

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

In the Matter of

Target Telecom, Inc.

File No. ENF-96-04
NAL/Acct. No. 616EF004

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 19, 1996; Released: January 23, 1996

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By this Notice of Apparent Liability for Forfeiture ("NAL"), we initiate enforcement action against Target Telecom, Inc. ("TTI").¹ For the reasons discussed below, we find that TTI apparently willfully violated Commission rules and orders² by changing the primary interexchange carrier ("PIC") designated by David S. Houlden ("Houlden"), Executive Director of the Newburyport Housing Authority ("Newburyport") of Newburyport, Massachusetts, without Newburyport's authorization. Based upon our review of the facts and circumstances surrounding the violations, we find that TTI is apparently liable for a forfeiture in the amount of forty thousand dollars (\$40,000).

II. THE COMMISSION'S PIC CHANGE RULES AND ORDERS

2. In its *Allocation Order* and subsequent *Reconsideration Order* and *Waiver Order*,³ the Commission set forth rules and procedures for implementing equal access⁴ and cus-

tomers' presubscription⁵ to an interexchange carrier ("IXC").⁶ 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.⁷ After considering claims by certain IXCs that this requirement would stifle competition because consumers would not be inclined to execute the LOAs even though they agreed to change their PIC, the Commission modified the requirement to allow IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs."⁸ In 1992, the Commission again revised its rules because it continued to receive complaints about unauthorized PIC changes.⁹ 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, return 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 change order.¹⁰ 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.

3. 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.¹¹ The Commission's recent rules prohibit the potentially deceptive or confusing practice of combining the LOA with promotional materials in the same document.¹² 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.¹³ The rules prohibit

¹ Target Telecom, Inc. is located at 155 Willowbrook Boulevard, Wayne, New Jersey.

² 47 C.F.R. § 64.1100; Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase 1, 101 FCC 2d 911 (1985) (*Allocation Order*); *recon. denied*, 102 FCC 2d 503 (1985) (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase 1, 101 FCC 2d 935 (1985) (*Waiver Order*).

³ See *supra* proceedings cited at note 2.

⁴ Equal access for interexchange carriers ("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 Judgement* 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.

⁵ Presubscription is the process by which each customer selects one primary interexchange carrier ("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," only the customer accesses the primary IXC's services. An end user can also access other IXCs by dialing a five-digit access code (10XXX). *Id.* at 911.

⁶ 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.*

⁷ 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.

⁸ *Waiver Order*, 101 FCC 2d at 942.

⁹ Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038-39 (1992) (*PIC Change Order*).

¹⁰ See 47 C.F.R. § 64.1100; *PIC Change Order*, 7 FCC Rcd at 1045.

¹¹ Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 10 FCC Rcd 9560 (1995).

¹² See *id.* at 9574-75. Checks that serve as an LOA are excepted from the "separate or severable" requirement so long as the check contains certain information clearly indicating that endorsement of the check authorizes a PIC change and otherwise complies with the Commission's LOA requirements. *Id.* at 9573.

¹³ See *id.* at 9564-65.

all "negative option" LOAs¹⁴ and require that LOAs and any accompanying promotional materials contain complete translations if they employ more than one language.¹⁵

III. THE NEWBURYPORT COMPLAINT

4. On July 31, 1995, the Commission received a written complaint from Houlden alleging that TTI had converted Newburyport's prescribed long distance service provider from AT&T Corporation ("AT&T") to TTI without Newburyport's authorization.¹⁶ Newburyport apparently first discovered the change to TTI when it received from TTI a telephone bill for February 1995. A Newburyport employee then contacted TTI about the bill.¹⁷ In response to the inquiry, TTI faxed to Newburyport a copy of a signed "Customer Service Agreement" ("service agreement") obtained from Business Network Communications, Inc. ("BNC")¹⁸ that included a LOA purportedly signed by Houlden authorizing the change. Houlden states that not only is the signature on the service agreement not his, the signature does not reflect the correct spelling of his name.¹⁹ Houlden attached to the complaint a copy of the LOA Newburyport received from TTI.

5. The Common Carrier Bureau's Consumer Complaints Branch (formerly known as the Informal Complaints and Public Inquiries Branch) sent letters to both TTI and BNC requesting specific information regarding the conversion of Newburyport's telephone service.²⁰ The information that TTI provided in response to the staff's inquiry indicates that Newburyport's service was switched to TTI on the basis of a BNC service agreement that was purportedly signed by Houlden.²¹ TTI states that when signed service agreements are received from its marketing agents they are verified by calling and confirming information prior to processing. TTI does not indicate that the order to convert Newburyport's service was verified prior to submission to NYNEX-New England.²² In its response, BNC does not directly state that the signature was forged but states that an "independent representative" was responsible for submitting the LOA purportedly containing Houlden's signature and that the representative has been removed from BNC's program.²³

IV. DISCUSSION

6. We have carefully evaluated the information submitted in connection with Newburyport's informal complaint and conclude that TTI is apparently liable for forfeiture for willful violation of the Commission's rules and PIC change requirements. We find TTI's apparent actions particularly egregious. It appears that on or about January 24, 1995,

TTI submitted a PIC change request based on an apparently forged LOA to NYNEX-New England, through its underlying carrier WilTel, Inc., resulting in the conversion of Newburyport's telephone service from AT&T to TTI. The statements and information provided by Newburyport, TTI, and BNC leave virtually no doubt that the LOA was not executed by Houlden and that TTI lacked the requisite authorization to request a PIC change to Newburyport's long distance service. There is no similarity between Houlden's signature on Newburyport's complaint and Houlden's purported signature on the LOA form that TTI used as the basis for the PIC change. Indeed, the signature on the LOA is spelled differently than Houlden's signature on the complaint. Under these circumstances, we conclude that TTI's apparent actions were in willful violation of the Commission's PIC change rules and orders and that a substantial forfeiture penalty is appropriate.

7. We also note that with regard to PIC changes, the actions of BNC, TTI's marketing agent, do not relieve TTI of its independent obligation to ensure compliance with our rules, nor do they otherwise mitigate TTI's role in the apparent violations. The Communications Act deems the acts or omissions of an agent or other person acting for a common carrier to be the acts or omissions of the carrier itself.²⁴ Hence, the Act expressly prohibits a carrier from evading the requirements of the Act or the Commission's rules or orders by hiring someone else who then engages in conduct that contravenes these requirements.

8. As a general matter, the unauthorized conversion of a customer's presubscribed long distance carrier continues to be a wide-spread problem in the industry.²⁵ We are particularly troubled by what appears to be a common practice by some IXCs of relying on unverified LOAs, which turn out to be falsified or forged, to effect changes in consumers' long distance service. The pervasiveness of the problem suggests that our current administration of the law has not produced sufficient deterrence to non-compliance and the carriers have little incentive to curtail practices that lead to consumer complaints. Furthermore, as a practical matter, the carriers' responses to alleged unauthorized conversion complaints rarely provide a detailed explanation or justification of the carrier's actions. Therefore, to draw industry's attention to the seriousness of the problem and to provide incentives to comply with the Commission's rules and orders, we intend to scrutinize carefully consumer complaints and to take prompt enforcement action, including the imposition of substantial monetary fines, when the facts indicate that a carrier has failed to take the necessary steps to ensure that LOAs are valid and duly authorized. If carriers intend to rely on a LOA to request a PIC change, they will be responsible for ensuring its validity.

¹⁴ See *id.* at 9565-66. "Negative option" LOAs require consumers to take some action to avoid having their long distance telephone service changed.

¹⁵ See *id.* at 9581.

¹⁶ Newburyport Housing Authority, Informal Complaint No. IC-95-22371 (July 31, 1995).

¹⁷ *Id.*

¹⁸ According to TTI's response to the complaint dated October 31, 1995, BNC is an independent sales and marketing company for TTI. BNC receives commissions based on volume usage of the orders submitted and provided. BNC's response, dated October 20, 1995, states that it has independent representatives who enroll customers to TTI's network and in turn earn monthly

commissions.

¹⁹ *Id.* The signature on the LOA reads "Holden" not "Houlden" as used by the complainant.

²⁰ Notice of Informal Complaint (September 11, 1995).

²¹ TTI Response to Informal Complaint No. IC-9522371 (October 31, 1995).

²² See *id.*

²³ BNC Response to Informal Complaint No. IC-9522371 (October 20, 1995).

²⁴ See 47 U.S.C. § 217.

²⁵ From June 1994 to June 1995, of the 28,773 informal complaints filed, 7,960 were for alleged unauthorized conversions of the customer's presubscribed long distance carrier.

9. Section 503(b)(2)(B) of the Communications Act authorizes the Commission to assess a forfeiture of up to one hundred thousand dollars (\$100,000) for each violation, or each day of a continuing violation, up to a statutory maximum of one million dollars (\$1,000,000) for a single act or failure to act.²⁶ In exercising such authority, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."²⁷ For purposes of determining an appropriate forfeiture penalty in this case, we regard the conversion of Newburyport's telephone line as a single violation. After weighing the circumstances surrounding the violation, we find that TTI is apparently liable for a forfeiture of forty thousand dollars (\$40,000) for the unauthorized conversion of the Newburyport line. TTI will have the opportunity to submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.²⁸ In this regard, we note that the Commission has previously held that a licensee's gross revenues are the best indicator of its ability to pay a forfeiture and that use of gross revenues to determine a party's ability to pay is reasonable, appropriate, and a useful yardstick in helping to analyze a company's financial condition for forfeiture purposes.²⁹ We will give full consideration to any financial information provided by TTI before assessing a final forfeiture amount.

V. CONCLUSIONS AND ORDERING CLAUSES

10. We have carefully reviewed the information submitted in connection with Newburyport's informal complaint and conclude that on or about January 24, 1995, TTI apparently converted, or caused a local exchange carrier to convert, Newburyport's telephone line without Newburyport's authorization through the use of an apparently forged LOA. We further conclude that TTI thereby apparently willfully violated Commission rules governing primary interexchange carrier conversions, and that its conduct warrants a forfeiture in the amount of forty thousand dollars (\$40,000).

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Target Telecom, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of forty thousand dollars (\$40,000) for its willful violation of the Commission's PIC change rules and orders, 47 C.F.R. § 64.1100; *PIC Change Order*, 7 FCC Rcd 1038 (1992); *Allocation Order*, 101 FCC 2d 911 (1985); *Waiver Order*, 101 FCC 2d 935 (1985).

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty days of the release of this Notice, Target Telecom, Inc. SHALL PAY the full amount of the proposed forfeiture³⁰ OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

13. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Mr. Jonathan Kaufman, President of Target Telecom, Inc., 155 Willowbrook Boulevard, Wayne, New Jersey 07470.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Common Carrier Bureau

²⁶ 47 U.S.C. § 503(b)(2)(B).

²⁷ *Id.* § 503(b)(2)(D).

²⁸ See *id.* § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁹ PJB Communications of Virginia, 7 FCC Rcd 2088, 2089 (1992) (finding that forfeitures of \$5,000 and \$3,000 assessed against two jointly owned and operated paging companies were not excessive because the total forfeiture amount (\$8,000) represented approximately 2.02 percent of the companies' combined gross revenues of \$395,469); see also David L. Hollingsworth d/b/a Worland Services, 7 FCC Rcd 6640 (Com. Car. Bur. 1992) (\$6,000 forfeiture representing approximately 1.21 percent of licensee's 1991 gross revenues and approximately 1.34 percent of

projected 1992 gross revenues not found to be excessive); Afton Communications Corp., 7 FCC Rcd 6741 (Com. Car. Bur. 1992) (\$6,000 forfeiture representing approximately 3.91 percent of 1990 gross revenues and 2.75 percent of projected 1992 gross revenues not found to be excessive).

³⁰ The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Target Telecom, Inc.'s check or money order to "NAL Acct No. 61611004." Such remittances must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.