

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	File No. ENF 99-09
Coleman Enterprises, Inc.)	
d/b/a Local Long Distance, Inc.)	
)	NAL/Acct. No. 916EF0004
Apparent Liability for Forfeiture)	

ORDER OF FORFEITURE

Adopted: **November 30, 2000**

Released: **December 7, 2000**

By the Commission

I. INTRODUCTION

1. In this Order, we assess a forfeiture of \$750,000 against Coleman Enterprises, Inc. d/b/a Local Long Distance, Inc. (“LLD”) for willful or repeated violations of the Communications Act of 1934, as amended (the “Act”), and implementing Commission rules and orders. We find that LLD willfully or repeatedly violated section 258 of the Act by changing the preferred interexchange carriers designated by 14 consumers without their authorization (a practice commonly referred to as “slamming”).¹

II. BACKGROUND

2. The facts and circumstances leading to the issuance of our Notice of Apparent Liability for Forfeiture (“NAL”) are fully recited in the NAL and need not be reiterated at length.² Between June 1998 and May 1999, the Commission processed 306 consumer complaints regarding LLD.³ The Commission investigated 14 of these complaints. Each of the 14 complainants asserted that LLD converted his or her preferred interexchange carrier (“PIC”) without authorization, and each complainant provided sworn statements and evidence to that effect. The complainants also alleged that LLD telemarketers misrepresented material facts about LLD’s services. As described in the NAL, the scripts used by LLD’s telemarketers offered a bill consolidation service to consumers, but did not reveal that agreeing to the bill consolidation service would result in their preferred carriers being changed to LLD. The scripts used by

¹ Section 258 states that “[n]o telecommunications carrier shall submit . . . a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.” 47 U.S.C. § 258. In the Notice of Apparent Liability that preceded this Order, we also found that LLD apparently violated section 201(b) of the Act for its unreasonable and egregious marketing practices. We declined, however, to propose a forfeiture for those apparent violations. Accordingly, in this Order, we address only those § 258 violations for which we proposed a forfeiture amount.

² *Local Long Distance Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 13786 (1999) (*LLD NAL*).

³ *Id.* at n.7.

the third party verifiers and the verification tapes submitted by LLD confirm that the verifiers failed to ask if the consumer was authorizing a switch of his or her preferred carrier. Further, in the NAL, the Commission stated that LLD may have deceptively used, as its name, the generic term “local long distance” as part of an effort to confuse consumers.⁴

3. In the NAL, based on our review of the facts and circumstances surrounding these apparent violations, we concluded that LLD was apparently liable for a proposed forfeiture of \$80,000 for each of the 14 complaints involving allegations of slamming through fraudulent sales and verification practices. In total, we proposed a forfeiture of \$1,120,000 for LLD’s apparent violation of section 258 of the Act and the Commission’s rules and orders.⁵

III. DISCUSSION

4. In its Response to the NAL, LLD does not challenge the Commission’s finding that LLD apparently submitted PIC-change orders to the complainants’ local exchange carriers without authorization. LLD directs its argument instead towards a mitigation of the forfeiture amount. Invoking the factors set forth in section 503(b)(2)(D) of the Act,⁶ LLD asserts that the amount should be reduced because: (1) the Commission’s verification rules are unclear; (2) the third party verifiers were independent contractors; (3) LLD had no intent to change the complainant’s PIC without proper authorization; (4) LLD has taken important remedial steps to curtail and prevent unauthorized conversions in the future; (5) LLD has an overall history of compliance before the Commission; and, (6) LLD lacks the ability to pay the forfeiture. We address LLD’s arguments below.

A. Commission’s Verification Rules and LLD’s Third Party Verifiers

5. Several of the arguments LLD makes in favor of mitigating the forfeiture amount concern the Commission’s third party verification rules and the third party verifiers LLD used in its telemarketing process. As stated above, LLD does not contest its liability but argues that the proposed forfeiture is too harsh, and should be reduced.⁷ As a basis for its request to reduce the forfeiture amount, LLD argues that the Commission’s third party verification rules are ambiguous. LLD specifically claims that the *Section 258 Order* implicitly recognizes its own ambiguity concerning the verification rules⁸ and that one Commissioner assertedly stated that the existing rules are ambiguous.⁹ Further, LLD argues that the

⁴ *Id.* at 13799.

⁵ *Id.*

⁶ The Act at section 503(b)(2)(D) provides that, in determining the amount of the forfeiture penalty, 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."

⁷ Response at 2.

⁸ Response at 6, *citing* the *Section 258 Order*, 14 FCC Rcd at ¶¶ 164 [sic]-7[sic] (the four paragraphs which discuss “Independent Third Party Verification” are actually found at ¶¶ 165 – 68 of the *Section 258 Order*, 14 FCC Rcd at 1601-02).

⁹ Response at 4 and 6, referring to Commissioner Furchtgott-Roth’s separate statement in *Business Discount Plan, Inc.*, Notice of Apparent Liability of Forfeiture, 14 FCC Rcd 340, 369 (1998) (*Business Discount NAL*).

Commission based the forfeiture, in part, upon the actions of LLD's independent third party verifiers, which the Commission imputed to LLD.¹⁰

6. The Commission's rules in effect during the time period relevant to this case¹¹ squarely place responsibility on a carrier to obtain the consumer's authorization to switch his/her service. This authorization must subsequently be verified by one of several methods. LLD claims it used independent third party verifiers, but whether the third party verifier used by LLD is an independent contractor is irrelevant to LLD's liability in this case. The apparent violations found in the NAL were based on LLD's failure to obtain that initial authorization from 14 consumers, before the third party verification took place. The Commission's determination was based on an investigation of LLD's telemarketing activities, including its telemarketing scripts. Specifically, the Commission found these scripts to be misleading about the services LLD offered. Further, the verification tapes LLD submitted revealed that LLD's telemarketers actively participated in the verification process, further undermining the consumer's ability to understand what he/she was purchasing and casting doubt on the independence of the verifier.¹² The Commission looked at these facts concerning the 14 complaints and determined in each instance that the consumer had apparently not given LLD authorization to change its PIC to LLD. The Commission further noted that the third party verification scripts and tapes LLD submitted to counter the consumers' allegations actually supported the claims that the consumers had not authorized a change in service. These materials demonstrate that neither LLD nor the third party verifiers asked the consumers if they had authorized a PIC change to LLD. These scripts and tapes do nothing to counter the consumers' allegations that they did not authorize a change in service in the first instance. We therefore find no reason to reduce the forfeiture amount in this regard.

7. We also reject LLD's argument that the relevant third party verification rules are ambiguous in any material respect. The fact the Commission sought comment on whether to refine its rules does not mean that those rules failed to provide clear notice of the relevant legal requirements as they applied at that time. Moreover, the issues that were the subject of the *Section 258 Order* are not relevant to the instant case.¹³ In addition, the separate statement of one Commissioner did not in fact indicate that the third party verification requirement was ambiguous and, in any event, was not endorsed by the Commission.¹⁴ Accordingly, we find no ambiguity in the third party verification rules as they apply to this case.

(B) Remedial Steps

¹⁰ Response at 7- 8.

¹¹ 47 C.F.R. § 64.1100(c)(1998).

¹² *LLD NAL*, 14 FCC Rcd at 13801.

¹³ For example, the *Section 258 Order* addresses absolution, for consumers, of charges imposed by unauthorized carriers, liability of subscribers and unauthorized carriers, preferred carrier freezes, and recovery of additional amounts from unauthorized carriers. None of these issues are involved in the instant proceeding.

¹⁴ *See, supra*, n. 9. In his separate statement in the *Business Discount NAL*, Commissioner Furchtgott-Roth said that "[b]efore we proceed much further with enforcement of slamming rules as they relate to marketing, the Commission should develop clear and unambiguous rules delineating permissible marketing practices from impermissible practices." *Business Discount NAL*, 14 FCC Rcd at 369. These comments appear directed to a section of that NAL discussing misleading marketing under Section 201(b) of the Act, not the Commission's slamming rules regarding third party verification. *See also Business Discount Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461, 14475-77 (2000), and *Business Discount Plan, Inc.*, Order on Reconsideration, FCC 00-424 (Dec. 7, 2000).

8. Although LLD further maintains that it has taken remedial actions to address its unauthorized carrier changes, and that it stopped its telemarketing services in December 1998,¹⁵ we do not find these actions sufficient to mitigate the amount of its forfeiture. We believe that the actions LLD described in its compliance plan,¹⁶ such as improving its customer services and establishing penalties for employees as incentives to ensure compliance, are not unusual for the industry. Moreover, LLD's cessation of its use of telemarketing activities in December 1998, came months after the former Consumer Protection Branch of the Common Carrier Bureau had forwarded many hundreds of informal consumer complaints to LLD for its response. We therefore find no basis for a downward adjustment of the forfeiture amount on this ground.

(C) Degree of Culpability

9. LLD argues that its treatment of consumers, once they complained about the unauthorized changes in service, indicates that LLD did not intend for the unauthorized switches to take place. LLD further maintains that the Commission should reduce the forfeiture amount because the precautions LLD placed in the telemarketing training materials indicate that LLD did not act willfully to harm consumers. We find these arguments unpersuasive. As to its treatment of its customers, as the NAL noted, LLD's responses to its consumers were "barebones" and did not address consumers' specific concerns about the misleading sales calls and verification practices.¹⁷ As to LLD's claim that it did not act willfully, it has long been established that the word "willfully," as employed in section 503(b) of the Act, does not require a demonstration that LLD knew that it was acting unlawfully.¹⁸ Section 503(b) requires only a finding that LLD knew it was doing the acts in question and that the acts were not accidental. Furthermore, section 258 of the Act imposes liability on the carrier responsible for submitting an unauthorized change, regardless of intent.¹⁹ LLD's treatment of harmed consumers and contention that it did not act willfully neither exonerate the company nor justify a reduction in the forfeiture amount.

(D) History of Compliance

10. LLD further argues that a reduction in the proposed forfeiture is warranted because it has a history of compliance before the Commission. LLD states that it "was authorized by the Commission in 1997 to provide international switched voice services," and that this is the "first notice of apparent liability [LLD] has received from this Commission."²⁰ As stated in the Commission's *Forfeiture Policy*

¹⁵ Response at 8.

¹⁶ Because of the extent of LLD's misrepresentations to consumers, in the NAL we required LLD to submit a compliance plan detailing how it would quickly identify and address consumer inquiries and change its sales scripts and verification practices. *LLD NAL*, 14 FCC Rcd at 13804.

¹⁷ *Id.* at 13788.

¹⁸ *ConQuest Operator Services Corp.*, Order of Forfeiture, 14 FCC Rcd 12518, 12525, n.41 (1999) (*ConQuest Forfeiture Order*); *Target Telecom Forfeiture Inc.*, Order of Forfeiture, 13 FCC Rcd 4456 (Com. Car. Bur. 1998) (*Target Telecom Forfeiture Order*), *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991).

¹⁹ 47 U.S.C. § 258; *Section 258 Order*, 14 FCC Rcd at 1539. The *Section 258 Order* reiterates that the statute does not establish an intent element for a violation of section 258. A carrier, therefore, would be liable for slamming if it was responsible for an unauthorized change, regardless of whether it was done intentionally.

²⁰ Response at 1 and 11.

Statement,²¹ a history of overall compliance is one of the factors the Commission may take into account in its consideration of downward adjustment of a forfeiture. Here, although LLD apparently only began providing service in 1997, its record reflects an ongoing problem regarding consumer complaints that involved misrepresentation. As mentioned above, the Commission received 306 consumer slamming complaints against LLD between June 1998 and May 1999. The proposed forfeiture amount for the 14 complaints for which the NAL was issued reflects the seriousness of the violations found. When we view LLD's pattern of slamming violations alongside its relatively short period of corporate existence, we are convinced that it would be inappropriate to reduce the forfeiture on this ground.²²

(E) Ability To Pay

11. LLD last argues that payment of the full amount of the proposed forfeiture "would place an extreme financial strain upon the company," which "has been operating at a significant loss for the past two years."²³ LLD requests that the Commission use its discretion under section 503(b) of the Act, and reduce or rescind its forfeiture.²⁴ In considering a carrier's claim of inability to pay, the Commission's rules state that any showing of why a forfeiture should be reduced must include a detailed factual statement, and other documentation and affidavits as may be relevant.²⁵ Case precedent reveals that an appropriate indicator of a carrier's ability to pay a forfeiture is its gross revenues.²⁶ Here, LLD has provided federal tax returns for 1997 and 1998, an unaudited cash flow statement for the year ending December 31, 1999, and bank summaries with alleged consumer credits listed. In this instance, we consider the most reliable and recent financial information that LLD provided us to be its 1998 federal tax return showing gross revenues of \$9,420,696.48 for that year. We agree that the proposed forfeiture amount, \$1,120,000, is somewhat excessive in light of these gross revenues and LLD's financial situation.²⁷ Accordingly, and in light of the seriousness of the violation, we reduce the forfeiture amount from \$1,120,000 to \$750,000.²⁸

²¹ See *Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17116 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999).

²² See *Brittan Communications International, Inc.*, Order of Forfeiture, 15 FCC Rcd 4852 (2000) (*Brittan Forfeiture Order*).

²³ Response at 11.

²⁴ *Id.* at 3.

²⁵ 47 C.F.R. § 1.80 (f)(3).

²⁶ See, e.g., *Target Telecom Forfeiture Order*, 13 FCC Rcd at 4464 ("the 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").

²⁷ LLD has filed for bankruptcy under Chapter 11 of the Bankruptcy Code. *Coleman Enter., Inc.*, No. 00-33476 - GFK (Bankr. D. Minn. filed Aug. 18, 2000).

²⁸ Filing for bankruptcy does not preclude the Commission from issuing an order defining LLD's penalty for slamming, because under 11 U.S.C. § 362(b) of the Bankruptcy Code, issuance of the order in this kind of action is excepted from the automatic stay against collections. See *United States v. Commonwealth Companies, Inc.*, 913 F.2d 518, 522 (8th Cir. 1990) (excepting suits by government agencies which fix damages for violation of fraud and consumer protection laws from the stay imposed in bankruptcy actions). Here, the Commission finds LLD to have violated section 258 of the Act, the goal of which is to protect consumers from their long distance carriers being changed without their authorization. See *Implementation of the Subscriber Carrier Selection Changes Provisions*

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), that LLD Services Corporation SHALL FORFEIT to the United States Government the sum of seven hundred and fifty thousand dollars (\$750,000) for violating section 258 of the Act, 47 U.S.C. § 258, and the Commission's rules and orders governing primary interexchange carrier conversions, 47 C.F.R. §§ 64.1100, 64.1150. For collection, the Commission will file a proof of claim at the appropriate time in LLD Services Corporation's bankruptcy action.²⁹

13. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent by certified United States mail to Daniel G. Coleman, President, Coleman Enterprises, Inc. d/b/a Local Long Distance, Inc., 6053 Hudson Road, Suite 110, St. Paul, Minnesota 55125.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1510 (1998).

²⁹ *See Commonwealth Companies*, 913 F.2d at 523.