

**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 ON RECONSIDERATION**

Adopted: May 3, 2001

Released: May 8, 2001

By the Commission

**I. INTRODUCTION**

1. In this Order, we deny a Petition for Reconsideration (“Petition”) filed by Coleman Enterprises, Inc. (d/b/a Local Long Distance, Inc.) (“CEI”). CEI requests that the Commission review its Order of Forfeiture,<sup>1</sup> which imposed a forfeiture of \$750,000 against CEI for willful or repeated violations of section 258<sup>2</sup> of the Communications Act of 1934, as amended (the “Act”), and our related rules and orders. In the *Forfeiture Order*, the Commission found that CEI willfully or repeatedly violated section 258 of the Act by changing the preferred interexchange carriers (“PICs”) designated by 14 consumers without their authorization (a practice commonly referred to as “slamming”).

**II. BACKGROUND**

2. Between June 1998 and May 1999, the Commission processed 306 consumer complaints against CEI.<sup>3</sup> Following an investigation of 14 of these complaints, the Commission issued a Notice of Apparent Liability for Forfeiture (“NAL”) against CEI.<sup>4</sup> Each of the 14 complainants asserted that CEI converted his or her PIC without authorization, and each complainant provided sworn statements and evidence to that effect. The complainants also alleged that CEI telemarketers misrepresented material facts about CEI’s services. The Commission found that CEI was apparently liable for a proposed forfeiture of \$80,000<sup>5</sup> for each of the 14 complaints involving allegations of slamming through fraudulent sales and

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<sup>1</sup> *Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24385 (2000) (*Forfeiture Order*).

<sup>2</sup> Section 258 provides in pertinent part that “no 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.

<sup>3</sup> *Forfeiture Order*, 15 FCC Rcd at 24385.

<sup>4</sup> *Local Long Distance, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 13786 (1999) (*CEI NAL*).

<sup>5</sup> The Commission set the forfeiture at \$80,000 for each violation based on the egregiousness of CEI’s

verification practices.<sup>6</sup> In total, we proposed a forfeiture of \$1,120,000.<sup>7</sup> CEI filed a response seeking rescission or reduction of the proposed forfeiture amount.<sup>8</sup> In the *Forfeiture Order*, we rejected most of CEI's arguments, but reduced the amount of the forfeiture to \$750,000 based on certain financial information CEI included in its response indicating its inability to pay the full amount assessed in the NAL.<sup>9</sup>

3. On January 8, 2001, CEI filed the instant petition for reconsideration ("Petition") with the Commission. In its Petition, CEI argues that the Commission should either rescind the forfeiture or reduce it further. Specifically, CEI claims that: 1) the Commission did not consider all the financial information CEI submitted; 2) precedent suggests that the forfeiture amount is too high and that CEI's bankruptcy filing warrants a further reduction; 3) CEI's crediting of consumer accounts and cessation of telemarketing activities warrant a downward adjustment; and 4) it is against the public interest and the interests of other bankruptcy creditors for CEI to pay a forfeiture now.<sup>10</sup> The Commission previously considered and rejected some of these arguments in the *Forfeiture Order*. We will, therefore, limit the discussion below to those new arguments raised by CEI.<sup>11</sup>

### III. DISCUSSION

4. Section 503(b) of the Act authorizes the Commission to assess forfeitures for each violation of the Act or any rule, regulation or order issued by the Commission under the Act.<sup>12</sup> In the *Forfeiture Policy Statement*, the Commission adopted guidelines for assessing these forfeitures,<sup>13</sup> and "retain[ed] discretion to take action in specific cases as warranted."<sup>14</sup> Within the context of the Commission's broad discretion, the forfeiture guidelines currently establish a \$40,000 base forfeiture

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misconduct. *See e.g., All American Telephone Company, Inc.*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 15040, 15041 (1998); *Brittan Communications International, Inc.*, Order of Forfeiture, 15 FCC Rcd 4852 (2000); *Amer-I-Net Services Corp.*, Order of Forfeiture, 15 FCC Rcd 3118 (2000); *Vista Services Corporation*, Order of Forfeiture, 15 FCC Rcd 20646 (2000), *recon. pending*.

<sup>6</sup> *CEI NAL*, 14 FCC Rcd at 13786.

<sup>7</sup> *Id.*

<sup>8</sup> Coleman Enterprises, Inc., Response to Notice of Apparent Liability, File No. ENF99-09 (filed Sept. 29, 1999).

<sup>9</sup> *Forfeiture Order*, 15 FCC Rcd at 24390.

<sup>10</sup> Petition at 2-8.

<sup>11</sup> Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106 (b)(2). A petition that simply repeats arguments previously considered and rejected will be denied. *Bennett Gilbert Gaines*, 8 FCC Rcd 3986, 3987 (Rev. Bd. 1993).

<sup>12</sup> 47 U.S.C. § 503(b)(1)(B). 47 C.F.R. § 1.80.

<sup>13</sup> *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, 17089 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>14</sup> *Forfeiture Policy Statement*, 12 FCC Rcd at 17093.

amount as a starting point in assessing liability for slamming violations.<sup>15</sup> In granting a downward adjustment of a forfeiture amount, the Commission considers the seriousness of the violation, the company's good faith or voluntary disclosure, its history of overall compliance, and its inability to pay.<sup>16</sup> The Commission may also adjust this amount upward based on, among other factors, the egregiousness of the misconduct.<sup>17</sup>

### A. Ability to Pay

#### 1. Financial Documentation Submitted by CEI

5. CEI argues that in assessing CEI's forfeiture liability, the Commission did not properly take into account as a mitigating factor CEI's ability to pay. According to CEI, the Commission arbitrarily relied solely on CEI's 1998 federal tax return in its *Forfeiture Order*. CEI contends that the Commission's failure to take 1997 and 1999 data into account resulted in an incorrect assessment of CEI's inability to pay the forfeiture.<sup>18</sup>

6. As explained in the *Forfeiture Order*,<sup>19</sup> the Commission has discretion to determine what documentation it considers as reliable and objective evidence of ability to pay.<sup>20</sup> Here, CEI provided federal tax returns for 1997 and 1998 to show that it operated at a loss. The Commission has stated however, that when gross revenues are sufficiently large, the fact that a business might be operating at a loss does not in and of itself indicate the business cannot afford to pay the forfeiture.<sup>21</sup> According to the tax returns, CEI's gross revenues for 1997 and 1998 were \$1,464,394.66 and \$9,420,696.48 respectively. In reviewing CEI's 1997 tax returns, we see that apparently 1997 was the company's first full year of operation.<sup>22</sup> CEI chose not to provide its 1999 federal tax return. Instead, it provided an unaudited cash flow statement for the year ending December 31, 1999, and bank summaries with alleged consumer credits listed.<sup>23</sup> Using our discretion, the Commission determined the most recent, reliable financial information that CEI provided to be its 1998 federal tax return. The Commission then reduced the forfeiture amount from \$1,120,000 to \$750,000, based on CEI's 1998 gross revenues, balanced by the seriousness of CEI's violations.<sup>24</sup> We believe this approach was eminently sound, and therefore reject CEI's arguments in this regard.

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<sup>15</sup> *Id.* at 17115.

<sup>16</sup> *Id.* at 17100-101.

<sup>17</sup> *Id.*

<sup>18</sup> Petition at 2.

<sup>19</sup> *Forfeiture Order*, 15 FCC Rcd at 24389.

<sup>20</sup> *See Forfeiture Policy Statement*, 12 FCC Rcd at 17107.

<sup>21</sup> *PJB Communications*, Order of Forfeiture, 7 FCC Rcd 2088 (1992).

<sup>22</sup> In its response to the *NAL*, CEI stated that it was "authorized by the Commission in 1997 to provide international switched voice services." *NAL Response* at 1.

<sup>23</sup> CEI filed the 1997 and 1998 tax returns with its *NAL* response on September 29, 1999. It subsequently submitted the unaudited financial 1999 information in February, 2000.

<sup>24</sup> *Forfeiture Order*, 15 FCC Rcd at 24389.

## 2. Past Precedent and Bankruptcy Filing

7. CEI argues that the \$750,000 forfeiture amount is disproportionately high in light of past Commission cases. CEI states that “the Commission has typically assessed forfeitures ranging from less than 0.70% to 3.91% of a carrier’s gross revenues,”<sup>25</sup> and that because the forfeiture amount assessed for CEI represents almost 8% of its 1998 gross revenues, it should be reduced for that reason alone.<sup>26</sup> CEI’s claim is a misleading statement of Commission case law and practice. CEI cites to several cases to support its contention that the Commission has typically assessed forfeitures ranging from less than 0.70% to 3.91% of a carrier’s gross revenues.<sup>27</sup> None of the orders cited by CEI for this proposition, however, state that the forfeiture amount assessed in the order is “typical.” Rather, the orders all find that the assessed forfeiture amount is not “excessive” or that it is “appropriate” given the facts and circumstances as well as the respective companies’ gross revenues.<sup>28</sup>

8. In the *NAL* the Commission proposed a forfeiture amount against CEI of \$80,000 for each of 14 violations, for a total of \$1,120,000. In the *Forfeiture Order*, we reduced that amount by \$370,000 to \$750,000 based on its inability to pay the full amount of the proposed forfeiture, balanced against the seriousness of the violations. We believe this is a significant reduction and are not persuaded that it should be reduced further given the nature of the violations at issue.

9. CEI also argues that the Commission did not “specifically consider [CEI’s] ability to pay in light of its bankruptcy filing under Chapter 11 of the Bankruptcy Code” (“Chapter 11”).<sup>29</sup> It claims that the Commission has reduced forfeiture amounts in at least two cases when a respondent has raised its bankruptcy filing as a mitigating factor.<sup>30</sup> One of those cases, *Transnational Network, Inc.*, involved a carrier who filed bankruptcy under protection of Chapter 11 during its application for review of an \$8,000 violation for failure to respond to Commission inquiries.<sup>31</sup> The Commission denied the application for review, but *sua sponte* reduced the forfeiture to a nominal amount.<sup>32</sup> CEI’s violations are far more egregious because they involve repeated misrepresentations made to numerous consumers resulting in the unauthorized conversion of consumers’ telecommunications service. Therefore, we find the *TNI Order* irrelevant to the facts in this proceeding. Further, we note that we have already reduced the forfeiture against CEI by far more, in absolute terms, than we reduced the forfeiture in the *TNI Order*. In the other case cited by CEI, *Interstate Savings, Inc.*,<sup>33</sup> the Commission

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<sup>25</sup> Petition at 3, citing *Target Telecom, Inc.*, Order of Forfeiture, 13 FCC Rcd 4456, 4464 (Com. Car. Bur.1998) (*Target Telecom Forfeiture Order*), *Afton Communications Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 6741 (Com. Car. Bur.1992) (*Afton Communications Forfeiture Order*), *David L. Hollingsworth d/b/a/ Worland Services*, Memorandum Opinion and Order, 7 FCC Rcd 6640, 6641 (Com. Car. Bur. 1992) (*Hollingsworth Forfeiture Order*), and *PJB Communications Forfeiture Order*, 7 FCC Rcd at 2088.

<sup>26</sup> Petition at 4.

<sup>27</sup> Petition at 3, referring to *Target Telecom Forfeiture Order*, 13 FCC Rcd at 4464, n.45 (1998).

<sup>28</sup> *Target Telecom Forfeiture Order*, 13 FCC Rcd at 4464, *Afton Communications Forfeiture Order*, 7 FCC Rcd at 6742, *Hollingsworth, Forfeiture Order*, 7 FCC Rcd at 6641, and *PJB Communications Forfeiture Order*, 7 FCC Rcd at 2089.

<sup>29</sup> Petition at 4.

<sup>30</sup> *Id.*

<sup>31</sup> *Transactional Network, Inc.*, Memorandum Opinion and Order, 92 FCC 2d 1494 (1982)(*TNI Order*).

<sup>32</sup> *Id.* at 1495.

<sup>33</sup> *Interstate Savings, Inc.*, d/b/a/ *ISI Telecommunications*, Memorandum Opinion and Order, 12 FCC Rcd 2934

rescinded a forfeiture slamming order after the carrier, Interstate Savings, Inc. (“ISI”) converted its Chapter 11 filing to a Chapter 7 liquidation under the bankruptcy code. In so doing, the Commission stated:

[O]ur decision to rescind the forfeiture in no way exonerates ISI for its unlawful actions. . . . ISI committed a particularly egregious violation of the Commission’s PIC-change rules. . . . We note that while the slamming violation in this instance occurred while ISI was in Chapter 11 reorganization, it subsequently converted to Chapter 7 liquidations, and thus will no longer continue to operate as a common carrier. We will not hesitate to scrutinize a carrier’s compliance with the Act and our rules and orders while in bankruptcy and take enforcement action where appropriate, particularly if the carrier at issue plans to continue operation both during and after the Chapter 11 reorganization process.<sup>34</sup>

Because CEI continues in its Chapter 11 status, and has not stopped its common carrier functions, *Interstate Savings, Inc.*, provides no support for CEI’s argument that the forfeiture should be reduced or rescinded. In fact, the above-quoted language indicates quite the opposite.

10. CEI argues that the Commission has declined to reduce or rescind forfeitures against carriers in Chapter 11 bankruptcy “only in cases where the carriers have continued to violate the Commission’s rules after and in spite of receiving repeated inquiries, notices of complaints and Notices of Apparent Liability for forfeiture from the Commission regarding the violations.”<sup>35</sup> CEI claims it has cooperated fully with the Commission at all times during its investigation, and that, therefore, its forfeiture should be rescinded or reduced. In support of this argument, CEI cites to *J.C. Maxwell Broadcasting Group, Inc.*,<sup>36</sup> and *William Flippo*.<sup>37</sup> Both of these carriers continued alleged rule violations after a Notice of Apparent Liability for Forfeiture was issued against them, and in response to the NALs, both informed the Commission of their filing for bankruptcy.<sup>38</sup> In both forfeiture orders, the Commission stated that although there was precedent for reducing a forfeiture where bankruptcy was raised, no reduction was warranted or justified based on the facts and circumstances of those cases.<sup>39</sup>

11. But continuation of offenses is not a prerequisite for the Commission to decline forfeiture reduction, even in a bankruptcy situation. In another slamming case, *Long Distance Services, Inc.*, the carrier, Long Distance Services, Inc. (“LDS”),<sup>40</sup> argued, *inter alia*, that its forfeiture for two slamming violations should be reduced because it was taking remedial action. LDS had also filed for Chapter 11 bankruptcy protection. The Commission did not reduce the forfeiture, stating that LDS’s remedial efforts did not alter the fact that the violations had taken place, and further stating that “[a]ll common carriers are required to comply with the Commission’s rules, regardless of their size or resources, particularly those rules targeted to protect consumers

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(1997).

<sup>34</sup> *Id.* at 2937.

<sup>35</sup> Petition at 5.

<sup>36</sup> *J.C. Maxwell Broadcasting Group, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 784 (Mass Med. Bur. 1993) (*Maxwell Forfeiture Order*).

<sup>37</sup> *William Flippo*, Forfeiture Order, 15 FCC Rcd 23340 (Enf. Bur. 2000) (*Flippo Forfeiture Order*).

<sup>38</sup> *Maxwell Forfeiture Order*, 8 FCC Rcd at 784, *Flippo Forfeiture Order*, 15 FCC Rcd at 23340.

<sup>39</sup> *Id.*

<sup>40</sup> *Long Distance Services, Inc.*, Order of Forfeiture, 13 FCC Rcd 4444 (Com. Car. Bur. 1998) (*Long Distance Services Forfeiture Order*).

from deceptive practices.”<sup>41</sup> We find that CEI’s purported cooperation with the Commission after its violations, whether standing alone or coupled with its Chapter 11 bankruptcy filing, is not an adequate basis for reducing the forfeiture in this case.

### B. Credits Given to Consumers

12. CEI further argues that the Commission should have mitigated the proposed forfeiture amount based on CEI issuing credits to consumers who were slammed.<sup>42</sup> Subsequent to the filing of CEI’s response to the *NAL* but prior to the issuance of the *Forfeiture Order*, CEI submitted bank summaries and information that purportedly demonstrated that CEI had issued \$2,538,074 in consumer credits.<sup>43</sup> This amount, CEI claims, had a significant adverse impact on its financial condition and ability to pay the forfeiture.<sup>44</sup> But Commission precedent *required* CEI to reimburse slammed consumers for PIC-change costs, and to re-rate consumer’s bills to the amount the consumers would have paid their preferred carrier.<sup>45</sup> The record does not establish that for every customer, CEI did more than required in terms of issuing credits.<sup>46</sup> We therefore decline to find that CEI’s alleged compliance with our customer re-rating policy warrants further reduction of the forfeiture amount. Furthermore, as stated above, a carrier’s remedial efforts do not alter the fact that the violations have taken place.<sup>47</sup>

### C. Public Interest

13. Finally, CEI claims that because the Commission has on occasion stated that it is not in the public interest to issue a forfeiture against a company in bankruptcy, CEI’s forfeiture should likewise be rescinded.<sup>48</sup> We disagree. It is well established that the Commission has discretion to evaluate each case based on the facts and circumstances presented.<sup>49</sup> Moreover, the public interest is served by punishing those who engage in activities that violate the statute or Commission rules. Imposition of a forfeiture in this case sends a strong message to the industry that such violations will not be tolerated and also provides incentive to CEI to discontinue its unlawful practices. Given the egregious nature of the violations in this case, we believe that this enforcement action is warranted despite the potential adverse effects on CEI’s other creditors.

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<sup>41</sup> *Id.* at 4452.

<sup>42</sup> Petition at 6 – 7.

<sup>43</sup> Letter from Thomas K. Crowe, Counsel for CEI, to Colleen K. Heitkamp, Deputy Div. Chief, Telecommunications Consumers Division (February 25, 2000).

<sup>44</sup> Petition at 6.

<sup>45</sup> *See Target Telecom Forfeiture Order*, 13 FCC Rcd at nn. 29, 42, *citing Franks v. U.S. Telephone*, E-86-11, DA 4260 (Com.Car.Bur. 1986).

<sup>46</sup> Letter from Thomas K. Crowe to Colleen K. Heitkamp, *supra*, n.44. As evidence of consumer credits, CEI submitted bank summaries and a CD-Rom identifying full or partial credit given for customers’ cancellation requests, principally by billed telephone number, date, and amount. Although this information identified a portion of the full and partial credits issued to its customers from one of CEI’s underlying carriers, CEI could not say specifically how much of the credits were attributable to unauthorized conversions.

<sup>47</sup> *See supra* text accompanying nn. 40 – 41.

<sup>48</sup> Petition at 7 – 8.

<sup>49</sup> *See Triple X Broadcasting*, 46 R.R. 2d 788, 790 (Broadcast Bur. 1979) (The Commission “is not bound to deal with all cases at all times as it has dealt with some that appear comparable.”) *citing Continental Broadcasting Co. v. FCC*, 439 F.2d 580 (D.C.Cir. 1971), *cert. denied*, 403 U.S. 905 (1971).

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**CONCLUSION AND ORDERING CLAUSES**

14. In the *Forfeiture Order* the Commission discussed the seriousness of CEI's slamming offenses, considered CEI's claims of remedial measures, history of compliance, inability to pay, and determined that the proposed forfeiture amount should be lowered from \$1,120,000 to \$750,000.<sup>50</sup> CEI's arguments in its reconsideration petition do not persuade us that we should reverse this finding.

15. Accordingly, for the reasons stated above, IT IS ORDERED, pursuant to Section 405 of the Communications Act, as amended, 47 U.S.C. § 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Coleman Enterprises, Inc. IS DENIED.

16. 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 Coleman Enterprises Inc. 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, as well as the Commission's rules and orders in effect from June, 1998 through May, 1999 governing interexchange carrier conversions.

**FEDERAL COMMUNICATIONS COMMISSION**

Magalie Roman Salas  
Secretary

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<sup>50</sup> *Forfeiture Order*, 15 FCC Rcd at 24390.