

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

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| In the Matter of |) | |
| |) | File No. EB-00-TC-164 |
| America's Tele-Network Corporation |) | |
| |) | NAL/Acct. No. 200132170016 |
| Apparent Liability for Forfeiture |) | |

ORDER OF FORFEITURE

Adopted: December 12, 2001; Released: December 17, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we assess a forfeiture of \$1,020,000 against America's Tele-Network Corporation ("ATNC") for willful or repeated violations of the Communications Act of 1934, as amended (the "Act"),¹ and our rules and orders.² For the reasons set forth below, we find that ATNC willfully or repeatedly violated section 258 of the Act and the Commission's rules and orders by changing the preferred carriers for 16 consumers' telephone lines without the consumers' authorization, a practice commonly referred to as "slamming."

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the Notice of Apparent Liability ("NAL") previously issued by the Commission, and need not be reiterated at

¹ Section 258 states 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.

² 47 C.F.R. §§ 64.1100, 64.1150. Sections 64.1100 and 64.1150 are now codified at section 64.1120 of the Commission's rules. 65 FR 47678, 47690 (2000). Because the apparent violations occurred prior to November 28, 2000, the effective date of the revised rules, sections 64.1100 and 64.1150 were the applicable Commission rules in effect during the relevant time period. *See also Implementation of the Subscriber Carrier Selection Changes Provisions 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 (1998) (*Section 258 Order*); Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997).

length.³ In 2000, the Commission received 263 consumer complaints alleging slamming by ATNC. Commission staff investigated many of these allegations, requesting additional information from ATNC. This proceeding is based on 17 apparent violations, represented by 16 consumer complaints. Each of the 16 complainants asserted that ATNC had converted his or her designated preferred carrier without authorization.

3. Following an investigation of the above complaints, which included an opportunity for ATNC to respond to the allegations raised by complainants, the Commission issued the *ATNC NAL*. There the Commission determined that ATNC had apparently failed to obtain the complainants' authorization before submitting preferred carrier change requests, in violation of section 258 of the Act and the Commission's rules and orders against slamming. As a result, the Commission determined that ATNC was apparently liable for a proposed forfeiture of \$40,000 for each of the 17 violations, for a forfeiture of \$680,000. The Commission proposed increasing the fine by 50% based upon ATNC's apparent pattern of intentional and egregious misconduct, for a total proposed forfeiture of \$1,020,000.⁴

III. DISCUSSION

4. In its response to the *ATNC NAL*, ATNC does not deny that it submitted preferred carrier change orders to the complainants' local exchange carriers. However, ATNC contests the Commission's determination of apparent liability and proposal of a forfeiture penalty, as well as the amount of the forfeiture. ATNC argues that it should not be found liable because the Commission rejected ATNC's verification process based on standards that were not previously defined, and that the Commission interpreted ATNC's verification script too narrowly.⁵ ATNC also argues that that amount of the proposed forfeiture is excessive because 1) the Commission erred in determining ATNC's behavior to be apparently intentional and egregious; 2) the Commission did not take ATNC's remedial steps into consideration; and 3) the forfeiture amount is disproportionately higher than that imposed on other carriers.⁶ We find none of ATNC's arguments to be persuasive.

A. ATNC is Liable for Slamming

5. ATNC argues that the Commission based its finding of liability on an improper rejection of ATNC's verification script. ATNC first claims that the Commission engaged in "hip pocket rulemaking" by adopting a sample verification script from a 1991 Notice of Proposed Rulemaking⁷ as a "standard," without observing the notice and comment period required by the

³ *In the Matter of America's Tele-Network Corp.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 5788 (2001) (*ATNC NAL*).

⁴ *ATNC NAL*, 16 FCC Rcd at 5788-89.

⁵ Response at 2-7.

⁶ Response at 8-12.

⁷ *See In the Matter of AT&T*, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*1991 NPRM*).

Administrative Procedure Act,⁸ and without taking into account the impact on small businesses required by the Regulatory Flexibility Act.⁹ We disagree.

6. ATNC's argument is based on a misunderstanding of the Commission's use of the 1991 sample verification script in the NAL.¹⁰ The *ATNC NAL* did not adopt the 1991 sample script as a "standard" by which ATNC's and all other verification scripts would be judged. Instead, the *ATNC NAL* used the 1991 sample script merely as an example of what meets the standard established by Section 64.1150(d) of the Commission's rules, which requires that a verification must "include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier change."¹¹ In the *ATNC NAL*, the Commission recognized that the 1991 script has language that meets its verification standard: for example, "Did you . . . recently receive a call asking you to select [carrier name] as your long distance company?" "I'd like to confirm that you have selected [carrier name] to carry long distance calls."¹² By contrast, the language in ATNC's verification script at best presumes that the customer authorized a preferred carrier change during the sales portion of the call, and merely confirms that the customer has the authority to make a preferred carrier change:

Thank you for choosing America's Tele-Network as your long distance and local provider. . . . At the tone, please say your name and address clearly. Spell your name if necessary. Are you authorized to choose America's Tele-Network as your long distance and local long distance provider? Please say "YES" at the tone. To confirm your identity, at the tone please state your Date of Birth or your mother's maiden name Your Welcome package will be sent to you, which will include any information you need.¹³

7. As the Commission observed in the *ATNC NAL*, the script does not solicit a response from the consumer that he or she has, in fact, selected ATNC as a preferred carrier.¹⁴ Since ATNC's verification script does not solicit a clear and conspicuous confirmation of a

⁸ Response at 2-5.

⁹ Response at 2-3, 4-5.

¹⁰ The 1991 sample verification script referenced in the *ATNC NAL* was part of a settlement proposal between AT&T and MCI. The Commission tentatively concluded that the settlement proposal represented a reasonable method for resolving the problem of unauthorized changes in long distance providers. *1991 NPRM*, 6 FCC Rcd at 1691. ATNC is correct that the Commission eventually adopted the verification procedures from the *1991 NPRM* without specifically adopting the sample script as a standard. Response at 3-4. See also *In the Matter of Policies and Rules Concerning Changing Long Distance Carriers*, Report and Order, 7 FCC Rcd 1038, 1045 (1992).

¹¹ 47 C.F.R. § 64.1150(d).

¹² *ATNC NAL*, 16 FCC Rcd at 5795.

¹³ *ATNC NAL*, 16 FCC Rcd at 5794. The full text of the script is contained in the *ATNC NAL*, *Id.*

¹⁴ *ATNC NAL*, 16 FCC Rcd at 5795-96.

preferred carrier change, we affirm the *ATNC NAL* and conclude that ATNC's script is grossly deficient in light of the standard prescribed in our rules.¹⁵

8. ATNC also argues that, because the Commission did not previously define the factors by which a verification script would be sufficient under our the rules, the *ATNC NAL* engaged in "an *ex post facto* punishment [of ATNC] for failure to comply with an unannounced standard."¹⁶ We disagree. The standard in our rules for verifying a consumer's decision to change his or her preferred carrier is plain on its face: a verification must "include clear and conspicuous confirmation that the subscriber has authorized a preferred carrier change."¹⁷ The Commission stated in the *ATNC NAL* that ATNC's verification script did not solicit an "unambiguous, definitive, direct response from the consumer that he or she is confirming a request that ATNC provide telephone service."¹⁸ Contrary to ATNC's argument, this is not a new "factor" to determine if a verification script complies with the Commission's rules, but simply an application of the "clear and conspicuous" standard to ATNC's verification script. ATNC's script simply failed to meet the standard already clearly defined in our rules.

9. ATNC next claims that the Commission improperly scrutinized each sentence in ATNC's script, thus violating ATNC's First Amendment rights. ATNC argues that if the Commission had looked at the verification script "on the whole," it would have found that the script contained a clear and concise verification of a preferred carrier change.¹⁹ To the contrary, we believe that looking at ATNC's script "on the whole" reveals that the script assumes, without ever asking, that the subscriber has already chosen ATNC as his or her long distance provider.²⁰ This falls far short of being "clear and conspicuous" that the subscriber is actually "confirming a request that ATNC provide [long distance] service."²¹

B. The Amount of the Forfeiture is Proper

10. As discussed in the *ATNC NAL*,²² our rules establish a standard forfeiture amount of \$40,000 for violations of our rules and orders regarding unauthorized changes of preferred interexchange carriers.²³ Furthermore, based on the Act, our rules and guidelines allow an

¹⁵ *ATNC NAL*, 16 FCC Rcd at 5795-96.

¹⁶ Response at 5-6.

¹⁷ 47 C.F.R. § 64.1150(d).

¹⁸ *ATNC NAL*, 16 FCC Rcd at 5795-96.

¹⁹ Response at 6-7.

²⁰ *See, supra*, text accompanying note 13.

²¹ *See ATNC NAL*, 16 FCC Rcd at 5795-96.

²² *See ATNC NAL*, 16 FCC Rcd at 5797-98.

²³ 47 CFR § 1.80(b)(4).

upward adjustment of the forfeiture amount based on the particular facts and circumstances of the violation(s).²⁴ These include the egregiousness of the misconduct, ability or inability to pay, whether the violation was intentional, whether substantial harm resulted from the violations, history of compliance with Commission requirements, whether the violator realized substantial economic gain from the misconduct, and whether the violation is repeated or continuous.²⁵

11. We find that ATNC's deficient verification script deserves an upward adjustment of the forfeiture amount as part of ATNC's intentional failure to follow our verification rules. As discussed above, the company's verification script falls grossly short of eliciting a clear and conspicuous confirmation that a consumer wants to switch his or her preferred carrier to ATNC.²⁶ ATNC provided this script to an independent third-party verifier who simply followed the script to the letter. The consumer hearing the language from the script might not understand that by answering "Yes" to the authorization question, he or she had just confirmed consent to switch to ATNC. As a result, any misrepresentation and/or miscommunication between the consumer and the telemarketer during the sales process would go undetected during the verification process.²⁷ Also, ATNC offered no probative evidence to contradict the *ATNC NAL*'s determination that the company apparently intentionally violated the verification rules.²⁸ Accordingly, we affirm the *ATNC NAL* and conclude that ATNC intentionally failed to comply with our verification rules, thus justifying a substantial upward adjustment of the base forfeiture amount.

12. ATNC also argues that it was improper for the Commission to increase the proposed forfeiture upward because the Commission has typically increased forfeitures only in cases involving forged Letters of Authorization (LOAs) or evidence of deceptive marketing practices.²⁹ However, the fact that ATNC's case does not involve deceptive marketing practices or forged LOAs does not weaken the Commission's rationale for increasing the forfeiture consistent with factors set out in the statute, the Commission's rules, and the *Forfeiture Policy Statement*, i.e., that ATNC intentionally and egregiously failed to follow our verification rules. We therefore reject ATNC's argument in this regard.

²⁴ See 47 U.S.C. § 503(b)(2)(D). See also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, 12 FCC Rcd 17087, 17100-01 (1997) (*Forfeiture Policy Statement*); *recon denied* 15 FCC Rcd 303 (1999). As provided by the Commission's rules, the Commission and its staff retain the discretion to issue a higher or lower forfeiture, as permitted by statute. See 47 C.F.R. § 1.80(b)(4).

²⁵ See 47 C.F.R. § 1.80(b)(4).

²⁶ See, *supra*, text accompanying note 21.

²⁷ At least one ATNC telemarketer claimed to be sending a consumer a \$100 check, courtesy of AT&T, as compensation for over billing. See *ATNC NAL*, 16 FCC Rcd at 5790.

²⁸ See *ATNC NAL*, 16 FCC Rcd at 5798-99.

²⁹ Response at 8-9.

13. In addition, ATNC claims that the Commission's finding that ATNC intentionally failed to verify the authorizations has no support in the record, particularly given the fact that ATNC obtained taped third party verifications.³⁰ We do not agree that ATNC's taped "authorizations" reflect that ATNC made good faith efforts to comply with our rules. On the contrary, the tapes ATNC provided to the Commission merely underscored the confusion inherent in its defective verification process. As outlined in the *ATNC NAL*, none of the 13 tapes that ATNC submitted to Commission staff included the introduction thanking the customer for selecting ATNC.³¹ Also, two of the tapes indicate customer confusion regarding the question "are you authorized to select" ATNC.³² Accordingly, we find that ATNC's taped "authorizations" do not mitigate the intentional nature of ATNC's actions.

14. ATNC further asserts that in situations similar to its case, where deficiencies were found in the verification process, the Commission did not increase the forfeiture.³³ However, the facts of ATNC's case are different from the two cases it cites. Neither *Minimum Rate Pricing, Inc.*³⁴ nor *Long Distance Direct, Inc.*³⁵ involved a grossly deficient verification script like the one ATNC designed. The *MRP* proceeding involved a carrier's failure to secure an LOA prior to changing a consumer's preferred long-distance carrier, as well as tariff provisions that enabled the carrier to engage in slamming.³⁶ *LDDI* involved consumers being switched to an unauthorized long-distance carrier and incurring unauthorized charges after the consumers called The Psychic Friends Network (a joint marketing partner with the unauthorized long-distance carrier).³⁷ Because the details of the violations in these two cases are different from those in ATNC's case, it is unreasonable to expect the Commission to handle the forfeitures in the same way.

15. ATNC also argues that we should decrease the forfeiture because of the remedial steps it has taken to address its unauthorized preferred carrier changes, and because it ceased marketing activities as of October, 2000 to reassess its procedures.³⁸ We disagree. As the

³⁰ Response at 10.

³¹ See, *supra*, text accompanying note 13.

³² *ATNC NAL*, 16 FCC Rcd at 5794. The *ATNC NAL* gives more details on these and other points of customer confusion in ATNC's verification process. *Id.*

³³ Response at 9-10.

³⁴ *In the Matter of Minimum Rate Pricing, Inc.*, Notice of Apparent Liability, 12 FCC Rcd 17,638 (1997) (*MRP NAL*). See also, *In the Matter of Minimum Rate Pricing, Inc.*, Order Adopting Consent Decree, 13 FCC Rcd 24,525 (1998).

³⁵ *In the Matter of Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297 (2000) (*LDDI MO&O*).

³⁶ *MRP NAL*, 12 FCC Rcd at 17,644-45.

³⁷ *LDDI MO&O*, 15 FCC Rcd at 3298-99.

³⁸ Response at 10.

Commission has previously found,³⁹ ATNC's remedial steps, such as training and monitoring telemarketing employees, and instituting a validation department,⁴⁰ are not unusual for the industry.⁴¹ Furthermore, ATNC's cessation of telemarketing activities came months after the Consumer Information Bureau had forwarded over 200 informal consumer complaints to ATNC for its response. Thus, as the Commission found in the *Coleman Forfeiture*,⁴² we find no basis for reducing the forfeiture amount on these grounds.

16. Finally, ATNC asserts that the *ATNC NAL* fails to take into account ATNC's gross revenues as representative of its ability to pay, as compared to larger carriers.⁴³ In particular, ATNC asserts that the Commission proposes a much higher "per-slam" forfeiture for ATNC than it proposed for AT&T and Qwest in other slamming cases.⁴⁴ We disagree with ATNC's analysis. First, to the extent the Commission's investigation found more egregious violations by ATNC than other carriers, it would be unreasonable for us to change the total forfeiture amount just because it is disproportionate compared to other Commission orders.⁴⁵ Furthermore, we observe that the proposed upward adjustment per egregious violation was actually greater in the *AT&T NAL* and *Qwest NAL* than in the *ATNC NAL*. In both the *AT&T NAL* and *Qwest NAL*, the Commission proposed adjusting the forfeiture amount for the egregious violations (involving forgery) to \$80,000 per violation (a 100% increase), and proposed the \$40,000 base slamming forfeiture amount for the remaining violations.⁴⁶ In the *ATNC NAL*, by comparison, the Commission proposed increasing the forfeiture amount for ATNC's egregious violations by only 50%, for a total forfeiture of \$1,020,000 for 17 violations, or \$60,000 per violation.⁴⁷ Hence, for

³⁹ See *In the Matter of Coleman Enterprises, Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24,385, 24,388 (2000) (*Coleman Forfeiture*) (finding remedial steps to address unauthorized preferred carrier changes and cessation of telemarketing services insufficient to reduce forfeiture).

⁴⁰ In addition, ATNC has revised its telemarketing scripts to eliminate possible confusion, and has terminated problem telemarketing employees. Response at 10.

⁴¹ *Coleman Forfeiture*, 15 FCC Rcd at 24,388.

⁴² *Coleman Forfeiture*, 15 FCC Rcd at 24,388.

⁴³ Response at 11.

⁴⁴ Response at 11-12. ATNC compares the proposed \$1,020,000 forfeiture against it for 17 unauthorized switches with a \$640,000 proposed forfeiture against AT&T for 14 unauthorized switches, and a \$2,080,000 proposed forfeiture against Qwest for 30 unauthorized switches. See *In the Matter of AT&T Communications, Inc.*, Notice of Apparent Liability, 16 FCC Rcd 438 (2000) (*AT&T NAL*); *In the Matter of Qwest Communications International*, Notice of Apparent Liability, 14 FCC Rcd 18202 (1999) (*Qwest NAL*).

⁴⁵ See *In the Matter of Amer-I-Net Services Corporation*, Order of Forfeiture, 15 FCC Rcd 3118, 3122-23 (2000) (rejecting the argument that a forfeiture fine should be reduced because it is disproportionate compared to other Commission orders).

⁴⁶ The proposed \$640,000 total forfeiture against AT&T consisted of \$80,000 for each of the 2 egregious violations, and \$40,000 for each of the 12 remaining violations. See *AT&T NAL*, 16 FCC Rcd at 452. The proposed \$2,080,000 total forfeiture against Qwest consisted of \$80,000 for each of the 22 egregious violations, and \$40,000 for each of the 8 remaining violations. *Qwest NAL*, 14 FCC Rcd at 18215-16.

⁴⁷ *ATNC NAL*, 16 FCC Rcd at 5798-99.

ATNC's egregious violations, the Commission proposed a smaller forfeiture amount per violation than it proposed for AT&T and Qwest. It just so happens that, unlike in the *AT&T NAL* and *Qwest NAL*, all of ATNC's violations were found to be egregious. Finally, although ATNC correctly asserts that smaller carriers' gross revenues should be taken into account in determining the total forfeiture amount,⁴⁸ it has not produced any evidence that it will not be able to pay the total forfeiture proposed in the *ATNC NAL*. Accordingly, we find no basis for reducing the total forfeiture amount.

IV. CONCLUSION

17. After reviewing the information filed by ATNC in its Response, we find that ATNC has failed to identify facts or circumstances to persuade us that there is any basis for reconsidering the *ATNC NAL*. Further, ATNC has not shown any mitigating circumstances sufficient to warrant a reduction of the forfeiture penalty.

V. ORDERING CLAUSES

18. 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 ATNC Communications, Inc. SHALL FORFEIT to the United States Government the sum of \$1,020,000 for violating section 258 of the Act, 47 U.S.C. § 258, as well as the Commission's rules and orders governing preferred carrier conversions.⁴⁹

19. IT IS FURTHER ORDERED that a copy of this Order of Forfeiture shall be sent by certified United States mail to America's Tele-Network Corporation, in care of Charles H. Helein, Esq., The Helein Law Group, P.C., 8180 Greensboro Drive, Suite 700, McLean, Virginia 22102, and to John W. Little, President, America's Tele-Network Corporation, 720 Hembree Place, Roswell, Georgia 30076.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

⁴⁸ Response at 11-12.

⁴⁹ The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. ATNC should include the reference "NAL/Acct. No. 200132170016" on America's Tele-Network Corporation's check or money order. Such remittance must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box. 73482, Chicago, Illinois 60673-7482. Requests for full payment under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 12th Street, S.W., Washington, D.C. 20554. See 47 C.F.R. § 1.1914.

Secretary