

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

In the Matter of
Roger M. Barnes,
Robin A. Barnes, and
Faasolo Tavai,
Complainants,
v.
LDDS/WorldCom,
Petroleum Communications, Inc.,
PetroCom License Corporation,
RVC Services, Inc., d/b/a Coastel
Communications Co., and
Bachow/Coastel, LLC,
Defendants.
File Nos. WB-ENF-F-97-005
WB-ENF-F-97-006
WB-ENF-F-97-007
WB-ENF-F-97-008
WB-ENF-F-97-009

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2000

Released: February 29, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the formal complaint jointly filed by Roger M. Barnes, Robin A. Barnes, and Faasolo Tavai ("complainants") against Petroleum Communications, Inc., PetroCom License Corporation, RVC Services, Inc. d/b/a Coastel Communications Company, Bachow/Coastel, LLC (collectively, "the aggregator defendants") and LDDS/WorldCom ("WorldCom"). Complainants allege that the aggregator defendants and WorldCom violated the Telephone Operator Consumer Services Information Act ("TOCSIA"), section 201(b) of the Communications Act, and our rules by blocking outgoing calls from being made on the cellular pay telephones operated on oil and gas rigs by the aggregator defendants when such calls were made using carriers other than WorldCom. For the reasons stated below, we deny the complaint.

II. BACKGROUND

2. To place telephone calls from oil and gas rigs at sea, workers often use wireless pay telephones. Like landline payphones, each wireless payphone is presubscribed to an operator service provider (“OSP”) that allows a person to make calls billed to his or her calling card. Under TOCSIA,¹ however, the payphone owner (referred to as an “aggregator”²) may not prevent a caller from reaching the long-distance carrier of his or her choice by dialing that carrier’s access code. This practice is often referred to as “dial-around” access. Among other things, TOCSIA requires aggregators to ensure: (1) that their telephones allow consumers to perform this dial-around function; and (2) that consumers are not charged higher rates due to their use of dial-around access.³ In addition, OSPs must disclose their rates to consumers upon request and must oversee aggregator compliance with the statute.⁴

3. During the time period relevant to this case, complainants Roger Barnes and Faasolo Tavai have worked on oil and gas rigs in the Gulf of Mexico. Complainant Robin Barnes is the spouse of Roger Barnes. Together, complainants allege that the aggregator defendants violated TOCSIA between December 1993 and the date of the complaint by failing to program their cellular payphones to accept dial-around access codes, thereby giving complainants no choice but to use the long-distance service of the presubscribed OSP, WorldCom, at that carrier’s rates.⁵ Complainants further assert that WorldCom violated TOCSIA by not disclosing its rates upon request and by not adequately overseeing the aggregator defendants.⁶ Complainants also argue that these alleged actions by WorldCom and the aggregator defendants violated section 201(b) of the Communications Act of 1934 (“Act”),⁷ which prohibits unjust or unreasonable practices by telecommunications carriers.⁸ Finally, complainants contend that their allegations demonstrate that defendant PetroCom lied to the Commission in another proceeding when it claimed to be complying with TOCSIA.⁹ Defendants deny all these allegations.

¹ Telephone Operator Consumer Services Information Act (“TOCSIA”), Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

² See 47 U.S.C. § 226(a)(2) (defining “aggregator” as “any person that, in the ordinary course of its operations, makes telephones available to the public or transient users of its premises, for interstate telephone calls using a provider of operator services.”).

³ 47 U.S.C. § 226(c).

⁴ 47 U.S.C. § 226(b).

⁵ Second Amended Complaint at ¶¶ 18-22.

⁶ *Id.* at ¶¶ 22, 25-26.

⁷ 47 U.S.C. § 201(b).

⁸ Second Amended Complaint at ¶¶ 27-28.

⁹ *Id.* at ¶¶ 29-31. Complainants allege that PetroCom therefore violated section 1.17 of the Commission’s rules, which requires truthful statements before the Commission. See 47 C.F.R. § 1.17.

III. DISCUSSION

4. It is well established that a complainant has the burden of proof in a formal complaint proceeding under section 208 of the Act.¹⁰ Thus, the complainants in this case must present affidavits or other relevant information establishing, by a preponderance of the evidence, that WorldCom and the aggregator defendants violated the Act or our rules.¹¹ We find that complainants have not met their burden of proof and deny the complaint.¹²

5. Beginning with their first formal complaint in early 1997, complainants have had more than three years to prove their allegations against defendants. Indeed, the Wireless Telecommunications Bureau dismissed an earlier version of the complaint for failure to state a claim and expressly warned complainants that any amended complaint should allege specific facts in support of complainants' allegations.¹³ Despite that warning, complainants' second amended complaint is essentially identical to its predecessors, and complainants have come forward with virtually no substantive evidence supporting their claims.

6. The Commission's general pleading and format requirements provide that a formal complaint's allegations must be supported by affidavits or other relevant documentation.¹⁴ Instead of such evidence, however, complainants generally rely upon the vague and unsupported allegations in their complaint. For example, the Second Amended Complaint asserts that Roger Barnes attempted to obtain rate quotes from WorldCom,¹⁵ but complainants provide no documents or affidavits with specifics about these attempts, such as the dates they occurred, with

¹⁰ See 47 U.S.C. § 208; see also *Directel, Inc. v. American Tel. & Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 7554, 7560 (1996); *Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997).

¹¹ 47 C.F.R. § 1.720.

¹² We note that the Commission has determined to forbear from enforcing the unblocked access provisions of TOCSIA against CMRS aggregators and presubscribed carriers like WorldCom. See *Forbearance From Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16894 (1998) ("*Forbearance Order*"). Because we deny the complaint in this case on other grounds, this decision does not address whether the unblocked access provisions of TOCSIA apply in formal complaints filed prior to issuance of the *Forbearance Order*.

¹³ See Letter from Gary Schonman, Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Counsel of Record, dated July 8, 1999, at 2. The Wireless Bureau dismissed the original complaint on April 23, 1997 because it was improperly filed as a class action. See Letter from Howard Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Paul C. Besozzi, Counsel for Complainants, dated April 23, 1997, at 1.

¹⁴ 47 C.F.R. § 1.720(c).

¹⁵ Second Amended Complaint at ¶ 22. See also Answers of Roger M. Barnes *et al.* to Bachow/Coastel, LLC's First Set of Interrogatories at 5 (stating that Barnes made "numerous attempts" to get rate quotes from WorldCom).

whom Barnes spoke, or the substance of these alleged conversations. Similarly, complainants allege that they repeatedly attempted but failed to obtain dial-around access, but they provide no evidence in support of these claims.

7. The only evidence offered by complainants in support of their claims is a stack of telephone bills purporting to show charges allegedly imposed by WorldCom and the aggregator defendants.¹⁶ These bills -- accompanied only by a brief summary and without any explanation or affidavits -- list only two potentially relevant calls billed by WorldCom.¹⁷ Moreover, the records do not identify which aggregator defendants, if any, operated the cellular telephones used for these calls. Absent evidence that a specific aggregator defendant operated the telephones in question, we cannot reasonably conclude that any of the aggregator defendants violated TOCSIA or that WorldCom inadequately oversaw any of the aggregator defendants.¹⁸

8. In any event, even this evidence is irrelevant under the statute of limitations governing this case. Complainants generally may seek damages only for the two years before the date they filed their complaint.¹⁹ Under the Commission's rules, where a complaint has been dismissed for failure to state a claim, as with complainants' First Amended Complaint here,²⁰ the statute of limitations period is not tolled.²¹ Thus, since complainants did not file their Second Amended Complaint until July 6, 1999, they cannot seek relief against defendants based solely on actions that occurred more than two years beforehand. Complainants have no evidence whatsoever against WorldCom or any aggregator defendant for this period and have not demonstrated that any potential violation prior to June 6, 1997, constituted part of a "continuing violation" that extended beyond that date. Accordingly, complainants' claims are barred by the statute of limitations.

¹⁶ See Second Amended Complaint, Exhibits A and B.

¹⁷ See *id.*, Exhibit B. Under the most liberal reading of the statute of limitations for this case, see *infra* note 19 and accompanying text, complainants' telephone bills contain charges for only two relevant calls. These calls both occurred on August 3, 1995 and consist of a five-minute operator-assisted phone call at a cost of \$11.05 and an eight-minute operator-assisted phone call at a cost of \$14.94. *Id.*

¹⁸ See *General Plumbing Corp. v. New York Telephone Co. et al.*, Memorandum Opinion and Order, 11 FCC 11799, 11809 n. 63 (1996).

¹⁹ See 47 U.S.C. § 415(b) ("All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues ..."); § 415(c) ("For recovery of overcharges action at law shall begin or complaint filed with the Commission against carriers within two years from the time the cause of action accrues ..."). We therefore do not consider the telephone bills from Roger and Robin Barnes that list additional WorldCom charges, since these charges occurred in 1994, outside the statute of limitations period for this case.

²⁰ See *supra* note 13 and accompanying text.

²¹ See 47 C.F.R. § 1.728(a) (where a formal complaint is dismissed for failure to state a claim, "any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.").

9. Complainants assert that they cannot tie individual defendants to specific charges without additional discovery.²² Complainants therefore have requested that the aggregator defendants identify, by location and telephone number, all their cellular pay telephones located in the Gulf of Mexico or aboard vessels that transit the Gulf.²³ We find, however, that complainants have not provided sufficient evidence of violations of the Act or our rules to warrant such extensive discovery. As noted above, the allegations in the Second Amended Complaint are extremely vague, and complainants have attached no affidavits and little documentary evidence to support their claims. Nor have complainants explained what steps they took to identify the aggregators responsible for specific payphones or why such discovery is necessary to identify the defendants responsible for the alleged violations.

10. As the Commission has stated, “[f]ormal complaint proceedings, unlike court litigation or administrative-trial type hearings, are often resolved solely on the written pleadings. These pleadings must therefore stand on their own and provide the factual underpinnings for a decision on the merits.”²⁴ The Commission’s rules place *on complainants* the burden of pleading and documenting a violation of the Act. We find that the record does not support a finding that the defendants violated TOCSIA, section 201(b) of the Act, or the Commission’s rules,²⁵ and therefore deny the complaint.

IV. CONCLUSION

11. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 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, 0.311, that the formal complaint, jointly filed by Roger M. Barnes, Robin A. Barnes, and Faasolo Tavai against LDDS/WorldCom, Petroleum Communications, Inc., PetroCom License Corporation, RVC Services, Inc. d/b/a Coastel Communications Company, and Bachow/Coastel, LLC IS DENIED.

12. It is FURTHER ORDERED, all unresolved pleadings in this case ARE DISMISSED as moot.

²² See Affidavit of Richard E. Jesmonth, counsel for complainants, dated July 2, 1999 at 2.

²³ See, e.g., Complainants’ First Set of Interrogatories to Defendants Petroleum Communications, Inc. and PetroCom License Corporation at 6. Defendants have opposed this request as overbroad. See, e.g., Response of Defendants Petroleum Communications, Inc. and PetroCom License Corporation to Complainants’ First Set of Interrogatories at 2.

²⁴ *Procedures to be Followed When Complaints Are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806, 1807 (1988); see also *American Message Centers v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995).

²⁵ Because we find that complainants did not adequately prove their allegations that the defendants violated TOCSIA or section 201(b), we reject complainants’ allegation that PetroCom lied to the Commission when it stated that it was complying with the statute. See Second Amended Complaint at ¶¶ 29-31.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau