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

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	File No. E-97-02
Complainant,	)	
v.	)	
	)	
Winback & Conserve Program, Inc.,	)	
	)	
Defendant.		

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2001 **Released: August 23, 2001**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part and deny in part the formal complaint filed pursuant to section 208 of the Communications Act of 1934, as amended ("Act"),[1] by AT&T Corp. ("AT&T") against Winback & Conserve Program, Inc. ("W&C"). AT&T alleges that W&C violated section 201(b) of the Act[2] by changing the 800-number service provider of 40 end users ("End Users") from AT&T to W&C without obtaining the End Users' authorization.[3] We find that AT&T has met its burden of proving that W&C violated section 201(b) by changing the 800-number service provider of ten of the 40 End Users without authorization. We also find, however, that AT&T has not met its burden of proving that W&C improperly changed the 800-number service provider of the remaining 30 End Users.

[1] 47 U.S.C. § 208.

[2] 47 U.S.C. § 201(b). Section 201(b) of the Act states, in pertinent part: "All … practices … for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such … practice … that is unjust or unreasonable is hereby declared to be unlawful …". *Id*.

[3] Toll-free, or 800-number, service is an interexchange service in which a subscriber agrees in advance to pay for all calls made to its 800-number from a specified area. *See In the Matter of Provision of Access for 800 Service*, Report and Order, 8 FCC Rcd 1423, 1423 at ¶ 2 (1993).

II. BACKGROUND

A. Factual Background

2. Complainant AT&T is a facilities-based interexchange carrier ("IXC") that provides a variety of telecommunications services, including 800-number service. During the relevant period, the terms and conditions pursuant to which consumers subscribed to AT&T's services were set forth in tariffs filed with the Commission.[4]

3. Defendant W&C was, through late 1994/early 1995, a non facilities-based "reseller" of interexchange telecommunications services.[5] In 1993, W&C subscribed to AT&T's Customer Specific Term Plans II for 800-number service ("CSTP II Plans").[6] W&C resold the 800-number service to third-party end users, including the 40 End Users at issue here.[7] The end users, including the 40 End Users, were W&C's customers.[8]

4. Through at least late 1994, W&C obtained billing services as well as 800-number services from AT&T. As a result, during that period, AT&T billed W&C's customers for W&C's services.[9] The bills sent by AT&T to W&C's customers made no reference to W&C. Further, these bills were headed "AT&T 800 READYLINE," bore the AT&T globe logo, and instructed customers to make their checks payable to AT&T and to mail them to AT&T.[10]

5. W&C acquired customers in two ways. First, it marketed its services directly to potential customers. Second, it acquired customers by securing the transfer and assignment of

[4] *AT&T Corp. v. Winback & Conserve Program, Inc.*, Complaint of AT&T Corp., File No. E-97-02 (filed Oct. 25, 1996) ("Complaint") ¶¶ 2-3.

[5] A "reseller" purchases a large volume of telecommunications services from a facilities-based IXC at a lower rate than would apply if a smaller volume of services were purchased. The reseller then sells the services to third parties (usually end users), passing on a portion of the volume discount to the end users, and retaining a portion of the volume discount for itself. The end users are customers of the reseller and not of the underlying IXC; the reseller is both the IXC's customer and its competitor. *See generally, WATS Int'l Corp. v. Group Long Distance (USA), Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3720, 3728 at ¶¶ 15-16 (Com. Car. Bur. 1995), *app. for rev. denied*, Memorandum Opinion and Order, 12 FCC Rcd 1743 (1997).

[6] Complaint ¶¶ 6-9. *See* Complaint Ex. A (Certification of Howard Appel, dated October 4, 1996) ("Appel Cert.") Ex. A, at Attachment E; *AT&T Corp. v. Winback & Conserve Program, Inc.*, Verified Answer of Winback & Conserve Program, Inc., File No. E-97-02 (filed Dec. 18, 1996) ("Answer") ¶¶ 3, 9, 29-32, and Ex. 1 (Certification of Alfonse Inga dated Dec. 18, 1996) ("Inga Cert.") Ex. H.

[7] Complaint ¶¶ 6, 9; Answer ¶¶ 25, 27.

[8] Appel Cert. Ex. A, at Attachment E; Answer ¶¶ 29–33, 42-43, and Inga Cert. Ex. C.

[9] Answer at i; AT&T Br. at 2.

[10] Answer Ex. 2. *See* AT&T Br. at 25 – 26. AT&T's bills, submitted on behalf of other resellers, were in the same format. *AT&T Corp. v. Winback & Conserve Program, Inc.*, Supplemental Answer, File No. 97-02 (filed Feb. 19, 1997) ¶¶ 3-6.

CSTP II Plans subscribed to by other resellers, thereby also acquiring the reseller's customers.[11]

6. AT&T required that W&C submit certain forms to AT&T before AT&T would consider an end user to be W&C's customer for billing and other purposes. When W&C acquired a customer through its own marketing efforts, AT&T required that W&C submit a form executed by the end user and bearing W&C's name at the top ("Subscriber Form").[12] When W&C acquired customers by purchasing other resellers' CSTP II Plans, AT&T required that W&C submit a form signed by the assigning reseller ("Transfer Form"). In this latter situation, according to our record, AT&T did not require that W&C submit a form signed by the end users transferred to W&C pursuant to the assignment, and W&C did not notify these end users of the transfer. Thus, an end user could become a W&C customer without ever having heard of W&C.[13]

7. In December 1994, W&C entered into an agreement with Combined Companies, Inc. ("CCI"), pursuant to which CCI agreed to a transfer of W&C's CSTP II Plans (and, therefore those Plans' participants, including the 40 End Users).[14] Neither W&C nor CCI notified the Plans' participants (including the 40 End Users) of their transfer to CCI.[15] W&C states that, after that date, it ceased to provide interstate telecommunications services.[16]

8. In about June 1996, AT&T took the position that CCI was liable to it for "shortfall charges" because CCI had not met its revenue commitments under the CSTP II Plans. AT&T placed shortfall charges on the bills of CCI's end user customers -- including the 40 End Users at issue here -- in amounts apportioned according to each end user's usage.[17] The 40 End Users, among others, telephoned AT&T regarding the shortfall charges, and were informed that the charges had been imposed because they were CCI customers.[18] In July 1996, AT&T informed CCI that it would remove the shortfall charges from CCI's customers' bills and charge CCI instead.[19] AT&T also sent a letter to CCI end users stating that it would submit the charges to

[11] Inga Cert. ¶¶ 19, 26, 28, 29.

[12] Inga Cert. ¶ 20, and Ex. C; *AT&T Corp. v. Winback & Conserve Program, Inc*, AT&T's Initial Brief, File No. E-97-02 (filed Nov. 14, 1997) ("AT&T Br.") at ii.

[13] Inga Cert. ¶¶ 29-31, and Ex. D. *See* AT&T Br. at 18-19. *AT&T Corp. v. Winback & Conserve Program, Inc.*, Reply Brief of Winback & Conserve Program, Inc., File No. 97-02 (filed Dec. 19, 1997) ("W&C Br.") at 20. *See also*, Inga Cert. Ex. F.

[14] Answer at i, ¶¶ 3, 9, 24, 28; AT&T Reply Ex. 1 (*Combined Companies, Inc. v. AT&T Corp.*, No. 95-908, *slip op.* (D. N.J. May 19, 1995)).

[15] Complaint Exs. 1-42 at ¶¶ 5, 7; Answer ¶¶ 28, 33.

[16] Answer ¶¶ 3, 6.

[17] Appel Cert. Ex. A; AT&T Br. at 3-4.

[18] AT&T Complaint Exs. 1-42 ¶ 5; Answer at i.

[19] Appel Cert. Ex. A.

CCI.[20] The letter also affirmed AT&T's right to charge the end users, however, and warned that, until CCI paid the charges, the end users would not receive the discounts they had been receiving.[21]

B. This Proceeding

9. AT&T alleges that W&C violated section 201(b) of the Act by changing the 800-number service provider of the 40 End Users from AT&T to W&C without obtaining the End Users' authorization.[22] AT&T asks the Commission to declare that W&C violated section 201(b), and to "enjoin W&C from engaging in continued acts or practices in violation of section 201(b)."[23] AT&T states that it will file a supplemental complaint for damages, if appropriate.[24]

10. AT&T submitted with its complaint 40 certifications signed under penalty of perjury by employees or owners of the 40 End Users. The certifications were prepared by AT&T following telephone interviews with a number of CCI end users who contacted AT&T regarding the shortfall charges on their bills.[25] The certifications are all virtually identical. Each affiant attests that: (1) the End User initially subscribed to AT&T for 800-number service; (2) the affiant did not discover that the End User was a customer of CCI until he/she telephoned AT&T regarding the shortfall charges; (3) prior to the telephone call with AT&T, the affiant "had never heard of CCI or W&C"; and (4) at no time did the affiant or anyone acting on behalf of the End User "knowingly authorize a switch … from AT&T to CCI [or] W&C ...".[26]

11. In its answer, W&C admits that all of the 40 End Users were once W&C customers, but were all transferred to CCI when W&C assigned its CSTP II Plans to CCI.[27] W&C denies that it changed the 800-number service provider of any of the 40 End Users from AT&T to W&C without authorization.[28] Additionally, W&C does not deny that section 201(b) of

[20] Appel Cert. Ex. A, at Attachment E; Answer at ii.

[21] Appel Cert. Ex. A, at Attachment E. The record does not reveal whether CCI paid the shortfall charges.

[22] *See, e.g.*, Complaint ¶¶ 12, 13.

[23] Complaint ¶ 22(c).

[24] Complaint ¶ 22(b) (citing 47 C.F.R. § 1.722).

[25] Appel Cert. ¶¶ 4–5; Complaint Exs. 1–42 ¶¶ 4-5.

[26] Complaint Exs. 1–42 ¶¶ 3-11.

[27] Answer at ii, ¶¶ 27, 33; Inga Cert. ¶ 25, and Ex. A.

[28] Answer ¶¶ 9-1, 23-26. W&C also submitted a counter complaint alleging that AT&T's imposition of the shortfall charges violated section 201(b). *AT&T Corp. v. Winback & Conserve Program, Inc.*, Counter Complaint of Winback & Conserve Program, Inc., File No. 97-02 (filed Dec. 18, 1996). W&C's Counter Complaint was dismissed without prejudice on W&C's motion. *AT&T Corp. v. Winback & Conserve Program, Inc.*, Letter Ruling, File No. 97-02 (dated July 15, 1997).

the Act precludes the unauthorized switching of an end user's 800-number service provider.[29]

II. DISCUSSION

A. Section 201(b) of the Act Applies to Carrier Subscription Processes.

12. We find that changing an end user's 800-number service provider without authorization violates section 201(b) of the Act – a conclusion that no party to this proceeding has contested. While the exact fact pattern now before us has not been considered previously under section 201(b), the Commission has considered highly analogous circumstances. The Commission has relied on section 201 as authority for its regulations aimed at preventing carriers from changing a consumer's pre-subscribed IXC ("PIC") without proper consent.[30] In addition, the Common Carrier Bureau has held that changing an end user's PIC without authorization violates section 201(b).[31] In doing so, the Bureau found that the defendant carrier had "change[d] … the designated [PIC] for … customers in the Phoenix LATA without the customers' authorization,"[32] and that the carrier therefore had engaged in unjust and unreasonable practices within the meaning of section 201(b).[33] In light of this precedent and the failure of any party to challenge the application of section 201(b) to these facts, we conclude that section 201(b) prohibits unauthorized 800-number service provider changes. For purposes of section 201(b), there are no material differences between unauthorized PIC changes and unauthorized 800-number service provider changes. In both circumstances, consumer choice is violated and competition in the marketplace is undermined. The Commission has stressed that changing a subscriber's carrier without the subscriber's consent undermines the competitive nature of the interexchange marketplace and deprives consumers of their right to select their telecommunications providers.[34] Therefore, to the extent that AT&T can show that W&C switched an End User's 800-number service provider without the End User's authorization,

[29] Answer ¶ 18.

[30] *See In the Matter of Investigation of Policies and Rules Concerning Changing Long Distance Carriers*, Report and Order, 7 FCC Rcd 1038, 1047 at ¶ 54 (1992) (citing section 201 as authority for its PIC-change verification rules).

[31] *Hi-Rim Commun., Inc. v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 6551 (Com. Car. Bur. 1998).

[32] *Id.* at 6555 ¶ 14.

[33] *Id.*

[34] *See, e.g., In the Matter of CCN, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, 12 FCC Rcd 8547, 8552 ¶ 16 (1997). The ruling in *WATS Int'l Corp. v. Group Long Distance (USA), Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3720 (Com. Car. Bur. 1995), *app. for rev. denied*, 12 FCC Rcd 1743 (1997), further demonstrates that section 201(b) prohibits resellers from infringing upon consumer choice. In that decision, the Bureau held that section 201(b) prohibited a reseller from changing its underlying network provider without informing its customers of the change because the reseller had induced customers to subscribe to its services with the understanding that their calls would be carried over the original provider's network, and the Commission affirmed.

AT&T has demonstrated a violation of section 201(b).

B. With Respect to 30 of the 40 End Users, AT&T Has Not Met Its Burden of Proving that W&C Unlawfully Changed the 800-Number Service Provider from AT&T to W&C Without Authorization.

13. It is well established that, in a formal complaint proceeding, the complainant has the burden of establishing, by a preponderance of the evidence, that the defendant has violated the Act.[35] For the reasons explained below, we conclude that AT&T has not met this burden with respect to 30 of the 40 End Users. Consequently, as to these 30 End Users, AT&T's complaint is denied.

14. AT&T's claim fails with respect to 24 of these End Users because AT&T has not met its burden of proving that these End User were switched from AT&T by W&C rather than by another reseller.[36] W&C asserts that these 24 End Users became W&C customers when W&C acquired other resellers' CSTP II Plans. Therefore, W&C argues, even if these End Users were changed without their consent, the wrongful conduct was that of another 800-number service provider, not W&C.[37]

15. AT&T admits that some or all of the End Users may have been improperly switched from AT&T by a reseller other than W&C.[38] Further, AT&T provides no evidence to rebut W&C's evidence that the 24 End Users were not switched from AT&T by W&C.[39]

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[35] *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming the Commission's decision to impose the burden of proof on the complainant). *See also Consumer.Net v. AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 281, 284-85 at ¶ 6 (1999); *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615 at ¶ 291 (1997); *America's Choice Communs., Inc. v. LCI Int'l Telecom. Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22496 at ¶ 8 (1996); *American Telegram Corp. v. New Valley Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 11846, 11851 at ¶ 12 (1996).

[36] These 24 End Users' certifications are found at Complaint Exs. 1-5, 8, 13, 14, 17, 18, 20, 22, 23, 25, 28-30, 32-34, 37-39, and 42.

[37] Answer ¶ 25; Inga Cert. ¶¶ 28, 34, 46, 48, 53, 62, 67, 69, 74, 76, 83, 87, 92, 100, and at Exs. A, E, I.

[38] *See, e.g.*, AT&T Br. at 13 (stating that AT&T was the End Users' 800-number service provider "immediately preceding the slamming by W&C or its … *predecessor-in-interest*") (emphasis added).

[39] The End User certifications provide no such evidence. An End User switched without its knowledge from AT&T by a reseller other than W&C, and then assigned by the reseller to W&C, could accurately state, as do the End User certifications, that they never "heard of CCI or W&C," and never "authorize[d] a switch … from AT&T …". *See e.g.*, Complaint Ex. 1 ¶¶ 7, 9, 10. The End Users would not be aware of the initial switch from AT&T, because it was unauthorized. The End Users also would not be aware of the subsequent assignment to W&C, because AT&T did not require that W&C memorialize such an assignment with a form signed by the End User. Further, AT&T's bills to the resellers' customers strongly suggested that AT&T remained the customers' 800-number service provider, as they contained many references to AT&T and none to the reseller. *See* ¶ 4, *supra*.

Accordingly, AT&T has not met its burden of proving that the 24 End Users were switched from AT&T by W&C.

16. AT&T cursorily argues that, even if an End User were improperly switched by another reseller rather than by W&C, W&C has nevertheless violated section 201(b), because it is liable for the acts of its predecessors-in-interest. AT&T cites no authority, and we are aware of no authority, that would, on the facts here, render W&C liable under section 201(b) solely because a reseller from whom it acquired a customer unlawfully switched that customer.[40]

17. We also find that AT&T has not met its burden of proof with respect to another three End Users.[41] The affiants submitting certifications on behalf of these End Users state that they were "solely responsible for the purchase and administration of [the End User's] business telephone services," and that, "to [their] knowledge" the End User never switched to W&C.[42] The record does not reveal when these three End Users became W&C customers, but does establish that W&C began reselling the CSTP II Plans in 1993.[43] The record also establishes that the affiants for these End Users were not employed by the End Users in 1993.[44] Therefore, it is possible that, in 1993, the three End Users authorized a switch from AT&T to W&C, but the affiants themselves aren't aware of the switch because they were not employed by the End User until later. The affiants would not subsequently have become aware of the switch, and may reasonably have concluded that the End User subscribed to AT&T's 800-number service, because the End Users' telephone bills, sent by AT&T on behalf of W&C, strongly suggested that this was the case.[45] Accordingly, the certifications do not demonstrate by a preponderance of the evidence that W&C wrongfully switched the 800-number service provider of these three End Users.

18. We further find that AT&T has not met its burden of proof with respect to another

[40] The sole authority cited by AT&T is *AT&T Co. v. MCI Communications Corp.*, 735 F. Supp. 1294, 1298 (D. N.J. 1990). That decision stands for no such proposition. The court, disposing of motions to transfer and dismiss for lack of jurisdiction, merely mentions in passing that the defendant telemarketing company "or its predecessors" provided telemarketing services to the co-defendant. *Id.* AT&T does not allege, and the record does not indicate, that W&C was aware of any alleged impropriety in the other resellers' acquisitions of customers. Further, AT&T has not raised, and we do not address, the issue of whether any of the assignments to W&C were a material change such that W&C should have notified the end users of the assignment. *Cf., WATS Int'l Corp. v. Group Long Distance (USA), Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3720, 3728 at ¶¶ 15 -16 (1995) (Com. Car. Bur. 1995), *app. for rev. denied*, Memorandum Opinion and Order, 12 FCC Rcd 1743 (1997) (discussed above at ¶ 12).

[41] These three End Users' certifications are found at Complaint Exs. 6, 7, and 15.

[42] Complaint Exs. 6, 7 and 15 at ¶¶ 1, 10.

[43] *See* n.6, *supra*.

[44] Complaint Exs. 6, 7 and 15 at ¶ 1.

[45] As previously described, AT&T's bills to W&C's customers made no reference to W&C, were headed "AT&T 800 READY LINE," bore the AT&T globe logo, and directed the end user to make their checks payable to AT&T and mail them to AT&T. *See* ¶ 4, *supra*.

three End Users, because W&C has provided Subscriber Forms signed by these End Users,[46] and AT&T does not allege that the signatures are forged. These affiants' assertion in their certification that they "never heard of … W&C"[47] appears to be incorrect, because the Subscriber Forms are headed "Winback & Conserve Program, Inc." AT&T fails to explain these inconsistencies.

C. AT&T Has Met Its Burden of Proving That W&C Unlawfully Changed the 800-Number Service Provider of Ten End Users From AT&T To W&C Without Authorization.

19. In our view, a preponderance of record evidence establishes that W&C changed the 800-number service provider of the remaining ten End Users from AT&T to W&C without obtaining these End Users' authorization.[48] We base this conclusion primarily on the contents of the applicable certifications. As described above, the affiants submitting these certifications state that (1) the End User initially subscribed to AT&T for 800-number service; (2) the affiant did not discover that the End User was a customer of CCI until he/she telephoned AT&T regarding the shortfall charges; (3) prior to the telephone call with AT&T, the affiant "had never heard of CCI or W&C"; and (4) the End User never "knowingly authorize[d] a switch … to CCI [or] W&C ...".[49] Furthermore, these affiants were employed by the End User at the time of the switch to W&C,[50] and presumably would have been aware of the switch had it been authorized. Moreover, W&C admits that these End Users initially subscribed to AT&T's 800-number service,[51] and that it acquired these End Users through its own marketing, rather than from another reseller.[52]

20. W&C asserts a number of defenses, all of which fail.[53] First, it contends that AT&T "fails to state a cause of action," because "the [End Users'] accounts were validly

[46] Inga Cert. at Exs. C, F, and H. These three End Users' certifications are found at Complaint Exs. 9, 26, and 31.

[47] Complaint Exs. 9, 26, and 31, at ¶ 7.

[48] The End User certifications submitted on behalf of these ten End Users are found at Complaint Exs. 10-12, 16, 19, 21, 24, 27, 40, and 41.

[49] Complaint Exs. 10-12, 16, 19, 21, 24, 27, 40, and 41, at ¶¶ 3-11.

[50] *See, e.g.*, Complaint Ex. 10 ¶ 1.

[51] *See, e.g.*, W&C Br. at 31-32 (arguing that "AT&T knew that it had lost these customers whenever it was that it lost them"); Answer ¶¶ 29–32 (asserting that, when "an 800 [-number] customer account *formerly serviced directly by AT&T* is [switched to a reseller]," AT&T does not suffer damages) (emphasis added).

[52] Inga Cert. Ex. A.

[53] W&C asserts as an affirmative defense that AT&T's complaint is "barred by the statute of limitations," apparently invoking section 415(b) of the Act, 47 U.S.C. § 415(b). Answer ¶ 35. Section 415(b) applies only to claims for damages. *See ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 654, 670 at ¶ 30 (1995). Accordingly, this defense will be addressed if AT&T files a supplemental complaint for damages. We note, however, that had W&C shown that AT&T delayed unreasonably in bringing its claims for declaratory and injunctive relief, we have discretion to dismiss those claims on equitable grounds. *See generally Black Radio Network v. New York Tele. Co.*, Memorandum Opinion and Order, 12 FCC Rcd 13,737, 13748 n.40 (Com. Car. Bur. 1997).

transferred by order of the United States District Court for the District of New Jersey on May 19, 1995 to CCI."[54] W&C mischaracterizes the district court's ruling. The ruling only concerned the validity of W&C's assignment of the end users to another reseller. The court said nothing about the validity of W&C's acquisition of those end users in the first place.

21. Second, W&C argues that it relied solely upon independent contractors to market its services, and that it cannot be held liable for their misconduct.[55] Section 217 of the Act, however, expressly imposes liability on carriers for the acts of their independent contractors.[56]

22. Third, W&C denies that the certifications satisfy AT&T's burden of proving that W&C switched the End Users without their permission. To support its denial, W&C first observes that AT&T has failed to produce the Subscriber Forms for the End Users, even though AT&T would not have changed the End Users to W&C unless W&C had previously submitted a Subscriber Form signed by the End Users. According to W&C, this failure suggests that the Subscriber Forms contained valid signatures demonstrating that the End Users authorized the switch to W&C.[57] This argument does not succeed, because W&C also has not submitted Subscriber Forms for any of the ten End Users. Moreover, AT&T was under no legal obligation to retain the Subscriber Forms, and states that it did not do so.[58] Thus, any implication to be drawn from the absence of the Subscriber Forms from our record fails to overcome the clear and express statements made in the certifications.[59]

23. To further rebut the certifications, W&C points to the fact that the End Users were billed for W&C's services by AT&T on bills strongly implying that AT&T, rather than W&C, was the End User's 800-number service provider, and further notes that the event of signing on with W&C was a one-time occurrence, whereas each End User received AT&T's bills monthly over

[54] Answer ¶ 28 (citing *Combined Companies, Inc. v. AT&T Corp.*, No. 95-908, *slip op.* (D. N.J. May 19, 1995)), (AT&T Reply at Ex. 1), in which the court ruled that W&C and CCI had "established their right to a have the transfer of CSTP II plans [from W&C to CCI] … recognized and authorized by AT&T," and granted a preliminary injunction ordering AT&T "to provide CCI full service on the CSTP II Plan[s] …").

[55] W&C Br. at 25-26.

[56] 47 U.S.C. § 217 (providing, in pertinent part: "In construing and enforcing the provisions of this Act, the act … of any officer, agent, or other person acting for or employed by any common carrier … acting within the scope of his employment, shall in every case be also deemed the act … of such carrier …"). *See In the Matter of Long Distance Direct, Inc., Notice of Apparent Liability for Forfeiture,* Order of Forfeiture, 15 FCC Rcd 3297 (2000) (imposing a forfeiture on an IXC for violations of sections 201(b) and 258 of the Act even though the IXC asserted that the acts complained of were those of its independent contractors).

[57] W&C Br. at 19-20.

[58] AT&T Br. Ex. A (*AT&T Corp. v. Winback & Conserve Program, Inc.*, Response of AT&T Corp. to the First Set of Interrogatories of Defendant Winback & Conserve Program, Inc., File No. E-97-02 (dated Jan. 17, 1997) ("AT&T's Interrogatory Responses"), Response to Interrogatory No. 11).

[59] W&C argues that the Subscriber Forms contained the End User's AT&T account number, and that this information could be obtained only from the End Users. Inga Cert. ¶ 25; W&C Br. at 20. Yet, W&C could have obtained this information from the End Users by representing itself as AT&T.

extended periods.[60] W&C speculates that AT&T's allegedly misleading billing practices, coupled with the inherently complicated nature of the relationship between a reseller and the underlying facilities-based carrier, caused the End Users to become confused as to W&C's role. Alternatively, W&C suggests that the End Users simply forgot that W&C was their 800-number service provider.[61]

24. The clarity and simplicity of the ten End Users' certifications contradict W&C's assertion that these End Users are merely confused. The affiants state that they "never heard of … W&C" and that the End Users "never entered into any agreement with ... W&C."[62] We also doubt that the End Users forgot that they subscribed to W&C's services. W&C began reselling the CSTP II Plans only three years before these certifications were signed. If the End Users had forgotten that they switched to W&C, the act of reviewing the certifications prior to execution almost certainly would have reminded them.

25. W&C argues further that the End Users' certifications "are not credible nor validly obtained."[63] W&C first observes that the certifications were not prepared by the End Users themselves, but by AT&T -- W&C's competitor and adversary in two pending federal court actions.[64] W&C also argues that the End Users signed the certifications to avoid the re-imposition of the shortfall charges by AT&T. According to W&C, the certifications were "solicited by AT&T from companies over whose heads AT&T held a huge financial club (the threat of re-imposition of the [shortfall] charges)."[65] W&C further asserts that the End Users signed the certifications out of misdirected anger at CCI. In W&C's view, "AT&T deceitfully advised each of the 40 [End Users] that CCI was solely responsible for [the shortfall charges] being placed on their bills, magnanimously removed the [shortfall] charges from the bills which the end users never owed in the first place, and proceeded to weave a very skillful verbal web leading these people to believe they had been [switched without their authorization]."[66]

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[60] *See* W&C Br. at 23.

[61] W&C Br. at 12, 23, 26.

[62] *See, e.g.*, Complaint Ex. 10 ¶¶ 6, 8.

[63] Answer ¶ 26.

[64] W&C Br. 10-11. In 1993, AT&T sued W&C in federal court alleging that, in soliciting customers, W&C sales representatives misrepresented that they were acting on behalf of AT&T. Complaint ¶ 20 (citing *AT&T Company v. Winback & Conserve Program, Inc.*, 851 F. Supp. 617, 619 (D.N.J.), *remanded for further consideration*, 42 F.3d 1421 (3rd Cir. 1994)); W&C Br. at 2. In 1995, W&C brought an action seeking a ruling that its assignment of the CSTP II Plans to CCI, and the subsequent transfer of the Plans to another reseller, were valid. *See* AT&T Reply Ex. 1 (*Combined Companies, Inc. v. AT&T Corp.*, No. 95-908, *slip op.* (D. N.J. May 19, 1995)).

[65] W&C Br. at 11.

[66] Answer at i–ii. W&C also argues that the certifications are not credible because AT&T settled with CCI. W&C Br. at 11. We do not agree. The certifications were signed long before AT&T and CCI had settled their dispute here.

26. The foregoing circumstances do require us to review the certifications with greater caution than would otherwise apply. Even when so viewed, however, we believe them to be credible. The affiants almost certainly understood the significance of what they were signing. The language of the certifications is straightforward and clear. Moreover, the solemnity and importance of the documents are apparent, because the certifications are expressly made under penalty of perjury, bear the caption of this action, and state that the affiant "make[s] this certification … in support of AT&T's complaint against … W&C."[67]

27. Further, the allegations in the certifications receive independent support from W&C's Late Payment Letter, which W&C sent to any of its customers who were late paying a bill. This Late Payment Letter strongly suggests that AT&T was the end user's 800-number service provider. It begins: "AT&T recently advised us that your account is now past due. In addition to the monthly AT&T invoices sent to you, AT&T also sent you a reminder at 45 days past due. We must now collect this money for AT&T."[68] Thus, the Late Payment Letter could easily lead the end user to believe that it owed the money *to AT&T* and that, therefore, AT&T was its service provider. W&C appears to be AT&T's collection agent, informed by AT&T when accounts are past due and "collect[ing]" the money "*for* AT&T." Adding to the potential confusion, the letter warns that payment must be received "to avoid possible interruption of your *AT&T* 800 line." The remaining portions of the letter also are confusing. They do not reveal the nature of the relationship between W&C and the end user, and refer repeatedly to "AT&T" and "your AT&T account number."[69] In short, the Late Payment Letter does not appear designed to accomplish the legitimate purpose of assuring end users that their calls would be carried on AT&T's lines. Rather, the Late Payment Letter may well lead end users to believe erroneously that AT&T was their service provider. Such correspondence would be necessitated if some of W&C's end users had not authorized the switch to W&C. W&C's provision of these confusing materials regarding its status as a service provider to its end users therefore buttresses the End Users' assertions in the certifications that they did not authorize a switch from AT&T.[70]

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[67] *See, e.g.*, Complaint Ex. 10 ¶ 2.

[68] Inga Cert. at Ex. B (emphasis in original).

[69] W&C argues that, because W&C's name is on the Late Payment Letter's letterhead, and the letter begins "Dear Client," the Late Payment Letter made clear that the reader was not "dealing with AT&T". W&C Br. at 31. W&C fatally ignores the vast majority of the letter, as described above.

[70] W&C asserts that four of the ten End Users received customer service and/or Late Payment Letters from W&C, contradicting these End Users' statements in their certifications that they "never heard of … W&C." W&C Br. at 17-19. W&C's only evidence is a document described by W&C as a "summary of information maintained in W&C's database." W&C Br. at 17 (describing Inga Cert. Ex. A). W&C's "summary" (without providing the underlying data) is hearsay, and therefore entitled to less weight than the End Users' certifications. W&C also submits a check drawn on the account of Trudy Philbin. Inga Cert. Ex. G. W&C states that the initials on the check are the same as those of End User T.L.P. Technologies Inc., asserts that the check is that of the secretary of that company, and contends that the check was mailed to W&C in payment of a past due phone bill. Inga Cert. ¶ 65. Because we doubt that a personal check would be used to pay a company's bill, we do not find the check sufficient to contradict the statements made in this End User's certification. Finally, W&C cites to a certification dated December 4, 1996 by Mr. Inga purporting to describe his telephone conversations with employees of (continued….)

28. Finally, in addition to W&C's other defenses described above, Mr. Inga, W&C's President, states in summary that none of the 40 End Users was improperly switched by W&C.[71] As discussed above, we do not believe the weight of the evidence supports that view. In particular, we do not find his assertion sufficient to overcome the detailed and sworn certifications of the ten End Users. Moreover, Mr. Inga's overall testimony contained significant contradictions[72] and often was not based on personal knowledge.[73]

29. In conclusion, we find that AT&T has met its burden of proving that W&C violated section 201(b) of the Act by switching ten of the End Users from AT&T to W&C without authorization. Accordingly, as to those ten End Users, AT&T's complaint is granted.[74]

(Continued from previous page)
certain of the End Users. Answer ¶ 10. This certification is hearsay, and therefore does not overcome these End Users' direct testimony.

[71] Inga Cert. ¶ 2.

[72] For example, in three different places in the record, Mr. Inga specifies three different times when W&C ceased marketing -- early 1994, late 1994, and early 1995. *Compare* W&C Br. at 25 (by Mr. Inga *pro se*) *with* Answer ¶ 37, *and with* Inga Cert. ¶ 19. Similarly, Mr. Inga's explanation of certain dates set forth in a W&C letter pertaining to the End Users, W&C Br. at 14 (discussing Complaint Exs. 2, 18), is contrary to the clear language of the letter. His explanation also would mean that one of the End Users became a W&C customer in 1991, and another in 1992, *see* Complaint Exs. 6, 7; yet W&C states that it did not begin selling the CSTP II Plans until 1993. Answer ¶¶ 29-32.

[73] For example, Mr. Inga states that "[t]here was not one [End User] company that was slammed, even by the original [reseller] company, that signed them on …" W&C Br. at 11 (by Mr. Inga *pro se*). We do not understand how Mr. Inga can know that none of the End Users was improperly switched by the resellers whose CSTP II Plans W&C acquired, particularly as he also states that those resellers were W&C's "competit[ors]". *Id.*

[74] Nevertheless, we deny AT&T's request that the Commission enjoin W&C from engaging in continued acts in violation of section 201(b). AT&T does not contest W&C's assertion that, prior to the filing of AT&T's complaint here, W&C ceased to provide interstate telecommunications services. Answer ¶¶ 3, 6. Accordingly, AT&T's request is moot.

IV. ORDERING CLAUSE

30. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208, that the formal complaint filed by AT&T Corp. against Winback & Conserve Program, Inc., IS GRANTED to the extent indicated herein and is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary