also assert that WIC has misrepresented important facts and the law in this case. They reiterate that the customers who were switched from AT&T to Sprint were GLD's customers, not AT&T's.³⁷ This point was "admitted," the defendants argue, by one of WIC's "principals" in deposition testimony filed with the District Court.³⁸ The defendants also argue that GLD's change from AT&T to Sprint was necessitated by a bona fide dispute between GLD and AT&T.³⁹ The defendants assert, moreover, that GLD's customers were aware of GLD's role as a switchless reseller and that the March 1, 1993 letter GLD sent to its customers to obtain LOAs was unambiguous and consistent with the Commission's rules.⁴⁰ With regard to Sprint, the defendants argue that Sprint acted lawfully and reasonably by providing service to GLD's customers pursuant to the PIC change orders submitted by NICE.⁴¹ The defendants maintain that WIC misrepresents the law when it asserts that switchless resellers have no status under the Commission's PIC

³⁴ Defendants' Memorandum at 2-7.

³⁵ Id.

³⁶ Id. at 2-4.

³⁷ Id. at 7-9.

³⁸ Id. at 8. The defendants cite to a deposition given by Mr. Gary Gomer on October 7, 1993. See Evidentiary Appendix of Exhibits to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment for Count No. II of Plaintiff's Amended Complaint, Exhibit M, filed March 21, 1994, Civil Action No. 93-CV-3816, United States District Court for the Eastern District of Pennsylvania.

³⁹ Defendant's Memorandum at 12-15.

⁴⁰ Id. at 15-17.

⁴¹ Id. at 19.

verification rules.⁴²

C. Discussion.

12. We have carefully reviewed the evidence and arguments submitted by the parties in light of the Commission's PIC change rules and orders. For reasons discussed below, we find no persuasive support for WIC's claim that the defendants violated the Commission's PIC verification rules in connection with GLD/NICE's change in its underlying long distance carrier. We do find, however, that the GLD/NICE violated the just and reasonable provisions of Section 201(b) of the Act⁴³ by failing to adequately inform end-user customers of the change. We first address the defendants' threshold standing claim.

13. Standing. We reject the defendants' threshold assertion that the plaintiff, WIC, does not have standing to bring an action alleging violations of the Commission's PIC verification rules because it is not and has never been an end-user customer of GLD, NICE, or Sprint. Because this case involves the allegation of wrongdoing by common carriers, WIC initially could have filed a complaint with the Commission under Section 208 of the Act,⁴⁴ rather than filing suit in District Court. Section 208 provides that "any person" may file a complaint alleging that a common carrier has violated the Act and that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant."⁴⁵ The fact that this case was initially filed with the District Court and later referred to the Commission does not undermine WIC's standing under the Act. To hold otherwise would undercut the doctrine of primary jurisdiction because it would

⁴² Id. at 11.

⁴³ Section 201(b) of the Act states that

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.

47 U.S.C. § 201(b).

⁴⁴ 47 U.S.C. § 208.

⁴⁵ Id. See Bill Correctors, Inc. and Apollo Systems, Inc. v. Pacific Bell, 10 FCC Rcd 2305, 2306 (Com. Car. Bur. 1995); see also American Satellite Corporation v. Southwestern Bell Telephone Company, 64 FCC 2d 503, 507-8 (1977).

deprive the court of the ability to refer issues such as this one to the expert agency.⁴⁶

14. The Commission's PIC Change Rules. The crux of WIC's argument is that before converting its resale service from AT&T to Sprint, GLD/NICE was required under Section 64.1100 of the Commission's rules to provide advance notice of the change to its end-user customers and to obtain LOAs from those customers authorizing the change from AT&T to Sprint. We find no support in the Commission's rules or its underlying orders for this result under the facts of this case.

15. A threshold question in this matter is, who is the PIC? Is the PIC AT&T because it is the underlying carrier, or is it GLD/NICE because of its proximate relationship with the end-user? The Commission's PIC selection orders clearly contemplate that a reseller such as GLD/NICE may be a PIC.⁴⁷ In fact, the Commission has emphasized that the carrier that sets the rates for the end-user is that end-user's PIC.⁴⁸ In this case, GLD/NICE sets the rates for the resold facilities that it provides to its end-users; therefore, it is the relevant PIC.

16. Since NICE was the successor in interest to GLD, the end-users in question here experienced no PIC change either when GLD, in effect, became NICE, or when NICE moved its underlying business from AT&T to Sprint.⁴⁹ Therefore, GLD/NICE violated no PIC rules, per se, when it moved its end users from AT&T to Sprint without seeking or obtaining their permission.⁵⁰

17. Section 201(b). This does not mean, however, that the actions taken by GLD/NICE were lawful under the Act. The next question is whether GLD/NICE's decision to change its underlying carrier from AT&T to Sprint was a material fact and, if so, whether GLD/NICE's actions to make the switch without informing its end-user customers as to who the underlying carrier would be were unjust and unreasonable within the meaning of Section 201(b) of the

⁴⁶ See note 2, supra.

⁴⁷ See, e.g., LOA Order, 10 FCC Rcd at 9576-78.

⁴⁸ Id.

⁴⁹ See, e.g., LOA Order, 10 FCC Rcd at 9576-78.

⁵⁰ Moreover, we note that the Commission, in an effort to eliminate consumer confusion about the carrier with whom they have contracted to obtain service in resale situations, mandated in its recent LOA Order that only the name of the "rate-setting" IXC may lawfully appear on an LOA. LOA Order, 10 FCC Rcd at 9575.

Act. We conclude that they were. We so conclude on the basis of NICE's apparently deliberate omission of information to its end-users of the switch from AT&T to Sprint when, in the March 1, 1993 letter, GLD/NICE informed its end-user customers that NICE had acquired GLD stock and would assume its status as a reseller providing the end-users' service. Purportedly stemming from the stock purchase, the letter requested that all customers sign a copy of the letter for purposes of "updating" GLD/NICE's records pursuant to state and federal regulations. The letter did not mention or otherwise indicate that GLD/NICE had converted its underlying long distance carrier from AT&T to Sprint or that signatures were being requested from customers to reflect their knowledge of and consent to the change.

18. It is clear from GLD/NICE's actions that it viewed its switch from AT&T to Sprint as a material change in its end-user customers' underlying service. GLD's marketing materials establish that GLD had induced customers to subscribe to GLD's service with the understanding that AT&T would be their underlying long distance service provider. Nevertheless, GLD/NICE elected not to inform its end user customers of this significant change in their presubscribed long distance service, despite the obvious means and opportunity it had to do so. GLD/NICE's failure to inform its customers of the change to Sprint flies in the face of the Commission's admonition to switchless resellers that their customers should be informed, whenever possible, of their underlying carrier's identity.⁵¹ We therefore conclude that the defendants GLD/NICE's actions were unjust and unreasonable within the meaning of Section 201(b) of the Act.

19. **Allegations against Sprint.** WIC has failed to demonstrate any actions by Sprint that would establish a violation of the Communications Act or the Commission's rules and orders. Sprint relied on NICE's assurance that all end-user customers identified by NICE had selected NICE as their PIC. Indeed, the record shows that when NICE could not provide proof for certain customers, Sprint refused to provide service for those customers.⁵² There is no evidence that Sprint violated the Commission's rules, orders or provisions of the Communications Act.

IV. ORDERING CLAUSES

20. ACCORDINGLY IT IS ORDERED pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 208, and authority delegated by Section 0.291 of the

⁵¹ See PIC Reconsideration Order, 8 FCC Rcd at 3219 (resellers were "strongly" urged to take reasonable steps to dispel their customers' possible confusion and forestall mistaken PIC change disputes).

⁵² Defendants' Memorandum at 20.

Commission's Rules, 47 C.F.R. § 0.291, that WIC's request for a declaratory ruling IS GRANTED IN PART AND DENIED IN PART.

21. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau shall forward a copy of this decision to the Chief Clerk for the United States District Court for the Eastern District of Pennsylvania promptly upon release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Kathleen M.H. Wallman". The signature is written in a cursive style with a large initial "K" and a long horizontal flourish at the end.

Kathleen M.H. Wallman
Chief, Common Carrier Bureau