

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

In the Matter of)	
)	
Metrocall, Inc.,)	
)	File No. E-98-06
Complainant,)	
v.)	
)	
WorldCom, Inc.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2000

Released: June 19, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the complaint filed pursuant to section 208 of the Communications Act of 1934, as amended (Act),¹ by Metrocall, Inc. (Metrocall), a telecommunications reseller, against WorldCom, Inc. (WorldCom), an interexchange carrier from whom Metrocall purchased telecommunications services, alleging violations by WorldCom of sections 201(b) and 202(a) of the Act.²

II. BACKGROUND

2. Complainant Metrocall is a “switchless” (i.e., non facilities-based) reseller of long distance and international telecommunications services. Defendant WorldCom is a facilities-based

¹ 47 U.S.C. § 208.

² Section 201(b) of the Act provides, in pertinent part: “All charges, practices, classifications, and regulations for and in connection with [interstate and international] 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). Section 202(a) of the Act provides, in pertinent part: “It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service...”. 47 U.S.C. § 202(a).

long distance and international telecommunications carrier.³

3. In August, 1995, WorldCom and Metrocall entered into an agreement (Agreement) pursuant to which WorldCom agreed to furnish, and Metrocall agreed to purchase, bulk long distance and international communications services.⁴ In early 1997, Metrocall agreed to provide "Basic DS-1" (or "T-1" high capacity digital transmission) service to ADT. Metrocall contacted WorldCom and requested DS-1 service for resale to ADT. WorldCom did not conduct a credit check on ADT before Metrocall began to provide service to ADT. The record is silent as to whether Metrocall asked WorldCom to conduct such a credit check or conducted such a credit check on its own.⁵

4. Metrocall's order was confirmed by WorldCom in March, 1997, and Metrocall's service to ADT commenced in late May, 1997. By July 1, 1997, ADT had used Metrocall's service to place more than 37,000 calls and had incurred more than \$210,000 in telephone charges owing to Metrocall. Many of these calls were to Latin and South American countries. ADT placed no calls after July 1, 1997, and "disappeared" soon thereafter, having paid none of Metrocall's charges.⁶ WorldCom has billed Metrocall approximately \$180,000 for ADT's calls.⁷

5. The billing arrangement between Metrocall and WorldCom was such that Metrocall did not know until the third week of July, 1997 that ADT had made a large number of calls to Latin and South American countries.⁸ Because it is "switchless," Metrocall lacked the capacity to monitor ADT's calls as they were placed.⁹ WorldCom, however, employs a computerized fraud alert system that almost instantaneously detects suspicious calling patterns anywhere in its network. WorldCom's system flags traffic indicating a prevalence of calls exceeding certain lengths, or a prevalence of calls to various international destinations, including

³ Amended Complaint, File No. E-98-06 (filed Dec. 24, 1997) (Amended Complaint) at 2 ¶¶ 1-2; Answer and Affirmative Defenses of WorldCom, Inc., File No. E-98-06 (filed Dec. 23, 1997) (Answer) at 2 ¶¶ 2-3. The events at issue here involved A+ Network, Inc., a telecommunications reseller that merged into Metrocall in 1995, and LDDS Communications, Inc., which would later become WorldCom. For convenience, we will refer to the parties as Metrocall and WorldCom. Amended Complaint ¶¶ 1-3, Ex. 1; Answer at 2 ¶ 5.

⁴ Amended Complaint at 1 ¶¶ 1-3, Ex. 1; Answer at 2 ¶ 5.

⁵ Amended Complaint at 2 ¶ 5; Answer at 2 ¶ 6.

⁶ Amended Complaint at 4-5 ¶¶ 9-11; Answer at 3 ¶¶ 2-3.

⁷ Amended Complaint at 6 ¶ 18; Answer at 4 ¶ 2.

⁸ Metrocall's billing system worked as follows: At the end of each month, WorldCom sent Metrocall a written report containing the total minutes, total calls, and total charges for all of Metrocall's end-users for that month. The report did not reveal which of Metrocall's end-users were making the calls, the dates the calls were made, or where the calls were terminated. WorldCom simultaneously sent Metrocall's billing company magnetic tape containing itemized billing information for the prior month. The billing company would decipher the tape and send the information to Metrocall, a process which usually consumed approximately ten days. Amended Complaint at 3-4 ¶¶ 7- 8, 5 ¶ 12; Answer at 2 ¶¶ 7-8, 4 ¶ 5.

⁹ Amended Complaint at 9 ¶ 25; Answer at 5 ¶ 2.

certain Latin and South American countries.¹⁰

III. DISCUSSION

A. WorldCom Did Not Violate Section 201(b) of the Act.

6. Metrocall asserts that WorldCom violated section 201(b) of the Act because it did not take certain steps to protect Metrocall from ADT's alleged fraud. Metrocall concedes that the Agreement itself does not require WorldCom to detect or prevent the commission of fraud by Metrocall's customers. In particular, Metrocall admits that the terms of the Agreement did not require WorldCom to check ADT's credit or monitor Metrocall's customers' calls.¹¹ Nevertheless, Metrocall relies on the Commission's decision in *RCI Long Distance, Inc. v. NY Telephone Co.*¹² to argue that WorldCom breached a duty owed by carriers "to protect their customers from practices that could detrimentally affect their telephone service."¹³ Metrocall asserts that, because Metrocall was WorldCom's customer, WorldCom was obligated under *RCI Long Distance* to conduct a credit check on ADT, to monitor ADT's calls for suspicious calling patterns, and to warn Metrocall if its fraud alert system was triggered by ADT's calls.¹⁴

7. WorldCom clearly was under no obligation to check ADT's credit. In *RCI Long Distance*, the Commission held that local exchange carriers (LECs) may have a duty to protect their payphone customers from fraudulent practices related to primary interexchange carrier (PIC) change requests. The present dispute does not involve LECs, payphones or PIC changes. Moreover, the Commission's reasoning in *RCI Long Distance* was based on the fact that LECs are often the "best line of defense" against PIC-change fraud.¹⁵ Here, WorldCom was not Metrocall's "best line of defense" against customers who do not pay their bills, as Metrocall was perfectly able to conduct its own credit check of ADT.

8. We do not decide whether WorldCom had any obligation to monitor ADT's calls or to notify Metrocall if its fraud alert system was triggered, as Metrocall has not shown that

¹⁰ Amended Complaint Ex. 7 (Declaration of James Lambeth) (Lambeth Dec'n) at ¶¶ 14-15; Answer Ex. 1 (Declaration of Michael W. Kelly) (Kelly Dec'n) at ¶¶ 5-6.

¹¹ Reply at 3-4 ¶¶ 7-8.

¹² *RCI Long Distance, Inc. v. NY Telephone Co.*, Memorandum Opinion and Order, 11 FCC Rcd 8090 (1996) (*RCI Long Distance*).

¹³ Amended Complaint at 10 ¶ 27 (citing *RCI Long Distance*, 11 FCC Rcd at 8094 ¶ 16). *See also*, Reply at ¶ 18.

¹⁴ Amended Complaint at 10 ¶ 27. We treat Metrocall's second cause of action, which alleges "negligence" and "breach of duty" by WorldCom, *id.*, as brought pursuant to section 201(b) of the Act. To the extent that Metrocall seeks to impose a duty of care on WorldCom other than pursuant to the Act, we deny the complaint on jurisdictional grounds. Further, we assume without deciding that WorldCom's failure to conduct credit checks of Metrocall's customers is a "practice[]... in connection with ... communication service" within the meaning of section 201(b). 47 U.S.C. § 201(b).

¹⁵ *RCI Long Distance*, 11 FCC Rcd at 8096 ¶ 16.

WorldCom failed to do so.¹⁶ In support of its allegations, Metrocall establishes that a large number of ADT's calls were to Latin and South America.¹⁷ In addition, Metrocall's Director of Telecommunications for Engineering declares under oath that Michael Kelly, Manager of Network Security for WorldCom, told him "that WorldCom's usual business procedure was to monitor and investigate patterns of calls made to Latin America, including all calls more than 20 minutes in length, and that in spite of ADT's calling patterns, which would normally trigger Worldcom's fraud alert system, ADT's calls were not monitored by WorldCom... ."¹⁸

9. WorldCom counters with the declaration of Mr. Kelly, who states that WorldCom *did* monitor ADT's calls, and that its fraud alert system detected no suspicious calling patterns. Mr. Kelly states that "there was nothing in [ADT's] calling patterns sufficient to trigger a fraud alert in WorldCom's fraud detection system."¹⁹ Mr. Kelly declares under oath (1) that his random sampling of ADT's calls revealed that roughly half terminated domestically, not in Latin or South America; (2) that his review of Metrocall's billing invoices revealed that the average duration of ADT's calls was less than six minutes;²⁰ and (3) that WorldCom's system "observes ... only total aggregate traffic patterns and fluctuations,"²¹ and that the volume of ADT's calls on the trunk assigned to Metrocall was not sufficient to trigger WorldCom's fraud alert system.²²

10. Although Mr. Kelly does not directly deny that he made the statements attributed to him by Metrocall's Director of Technology, he nevertheless specifically declares that WorldCom *did* monitor ADT's calls, and provides a detailed and reasonable explanation as to why ADT's calling pattern did not trigger WorldCom's fraud alert system. Weighing the evidence, we conclude that Metrocall has not met its burden of proving that WorldCom failed to monitor ADT's calls or failed to notify Metrocall that its fraud alert system was triggered. Accordingly, even if WorldCom was obligated to perform these activities (an issue we need not

¹⁶ It is well established that the complainant bears the burden of establishing a violation of section 201 of the Act in a formal complaint proceeding pursuant to section 208. *See, e.g., Amendment of the Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615 ¶ 291 (1997) (*Formal Complaints Order*). For the contrary position, Metrocall cites *Matter of TeleSTAR, Inc.*, Opinion and Order, 3 FCC Rcd 2860 (1988) (*TeleSTAR*), in which the burden of persuasion was shifted to defendant. Amended Complaint ¶ 39. *TeleSTAR*, however, did not concern alleged violations of section 201 of the Act and was not a section 208 complaint proceeding.

¹⁷ Amended Complaint at 4 ¶ 10, Exs. 4, 5; Answer at 3 ¶ 2.

¹⁸ Amended Complaint Ex. 7 (Lambeth Dec'n) at ¶ 15.

¹⁹ Answer Ex. A (Kelly Dec'n) at ¶ 13.

²⁰ Answer Ex. A (Kelly Dec'n) at ¶¶ 7, 10 - 14.

²¹ Answer Ex. A (Kelly Dec'n) at ¶ 15.

²² *Id.* Metrocall did not request discovery regarding Mr. Kelly's allegations or the workings of WorldCom's fraud alert system.

decide), Metrocall's complaint fails on this issue.²³

11. In sum, Metrocall's claim under section 201(b) of the Act fails. WorldCom was not obligated to conduct a credit check on ADT, and Metrocall has not shown that WorldCom failed to monitor ADT's calls or to warn Metrocall that its fraud alert system had been triggered.

B. WorldCom Did Not Violate Section 202(a) of the Act.

12. Metrocall asserts that WorldCom engaged in unjust and unreasonable discrimination against Metrocall in violation of section 202(a) of the Act when it (i) allegedly failed to monitor ADT's calls, and (ii) failed to conduct a credit check on ADT.²⁴ Metrocall asserts that these failures "dramatically depart from [WorldCom's] usual carrier/customer practices . . .".²⁵

13. An inquiry into whether a carrier is discriminating in violation of section 202(a) has three prongs. The complainant has the burden of persuasion to establish that (1) the services at issue are "like", and (2) there is disparate pricing or treatment between the "like" services. If the complainant succeeds in establishing the first two prongs, thereby making a *prima facie* showing of discrimination, the defendant has the burden of persuasion to establish that (3) the disparity is not unjust or unreasonable.²⁶

14. Metrocall's discrimination claim with respect to WorldCom's alleged failure to monitor ADT's calls fails. As previously discussed, Metrocall has not met its burden of proving that WorldCom failed to monitor ADT's calls.

15. Metrocall's discrimination claim with respect to WorldCom's failure to check ADT's credit also fails. In order to establish the first prong of that claim, Metrocall attempts to establish that WorldCom conducted credit checks of its other resellers' end-user customers.²⁷ Yet WorldCom denies this allegation,²⁸ and Metrocall's evidence on this point is insufficient. Metrocall relies solely on one of its employee's declarations that "it is common practice in the

²³ Metrocall cites *General Plumbing Corp. v. N.Y. Telephone Co.*, 11 FCC Rcd 11799 (1996), in which the Commission held that a carrier violated section 201(b) of the Act when it charged an end-user for unauthorized calls made by a third party who physically compromised the network from the carrier's side of the network demarcation point. Contrary to Metrocall's assertions, Amended Complaint ¶¶ 22-24, *General Plumbing Corp.* does not stand for the proposition that WorldCom may not charge Metrocall for ADT's calls, for that order involved charges for toll fraud, which are not at issue here. WorldCom is charging Metrocall for calls made by a known party - ADT - which was Metrocall's authorized end-user customer. Moreover, Metrocall does not allege that the calls were made by physically compromising WorldCom's side of the network.

²⁴ Amended Complaint at 12 ¶ 33.

²⁵ Amended Complaint at 13 ¶ 36.

²⁶ See, e.g., *Formal Complaints Order*, 12 FCC Rcd at 22615 n.782 (citing relevant court precedent).

²⁷ See Amended Complaint at 13 ¶ 35.

²⁸ Answer ¶ 30, Ex. A (Kelly Dec'n) at ¶ 2.

telecommunications industry for facilities-based carriers such as WorldCom to conduct credit checks, require credit references and security deposits from T-1 applicants such as [ADT].²⁹ That statement begs the question: The declarant may merely be stating that facilities-based carriers conduct credit checks of their *own customers* who order T-1 lines.³⁰ Further, the declarant does not state that it was *WorldCom's* practice (as opposed to general industry practice) to conduct credit checks. Finally, the declarant does not set forth the basis for his knowledge or provide specific examples of such credit checks being made.³¹ Thus, Metrocall has not proved the first prong of its discrimination claim (that the services at issue are “like”), and its claim under section 202(a) of the Act is therefore denied.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 202(a), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202(a), and 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the formal complaint filed by Metrocall, Inc. against WorldCom, Inc., IS DENIED.

17. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the above-captioned complaint is DISMISSED WITH PREJUDICE and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²⁹ Amended Complaint Ex. 7 (Lambeth Dec'n) at ¶ 17.

³⁰ An argument that WorldCom discriminated because it conducts credit checks of its own T-1 customers also would fail. It is neither unjust nor unreasonable within the meaning of section 202(a) of the Act for WorldCom to conduct credit checks of its own, but not ADT's, subscribers. WorldCom and Metrocall are competitors for the business of credit-worthy customers. WorldCom is not obligated to aid Metrocall in that competition when Metrocall was perfectly able to conduct its own credit check of ADT. *See WATS Int'l v. Group Long Distance (USA), Inc.*, 12 FCC Rcd 1743, 1743 n. 5 (1997) (a reseller is not only a customer but also a competitor of the carrier from whom it purchases bulk services); Answer at ¶¶ 22, 40.

³¹ In fact, we find it peculiar (if not disingenuous) that a reseller is arguing that the facilities-based carrier from which it orders service should be evaluating the propriety of serving the reseller's end-user customer.