IN THE SUPREME COURT OF OHIO

ValTech Communications, LLC,	:	
	:	**CASE NO.: 08-0873**
Appellant,	:	**ON APPEAL FROM THE**
	:	**PUBLIC UTILITIES COMMISSION**
v.	:	**OF OHIO**
	:	
Public Utilities Commission of Ohio,	:	**PUBLIC UTILITIES COMMISSION OF**
	:	**OHIO CASE NO. 04-658-TP-CSS**
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT
VALTECH COMMUNICATIONS LLC

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FILED
MAY 05 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT VALTECH COMMUNICATIONS, LLC

Appellant, ValTech Communications, LLC ("ValTech"), pursuant to R.C. 4903.11, R.C. 4903.13, and S.Ct. Prac. R. 11(3)(B) hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("PUCO" or "Commission") of this appeal to the Supreme Court of Ohio. Appellant appeals the PUCO's Entry on ValTech's motion to dismiss issued on May 18, 2005, the PUCO's Opinion and Order issued on September 13, 2006, the PUCO's Entry on Rehearing issued on November 8, 2006, and the PUCO's Second Entry on Rehearing issued on March 5, 2008 in Case No. 04-658-TP-CSS before the PUCO. The Case is entitled *In the Matter of the Complaint of Communications Options, Inc. v. ValTech Communications, LLC.*

Appellant, ValTech Communications, LLC ("ValTech"), was the respondent in the underlying proceeding. On July 14, 2004, Communication Options, Inc. ("COI") filed its amended complaint against ValTech. ValTech filed an answer and motion to dismiss the claims asserted in the amended complaint. The motion to dismiss was fully briefed and the attorney hearing examiner denied ValTech's motion to dismiss on January 19, 2005 and ValTech appealed this decision to the Commission. On May 18, 2005 the Commission issued its Entry on Interlocutory appeal affirming the attorney hearing examiner's denial of ValTech's motion to dismiss. This matter proceeded to a hearing and on September 13, 2006, the PUCO issued its Opinion and Order granting in part and denying in part COI's Complaint, denying ValTech's motion to dismiss, and denying ValTech's motion to strike. On October 12, 2006, appellant timely filed, pursuant to R.C. 4903.10, an Application for Rehearing from the Opinion and Order dated September 13, 2006. Appellant's Application for Rehearing was granted on November 8, 2006. On March 5, 2008, Appellee issued a Second Entry on Rehearing denying appellant's application for rehearing.

ValTech's Allegations of Error

Appellant files this Notice of Appeal, complaining and alleging that the Appellee's May 18, 2005 Entry on ValTech's motion to dismiss, the September 13, 2006 Opinion and Order, the November 8, 2006 Entry on Rehearing, and the March 5, 2008 Second Entry on Rehearing result in a final order that is unlawful, unjust, and unreasonable, and the Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

I. The PUCO erred when it denied ValTech's motion to dismiss the amended complaint and found that the informal complaint procedures set forth in former OAC 4901:1-5-08 are not mandatory preconditions to filing a formal complaint with the PUCO pursuant to O.R.C. 4905.26.

II. The PUCO erred when it denied ValTech's motion to dismiss and allowed Communications Options, Inc., a competitor of appellant, to file a complaint for alleged subscriber slamming in violation of former OAC 4901:1-5-08 when COI failed to direct consumers to follow the Commission's informal complaint procedures.

III. The PUCO erred when it found that ValTech's alleged misleading sales tactics constituted evidence of unauthorized changes of subscribers or "slamming."

IV. The PUCO erred when it went beyond the claims asserted in the complaint and found that ValTech used unfair, deceptive and unconscionable actions in violation of former OAC 4901:1-5-07 when the only violations asserted in the Complaint were violations of former OAC 4901:1-5-08 for alleged "slamming."

V. The PUCO erred when the Attorney Examiner denied Appellant's motion for separation of subpoenaed subscriber witnesses which resulted in inherently unreliable testimony.

VI. The PUCO erred when it failed to require the complainant to establish fraudulent misrepresentation by clear and convincing evidence.

VII. The PUCO's findings of fact and conclusions of law are erroneous and against the manifest weight of the evidence.

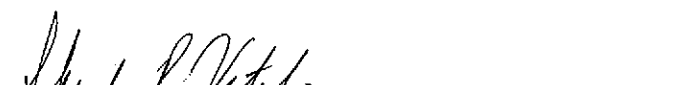
VIII. The PUCO erred in finding that ValTech's Letters of Authorization signed by customers to switch service to ValTech were invalid.

IX. The PUCO erred by assessing a penalty against ValTech that is not permitted by O.R.C. 4905.73(C)(4).

X. The PUCO erred by assessing remedies, penalties, and forfeitures that are improper under Ohio law.

WHEREFORE, Appellant respectfully requests that the Supreme Court of Ohio reverse the Commission's May 18, 2005 Entry on ValTech's motion to dismiss, the September 13, 2006 Opinion and Order, the November 8, 2006 Entry on Rehearing, and the March 5, 2008 Second Entry on Rehearing because they are unlawful, unjust, and unreasonable. This case should be remanded to the Commission with instructions to correct the errors complained of herein and dismiss the amended complaint filed by COI.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served on the following counsel, by ordinary U.S. mail, postage prepaid, this 5th day of May, 2008:

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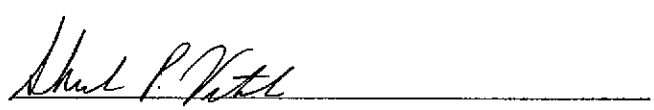

CERTIFICATE OF FILING

The undersigned hereby certifies that a Notice of Appeal of ValTech Communications, LLC was filed with the docketing division of The Public Utilities Commission of Ohio in accordance with 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Communication Options, Inc.,	)	
Complainant,	)	
v.	)	Case No. 04-658-TP-CSS
ValTech Communications LLC,	)	
Respondent.	)	

ENTRY

The Commission finds:

(1) On May 3, 2004, Communication Options, Inc. (COI or Complainant) filed a complaint against ValTech Communications LLC (ValTech). Complainant alleges that ValTech, through its agents and employees, has converted customers of COI to ValTech without customer authorization and has failed to follow the Local Service Guidelines issued in Case No. 95-845-TP-COI, Entry on Rehearing, Appendix A, Section XVII at 88, issued November 7, 1996.

(2) On May 19, 2004, ValTech filed its answer to the complaint and a motion to dismiss this case. On June 8, 2004, COI filed its memorandum in opposition to the motion to dismiss. On June 9, 2004, ValTech timely filed its reply to COI's memorandum in opposition.

(3) By Entry issued on June 18, 2004, the Attorney Examiner found that additional information was necessary in order to establish reasonable grounds for complaint in this matter and ordered that an amended complaint should be filed to provide further information regarding the subscribers who allegedly have been slammed by ValTech.

(4) On July 14, 2004, COI filed its amended complaint. COI contends that between March 24, 2004, and July 9, 2004, agents for ValTech made material misrepresentations to 13 COI

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customers to obtain letters of authorization to switch the customer's service from COI to ValTech.

(5) On July 27, 2004, ValTech filed its answer to COI's amended complaint. ValTech's response included a motion to dismiss and a memorandum in support. ValTech denied that it has switched the telecommunications service of subscribers without the permission of the subscribers. ValTech submits that COI's amended complaint fails to state a justiciable claim.

(6) On August 13, 2004, COI filed its memorandum contra ValTech's motion to dismiss. COI submitted that, while ValTech may be able to produce signed Letters of Authorization, the manner in which ValTech obtained the purported customer authorizations must be scrutinized. On August 19, 2004, ValTech filed its reply to COI's memorandum contra ValTech's motion to dismiss.

(7) A prehearing settlement conference was held on December 1, 2004, but the parties did not reach a settlement.

(8) On January 19, 2005, the attorney examiner issued an entry that denied ValTech's July 27, 2004 motion to dismiss the amended complaint filed by COI. The attorney examiner found that ValTech's arguments could not support dismissal of this case at this time. The attorney examiner concluded that whether or not ValTech has violated any tariff, statute, or rule is the issue to be determined as raised by the allegations in the complaint. The entry also set a case schedule, which included a hearing date for June 14, 2005.

(9) On January 24, 2005, ValTech filed a motion to certify an interlocutory appeal of the attorney examiner entry issued January 19, 2005. By entry issued March 25, 2005, the attorney examiner certified ValTech's interlocutory appeal.

(10) In its July 27, 2004 motion to dismiss, ValTech made several arguments:

(a) ValTech asserted that COI's amended complaint should be dismissed for lack of jurisdiction over the subject matter and for COI's failure to set forth reasonable grounds for its complaint. ValTech contended that COI is attempting to contort its allegations of "material misrepresentations" into allegations of unauthorized

switching of customers (slamming) in order to subject ValTech to unwarranted litigation expense and inconvenience. ValTech submitted that COI's alleged grievances are the same alleged grievances made in COI's previously filed civil action in the Richland County Court of Common Pleas, Case No. 04-CV-438 (which is still pending).

(b) ValTech opined that COI's amended complaint relies exclusively on Local Service Guideline Appendix A, Section XVII(C), Case No. 95-845-TP-COI (Entry on Rehearing, November 6, 1996).

This section provided that no subscriber's LEC may be changed unless and until "the LEC has obtained the subscriber's written authorization on a letter of agency (LOA; also known as a letter of authority) that explains what occurs when a subscriber's LEC is changed."

The Commission notes that in Case No. 00-1265-TP-ORD, *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, (May 29, 2001 Finding and Order), it adopted an Ohio-specific anti-slamming rule, Rule 4901:1-5-08, Ohio Administrative Code, (O.A.C.), pursuant to Section 4905.72, Revised Code, and which superceded the slamming provision in Local Service Guideline, Appendix A, Section XVII (C).

(c) ValTech asserted that the Commission's current prohibition against "slamming" and its requirements for submitting and verifying changes on behalf of subscribers in the subscribers' selection of a telecommunications provider are set forth in Section 4905.72, Revised Code, and Rule 4901:1-5-08, O.A.C.

Section 4905.72, Revised Code, provides that a consumer's prior, verified consent is required to switch a natural gas or telecommunications service provider. Specifically division (B)(1) states that:

> [n]o public utility shall request or submit, or cause to be requested or submitted, a change in the provider of . . . public telecommunications service to a consumer

> in this state, without first obtaining, or causing to be obtained, the verified consent of the consumer in accordance with rules adopted by the public utilities commission pursuant to division (D) of this section.

Division (D) basically provides that rules prescribing procedures necessary for verifying consumer consent shall be consistent with the rules of the Federal Communications Commission (FCC) in sections 47 C.F.R. 64.1100, et seq.

Rule 4901:1-5-08, O.A.C., further addresses telecommunications subscriber slamming. Paragraph (A) of this rule prescribes that no telecommunications provider shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining authorization from the subscriber and that verification of the authorization is consistent with the verification procedures prescribed by the FCC.

(d) ValTech further asserted both, the above statute and rule, state that the procedures for verification of authorization to submit changes in subscribers' selection of a telecommunications provider are as prescribed by the FCC and promulgated at 47 C.F.R. Part 64, Subpart K (§§ 64.1100 – 64-1190).

(e) ValTech contended that it has met all of the requirements for verification of authorization to submit changes as to all of its subscribers, including those reflected in the letters of authorization attached as exhibits 1 though 13 to ValTech's answer.

(11) COI filed a memorandum in opposition to ValTech's motion to dismiss on August 13, 2004. In its memorandum contra COI made the following arguments:

(a) COI asserted that ValTech submitted 13 exhibits attached to its answer that purported to be "Letters of Authorization" from the 13 customers identified in COI's amended complaint as customers whose service "ValTech converted and slammed," rather than address the allegations contained in COI's amended complaint.

COI contended that its complaint set forth the specific and fraudulent information ValTech used to improperly convert these 13 customers. COI asserted that the amended complaint provided the approximate time and name of the ValTech employee/agent who made the material representations. COI asserted that ValTech's fraudulent, deceptive, and unconscionable actions included informing COI's customers that: (1) COI switched its name to ValTech; (2) COI's upper management was (now) with ValTech; and (3) COI was bought out by ValTech (which resulted in the signing of new documents). COI argued that, while ValTech may be able to produce signed Letters of Authorization, the manner in which such authorizations were obtained must be scrutinized. COI submitted that, if proven, ValTech's false statements about COI would support a finding that ValTech illegally slammed COI customers' service.

(b) Further, COI asserted that ValTech's actions violated Section 4905.72, Revised Code, which would appropriately entitle COI to relief under Section 4905.73, Revised Code.

(12) On August 19, 2004, ValTech filed its reply to COI's memorandum contra. ValTech asserted that even if COI's allegations were proven, there has been no allegation of an unauthorized switch of telecommunications service (slamming). ValTech argued that COI would have the Commission structure a new concept of "constructive slamming," which is not provided for in the regulations. ValTech asserted that it has complied with its obligations under Section 4905.72(B), Revised Code, and Rule 4901:1-5-08, O.A.C., in that it has the customer's verified consent (via the Letter of Authorization); therefore, no slamming has occurred. ValTech further asserted that, since there has been no violation of Section 4905.72, Revised Code, COI is not entitled to any relief under Section 4905.73, Revised Code.

(13) As stated above, the attorney examiner issued an entry on January 19, 2005, that denied ValTech's motion to dismiss and ValTech filed an interlocutory appeal. In its interlocutory appeal, ValTech submitted that its appeal presented a new or novel question of interpretation, law, or policy. ValTech

contended that although COI's complaint purported to allege unauthorized changes in telecommunications providers (slamming), that in fact the complaint instead alleged misrepresentations, defamation, and slander by ValTech which, if proven, would be a violation of the Commission's Consumer Safeguards against unfair, deceptive, or unconscionable acts and practices in connection with a consumer transaction. ValTech further submitted that COI is inappropriately pursuing this complaint under the Commission's rules applicable to slamming, which have higher penalties and forfeitures, in order to disadvantage another competitor in the marketplace.

ValTech asserted that an immediate determination by the Commission is necessary to prevent the likelihood of undue prejudice or unjustified expense to ValTech. According to ValTech, for the Commission to wait until it issues an order on the merits of the case regarding whether slamming has been properly alleged, it will be too late to remedy the significant expense of discovery and hearings associated with this proceeding and to its extreme prejudice.

(14) COI filed a memorandum in opposition to ValTech's interlocutory appeal motion on January 31, 2005. COI opined that ValTech is attempting to portray COI's complaint as being a "new deceptive marketing practice-based cause of action" that should be plead under Rule 4901-5-07(A), O.A.C. (consumer safeguards), rather than Rule 4901:1-5-08, O.A.C., for telecommunications carrier subscription/slamming. COI asserted this attempted portrait is inconsistent with the Commission's statutory scheme set forth in Section 4905.72, Revised Code, and Rule 4901:1-5-08, O.A.C. COI further asserted that its complaint alleges ValTech deceived consumers, through patently false statements about COI, in order to obtain their signature on a Letter of Authorization. COI argued that ValTech cannot rely on its written customer authorizations, if these agreements were not voluntary, but induced by fraud or deception. COI contended that such conduct is not deceptive marketing; it is slamming.

(15) In examining the issues raised by ValTech, the Commission takes notice of ValTech's initial assertions, which are discussed in Findings (10) and (12) above, and the additional arguments in ValTech's interlocutory appeal. The Commission also takes

notice of COI's arguments, which are discussed in Finding (11) above, and COI's January 31, 2005 memorandum contra. Based on the arguments presented by the parties, we find that the attorney examiner did not err in denying ValTech's motion to dismiss COI's amended complaint and finding that whether or not ValTech has violated any statute or rule is the issue to be determined as raised by the allegations in the complaint. The Commission does not believe that any reference to a tariff violation has occurred and, therefore, it is eliminating that reference in the attorney examiner's ruling.

In support of this determination, we note that ValTech argues that it did obtain letters of authority from various customers prior to switching those customers from another local exchange carrier. COI has the right to contest the validity of those letters. However, if the letters of authority are valid, then it would appear that no violation of Section 4905.72, Revised Code, or Rule 4901:1-5-08, O.A.C., has occurred. On the other hand, paragraph A of Rule 4901:1-5-07, O.A.C., of the Commission's Minimum Telephone Service Standards (MTSS), provides, in part, that "No telecommunications service provider shall commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction." The MTSS, pursuant to Section 4905.231, Revised Code, are the minimum standards for the provisioning of adequate telephone service. The Commission adopted the MTSS rules and telephone companies are required to comply with them. Failure to comply may result in (a) a finding that ValTech is providing inadequate telephone service, (b) forfeitures pursuant to Section 4905.54, Revised Code, and/or (c) pursuant to Section 4905.381, Revised Code, the Commission prescribing revised practices to be adopted and observed by the company. In light of the above, we affirm the decision of the attorney examiner in this matter which denied ValTech's July 27, 2004 motion to dismiss the amended complaint.

It is, therefore,

ORDERED, That ValTech's interlocutory appeal of the January 19, 2005 attorney examiner entry is denied, pursuant to Finding (15). It is, further,

ORDERED, That a copy of this entry be served on COI and its counsel, ValTech and its counsel, and all interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JKS:ct

Entered in the Journal

MAY 18 2005

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Communication Options, Inc.,	)	
Complainant,	)	
v.	)	Case No. 04-658-TP-CSS
ValTech Communications LLC,	)	
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TABLE OF CONTENTS

APPEARANCES: 1
OPINION: 1
I. HISTORY OF THE PROCEEDINGS 1
II. APPLICABLE LAW 4
A. Marketing Practices 5
B. Telecommunications Carrier Subscription/Slamming 6
III. DISCUSSION OF THE ISSUES 14
A. Jurisdiction 14
B. COI's Amended Complaint 15
C. Whether the marketing practices used by ValTech to switch COI customers to ValTech violated MTSS Rule 4901:1-5-07, O.A.C.? 18
D. Whether the marketing practices used by ValTech to switch COI customers to ValTech violated MTSS Rule 4901:1-5-08, O.A.C.? 25
E. Whether ValTech's Letter of Agency (LOA) fails to comply with the applicable rules for changes in the subscriber's selection of a telecommunications provider? 27
ValTech Letter of Agency – form and content under 47 C.F.R. § 64.1130 27
IV. REFERRAL TO COMMISSION STAFF 30
V. REMEDIES, PENALTIES AND FORFEITURES 30
CONCLUSION: 34
FINDINGS OF FACT: 35
CONCLUSIONS OF LAW: 37
ORDER: 39

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Communication Options, Inc.,	)	
Complainant,	)	
v.	)	Case No. 04-658-TP-CSS
ValTech Communications LLC,	)	
Respondent.	)	

OPINION AND ORDER

The Commission, coming now to consider the testimony, and other evidence presented in this proceeding, hereby issues its Opinion and Order.

APPEARANCES:

Schottenstein, Zox & Dunn, Co., LPA, by Brian M. Zets and Christopher L. Miller, 250 West Street, Columbus, Ohio 43215, on behalf of Communication Options, Inc.

Cooper & Elliott, LLC by Rex Elliott and Andrew J. Sonderman, 2175 Riverside Drive, Columbus, Ohio 43221, on behalf of ValTech Communications, LLC.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On May 3, 2004, Communications Options, Inc. (COI or Complainant) filed a complaint against ValTech Communications LLC (ValTech or Respondent). COI's complaint alleged that ValTech, through its agents and employees, converted COI customers to ValTech without customer authorization (i.e., "slammed"), and that ValTech failed to follow the Local Service Guidelines issued in Case No. 95-845-TP-COI, Entry on Rehearing, Appendix A, Section XVII at 88, issued November 7, 1996.[1]

On May 19, 2004, ValTech filed its answer and a motion to dismiss this complaint. On June 8, 2004, COI filed its memorandum in opposition to ValTech's motion to dismiss. ValTech filed its reply to COI's memorandum in opposition on June 9, 2004.

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1 *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, (95-845) Finding and Order, Appendix A, Local Service Guidelines, Section XVIII.B, at 70-72; Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.B at 85-87, issued November 7, 1996.

By an entry issued June 18, 2004, the attorney examiner found that additional information was necessary in order to establish reasonable grounds for complaint in this matter and ordered that an amended complaint should be filed to provide further information regarding the subscribers who allegedly have been slammed by ValTech.

COI filed its amended complaint on July 14, 2004, after being granted an extension of time. In its amended complaint, COI contended that between March 24 and July 9, 2004, agents for ValTech made material misrepresentations to 13 COI customers in order to obtain letters of authorization to switch the customers' service from COI to ValTech.

On July 27, 2004, ValTech filed its answer to COI's amended complaint. ValTech's response included a motion to dismiss and a memorandum in support. ValTech denied that it switched the telecommunications service of subscribers without the permission of the subscribers. ValTech submitted that COI's amended complaint failed to state a justiciable claim. ValTech's motion to dismiss was subsequently denied on January 19, 2005, by attorney examiner entry, which will be discussed below.

A prehearing settlement conference was held on December 1, 2004, in compliance with the November 10, 2004 attorney examiner entry. The parties, however, were unable to reach a settlement in this matter.

On January 19, 2005, the attorney examiner issued an entry that denied ValTech's July 27, 2004 motion to dismiss COI's amended complaint. The attorney examiner found that ValTech's arguments could not support dismissal of this case at that time. The attorney examiner concluded, in pertinent part, that whether or not ValTech has violated any statute or rule is the issue to be determined as raised by the allegations in the complaint. The January 19, 2005 entry also set a schedule for the balance of the case, which included a hearing date for June 14, 2005.

On January 24, 2005, ValTech filed a motion to certify an interlocutory appeal of the attorney examiner entry issued January 19, 2005. By entry issued March 25, 2005, the attorney examiner certified ValTech's interlocutory appeal. The Commission denied ValTech's interlocutory appeal, by its entry issued May 18, 2005.

On March 3, 2005, ValTech filed a motion to compel responses to its second set of interrogatories and second request for production of documents, and a motion for suspension of the cutoff date for completion of discovery, and memorandum in support. On March 17, 2005, COI filed a memorandum contra ValTech's March 3, 2005 motion. By attorney examiner entry issued July 13, 2005, ValTech's motion to compel discovery was granted in part and denied in part. ValTech's motion for suspension of the discovery cutoff date was denied as moot.

An informal case status conference was conducted with the parties, by telephone, on May 20, 2005, which included discussion of timeframes for discovery completion and

the filing of testimony. On May 31, 2005, the attorney examiner issued an entry that revised the schedule for the balance of the case, including an evidentiary hearing to begin August 22, 2005.

On August 2, 2005, ValTech filed a new motion to dismiss under Rule 4901-1-23(F)(4), Ohio Administrative Code (O.A.C.), which addresses dismissal of a pending complaint if a party fails to comply with an order of the Commission compelling discovery. COI filed a memorandum contra ValTech's motion to dismiss, on August 9, 2005. On August 10, 2005, ValTech filed a motion for leave to conduct additional discovery and to continue the hearing date. On August 11, 2005, COI filed a memorandum contra ValTech's August 10, 2005 motion. The attorney examiner confirmed the continuance of the August 22, 2005 hearing and granted ValTech permission to conduct "limited discovery" by an attorney examiner entry issued on August 26, 2005. By this same entry, ValTech's August 2, 2005 motion to dismiss was held in abeyance to permit COI to comply with the findings of the entry. ValTech took the depositions of five COI employees in early October 2005 (COI Initial Br. at 4).

On October 18, 2005, COI filed a motion and a memorandum in support to issue subpoenas to: Cornell Webb, Peggy and Skip Correll, Harold Tomes, Steve Buck, Brian Giauque, Ivan Maibach, and Kelly [sic] Ward. The attorney examiner approved the subpoenas on October 18, 2005. An affidavit for service of each subpoena was filed in this docket on October 21, 2005.

The hearing began on Monday, October 24, 2005 and concluded on October 26, 2005. In COI's opening statement, COI's counsel stated that its customer witnesses were "purely a sampling of the business owners we have. Our amended complaint outlined 13 business owners, and we have taken those 13 and narrowed them down for judicial economy instead of pulling witness after witness. Some of it was our own doing; some of it was not." (Counsel for COI stated that Steve Buck from National Salt Distributors was not able to testify due to the recent death of his best friend. [Tr. I, at 14.] COI witness Ivan Maibach testified that Brian Giauque, the new owner of Shearer Equipment, was not present to testify because Mr. Giauque was in Florida for training. [Tr. I, at 79.]) COI presented the testimony of the following customer witnesses: Harold Tomes (Automotive Supplies, Inc., three NAPA Auto Parts stores: Mt. Vernon, Danville and Fredericktown); Cornell Webb (Webb's Automotive, Mansfield); Ivan Maibach (Shearer Equipment, Mansfield); Skip Correll (Pro Auto Body, Inc., Mansfield); Peggy Correll (Pro Auto Body, Inc., Mansfield); and Kelley Ward (Grand Slam Sports & Collectibles, Mansfield and Sandusky). In addition, COI presented the testimony of the following employees: Jessica Rathkopf (Customer Service Representative), Patricia Bowser (Customer Service Representative), Linda Smith (Customer Care Manager), Stephen K. Vogelmeier (COI President), and Perry J. Moody (Controller). ValTech presented the testimony of the following witnesses: Miriam Noble (independent sales agent), Douglas Miller (independent sales agent), Mark Cochenour (Vice President, Technical Operations), and Thomas Duckworth (ValTech, President).

On November 21, 2005, COI and ValTech filed a joint motion for an extension of time to file briefs. By attorney examiner entry issued November 23, 2005, the joint motion was granted, and the case schedule was amended to include the filing of initial briefs on December 21, 2005, and the filing of reply briefs on January 11, 2006. COI and ValTech each submitted initial post-hearing briefs on December 21, 2005, and reply briefs on January 11, 2006. On January 17, 2006, COI filed a supplement to its post-hearing reply brief. The Commission notes that the filing of additional pleadings, following the post hearing reply briefs, was not contemplated by this case schedule, and also is in violation of Rule 4901-1-31, O.A.C., which addresses briefs and memoranda. The Commission further notes that COI did not seek permission to submit any additional pleadings in this matter. Therefore, the Commission will not consider the January 17, 2006 supplement to COI's post-hearing reply brief in reaching its opinion in this matter.

On January 18, 2006, ValTech filed a motion to strike portions of COI's reply brief filed January 11, 2006. On February 2, 2006, COI filed a memorandum contra ValTech's motion to strike. ValTech's motion to strike contends that a portion of COI's January 11, 2006 reply brief contains factually inaccurate statements that mischaracterize the contents of exhibits and statements in the record. ValTech requests that specific paragraphs on pages 10 and 11 of COI's reply brief be stricken. The Commission believes that it is capable of recognizing when counsel may have been overzealous in its arguments or has actually attempted to mischaracterize the evidence in its pleadings. Accordingly, ValTech's motion to strike portions of COI's reply brief is denied.

II. APPLICABLE LAW

In accordance with its statutory authority, the Commission adopted minimum telephone service standards (MTSS) that apply to all telecommunications carriers regulated by the Commission. Chapter 4901:1-5, O.A.C., sets forth those minimum telephone service standards. The MTSS, in their current form, were established by the Commission in Case No. 96-1175-TP-ORD and became fully effective on January 1, 1998.[2] In carrying out Section 4905.72, Revised Code, the Commission addressed necessary changes to the MTSS under Case No. 00-1265-TP-ORD.[3] One of those changes was the addition of MTSS Rule 4901:1-5-07, O.A.C., which addresses consumer safeguards.[4] MTSS Rule 4901:1-5-08, O.A.C., was also added to address telecommunications carrier subscription and slamming.[5]

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2 *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code,* Case No. 96-1175-TP-ORD, Entry on Rehearing issued September 11, 1997.

3 *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code,* Case No. 00-1265-TP-ORD, Finding and Order, issued May 29, 2001 and Entry on Rehearing, issued September 13, 2001.

4 *Id.*, Entry on Rehearing, at 16-17, issued September 13, 2001.

5 *Id.*, Entry on Rehearing, at 17-21, issued September 13, 2001.

A. Marketing Practices

Rule 4901:1-5-07, O.A.C., replaced the earlier consumer safeguards language in the Local Service Guidelines at Section XVII.B.[6] MTSS Rule 4901:1-5-07, O.A.C., provides, in pertinent part:

> (A) No telecommunications service provider shall commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction. Without limiting the scope of this section, the act or practice of a telecommunications service provider is deceptive if the provider:
>
> (1) Fails to clearly highlight, in written or printed advertising or promotional literature, any material exclusions, reservations, limitations, modifications, or conditions associated with special offers or promotions;
>
> (2) Fails to place material exclusions, reservations, limitations, modifications, or conditions within close proximity to the words stating such special offer(s) or promotion(s);
>
> (3) Fails to clearly state all specific exclusions, reservations, limitations, modifications, or conditions when making offers through radio or television advertisement; or
>
> (4) Advertises or offers goods or services as "free" when the cost of the "free" offer is passed on to the consumer by raising the tariffed price of the goods or services that must be purchased in connection with the "free" offer.
>
> (B) Telecommunications service providers shall use positive subscriber enrollment for all services for which a monthly recurring charge would apply.
>
> . . .
>
> (D) Local service providers, when offering bundled service packages, shall explain that each service or feature within the package may be purchased individually, list each service and/or feature contained in the package, and, upon subscriber request, provide individual rates for each service or feature.

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6 95-845, Finding and Order, Appendix A, Local Service Guidelines Section XVIII.B, at 70-72; Entry on Rehearing, Appendix A, Local Service Guidelines Section XVII.B at 85-87, issued November 7, 1996; and Entry on Rehearing, Appendix A, Local Service Guidelines Section XVII.B, at 86-88, issued February 20, 1997.

(E) When a subscriber calls a telecommunications provider to request information about a specific local exchange service(s) or features), to report service problems, and/or to make payment arrangements, the provider shall not engage in sales practices until the provider first confirms that it has completely responded to the subscriber's concern(s). Upon a subscriber's request, the provider shall discontinue the sales discussion.

B. Telecommunications Carrier Subscription/Slamming

"Slamming" is the switching of a customer's service provider without the customer's prior authorization. To address this problem, the 123rd Ohio General Assembly enacted Sub. H.B. 177. This Act became effective on May 17, 2000, and addressed "slamming" by prohibiting the change of a consumer's provider of natural gas or telecommunications service, without obtaining the consumer's prior, verified consent. Sections 4905.72, 4905.73, 4905.74, Revised Code, were enacted, and Section 4905.99(D), Revised Code, was amended to vest the Commission with express authority regarding the unauthorized switch of natural gas and public telecommunications service providers.

The Commission's enforcement authority arose from its existing rules and the above act, which requires that the Commission order a public utility that has slammed a consumer to undertake various actions to make the consumer whole. Section 4905.72, Revised Code, provides, in pertinent part:

(B)(1) No public utility shall request or submit, or cause to be requested or submitted, a change in the provider of . . . public telecommunications service to a consumer in this state, without first obtaining, or causing to be obtained, the verified consent of the consumer in accordance with the rules adopted by the public utilities commission pursuant to division (D) of this section.

(B)(2) No public utility shall violate or fail to comply with any provision of a rule adopted by the commission pursuant to division (D) of this section or any provision of an order issued by the commission pursuant to division (B) or (C) of section 4905.73 of the Revised Code.

. . .

(D) The Commission shall adopt competitively neutral rules prescribing procedures necessary for verifying the consent of a consumer for purposes of division (B)(1) of this section and any procedures necessary for the filing of a security under division (C)(5) of section 4905.73 of the Revised Code, and may adopt such other competitively neutral rules as the commission considers necessary to carry out this section and section 4905.73 of the Revised Code. With respect to

public telecommunications service only, the rules prescribing procedures for verifying consumer consent shall be consistent with the rules of the federal communications commission in 47 C.F.R. 64.1100 and 64.1150.

Rule 4901:1-5-08, O.A.C., replaced the earlier slamming language in the Local Service Guidelines at Section XVII.C,[7] and also incorporated certain revisions triggered by changes in federal slamming policy and Ohio Sub. H.B. 177 as discussed above.[8] By these actions Ohio adopted an Ohio-specific anti-slamming rule within the MTSS that was consistent with the Federal Communication Commission's (FCC's) anti-slamming rules.[9] MTSS Rule 4901:1-5-08, O.A.C., provides, in pertinent part:

(A) No telecommunications provider shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining:

(1) Authorization from the subscriber;

(2) Verification of that authorization in accordance with the verification procedures prescribed by the federal communications commission (FCC) and in effect at the time of the change.

(B) A change of telecommunications provider may take place immediately upon request. However, within ten business days of verification by the submitting carrier of a subscriber request for a change of a telecommunications provider, the submitting telecommunications provider shall send each new subscriber an information package, by first class mail, containing at least the following information concerning the requested change:

(1) The information is being sent to confirm an order placed by the subscriber within the last two weeks;

(2) The name of the submitting telecommunications provider;

(3) A description of any terms, conditions, and/or charges that will be incurred;

(4) The name, address, and telephone number of the subscriber;

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7 95-845, Finding and Order, Appendix A, Local Service Guidelines, Section XVIII.C, at 72-75; Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.C, at 88-90, issued November 7, 1996; and Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.C, at 88-91, issued February 20, 1997.

8 *See* Case No. 00-1265-TP-ORD, Finding and Order, at 68-69, issued May 29, 2001.

9 *Id.*, at 69.

(5) A toll-free customer service telephone number, a postal address, and (if applicable) an e-mail address or website address for use to place inquiries or complaints with the submitting telecommunications provider; and

(6) The address, telephone number, and website address of the Commission.

(C) Any telecommunications provider that is informed by a subscriber or the commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the federal communications commission for the resolution of informal complaints of unauthorized changes of telecommunications providers.

(D) Any subscriber or telecommunications provider whose complaint cannot be resolved informally may file a formal complaint under section 4905.26 of the Revised Code, regarding any violation of section 4905.72 of the Revised Code, or of this rule. If the Commission finds, after notice and hearing, that a telecommunications provider has violated section 4905.72 of the Revised Code or this rule, the telecommunications provider shall be subject to the remedies provided for in section 4905.73 of the Revised Code.

Rule 4901:1-5-08(A)(2), O.A.C., provides that, before a telecommunications provider can submit a change request on behalf of the subscriber, verification of that authorization must be completed in accordance with the verification procedures prescribed by the FCC and in effect at the time of the change. FCC Rule 47 C.F.R. § 64.1120 provides the verification procedures, which state, in pertinent part:

47 C.F.R. § 64.1120: Verification of orders for telecommunications service.

(a) No telecommunications carrier shall submit or execute a change on the behalf of a subscriber in a subscriber's selection of a provider of telecommunications service except in accordance with the verification procedures prescribed in this subpart. Nothing in this section shall preclude any State commission from enforcing these procedures with respect to intrastate services.

(1) No submitting carrier shall submit a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining:

(i) Authorization from the subscriber, and

(ii) Verification of that authorization in accordance with the procedures prescribed

in this section. The submitting carrier shall maintain and preserve records of verification of subscriber authorization for a minimum period of two years after obtaining such verification.

. . .

(b) Where a telecommunications carrier is selling more than one type of telecommunications service (e.g., local exchange, intraLATA/intrastate toll, interLATA/interstate toll, and international toll) that carrier must obtain separate authorization from the subscriber for each service sold, although the authorizations may be made within the same solicitation. Each authorization must be verified in accordance with the verification procedures prescribed in this part.

(c) No telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of the following procedures:

(1) The telecommunications carrier has obtained the subscriber's written or electronically signed authorization in a form that meets the requirements of § 64.1130; or

. . .

(4) Any State-enacted verification procedures applicable to intrastate preferred carrier change orders only.

(d) Telecommunications carriers must provide subscribers the option of using one of the authorization and verification procedures specified in § 64.1120(c) in addition to an electronically signed authorization and verification procedure under 64.1120(c)(1).

The above FCC rule provides for three methods of verification, one of which is a signed letter of authorization from the subscriber, and which is the method used by ValTech in the present case. This written or electronic authorization must comply with the requirements of 47 C.F.R § 64.1130. This current rule provides, in pertinent part:

47 C.F.R. § 64.1130: Letter of agency form and content.

(a) A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization and/or verification of a subscriber's request to change his or preferred carrier selection. A letter of agency that does not conform with [to] this section is invalid for purposes of this part. (Alterations added.)

(b) The letter of agency shall be a separate document (or an easily separable document) or located on a separate screen or webpage containing only the authorizing language described in paragraph (e) of this section having the sole purpose of authorizing a telecommunications carrier to initiate a preferred carrier change. The letter of agency must be signed and dated by the subscriber to the line(s) requesting the preferred carrier change.

. . .

(e) At a minimum, the letter of agency must be printed with a type of sufficient size and readable type to be clearly legible and must contain clear and unambiguous language that confirms:

(1) The subscriber's billing name and address and each telephone number to be covered by the preferred carrier change order;

(2) The decision to change the preferred carrier from the current telecommunications carrier to the soliciting telecommunications carrier;

(3) That the subscriber designates [insert the name of the submitting carrier] to act as the subscriber's agent for the preferred carrier change;

(4) That the subscriber understands that only one telecommunications carrier may be designated as the subscriber's interstate or interLATA preferred interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional preferred carriers (e.g., local exchange, intraLATA/intrastate toll, interLATA/interstate toll, or international interexchange) the letter of agency must contain separate statements regarding these choices, although a separate letter of agency for each choice is not necessary; and

(5) That the subscriber may consult with the carrier as to whether a fee will apply to the subscriber's change in the subscriber's preferred carrier.

. . .

(j) A telecommunications carrier shall submit a preferred carrier change order on behalf of a subscriber within no more than 60 days of obtaining a written or electronically signed letter of agency. However, letters of agency for multi-line and/or multi-location business customers that have entered into negotiated agreements with carriers

to add presubscribed lines to their business locations during the course of a term agreement shall be valid for the period specified in the term agreement.

Rule 4901:1-5-08(C), O.A.C., as previously noted, provides that any telecommunications provider who is informed by a subscriber or the Commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the FCC. The current FCC rule that addresses informal complaint procedures is 47 C.F.R. § 64.1150, which states, in pertinent part:

47 C.F.R. § 64.1150: Procedures for resolution of unauthorized changes in preferred carrier.

. . .

(b) Referral of Complaint. Any carrier, executing, authorized, or allegedly authorized, that is informed by a subscriber or an executing carrier of an unauthorized carrier change shall direct that subscriber either to the state commission or . . . to the Federal Communications Commission's Consumer & Governmental Affairs Bureau, for resolution of the complaint. Carriers shall also inform the subscriber that he or she may contact and seek resolution from the alleged unauthorized carrier and, in addition, may contact the authorized carrier.[10]

. . .

(d) Proof of verification. Not more than 30 days after notification of the complaint, or such lesser time as is required by the state commission if a matter is brought before a state commission, the alleged unauthorized carrier shall provide to the relevant government agency a copy of any valid proof of verification of the carrier change. This proof of verification must contain clear and convincing evidence of a valid authorized carrier change, as that term is defined in §§ 64.1150 through 64.1160. The relevant government agency will determine whether an unauthorized change, as defined by § 64.1100(e), has occurred using such proof and any evidence provided by the subscriber. Failure by the carrier to respond or provide proof of

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10 *See, In the Matter of the Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumer Long Distance Carriers*, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135, (released May 3, 2000), ¶ 34, and Appendix A, at 5; and amended by Third Order on Reconsideration, FCC 03-42, (released March 17, 2003), ¶¶ 23, 68, and Appendix A, at 49.

verification will be presumed to be clear and convincing evidence of a violation.[11]

Section 4905.73, Revised Code

Section 4905.73, Revised Code, grants the Commission jurisdiction regarding any public utility violation of Section 4905.72(B), Revised Code. This section also provides for remedies and penalties to address the violations. The statute provides, in pertinent part, as follows:

(A) The public utilities commission, upon complaint by any person or complaint or initiative of the commission, has jurisdiction under section 4905.26 of the Revised Code regarding any violation of division (B) of section 4905.72 of the Revised Code by a public utility.

(B) Upon complaint or initiative under division (A) of this section, if the commission finds, after notice and hearing pursuant to section 4905.26 of the Revised Code, that a public utility has violated section 4905.72 of the Revised Code, the commission, by order, shall do all of the following:

(B)(1) Rescind the aggrieved consumer's change in service provider;

(B)(2) Require the public utility to absolve the aggrieved consumer of any liability for any charges assessed the consumer, or refund to the aggrieved consumer any charges collected from the consumer, by the public utility during the thirty-day period after the violation or failure to comply occurred or, where appropriate, during such other period after that occurrence as determined reasonable by the commission;

(B)(3) Require the public utility to refund or pay to the aggrieved consumer any fees paid or costs incurred by the consumer resulting from the change of the consumer's service provider or providers, or from the resumption of the consumer's service with the service provider or providers from which the consumer was switched;

(B)(4) Require the public utility to make the consumer whole regarding any bonuses or benefits . . . to which the consumer is entitled, by restoring bonuses or benefits the consumer lost as a result of the violation or failure to comply and providing bonuses or benefits the consumer would have earned if not for the violation or failure to comply, or by providing something of equal value.

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11 *Id.*, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135, (released May 3, 2000), ¶ 34; and Appendix A, at 5.

(C) In addition to the remedies under division (B) of this section, if the commission finds, after notice and hearing pursuant to section 4905.26 of the Revised Code, that a public utility has violated section 4905.72 of the Revised Code, the commission, by order, may impose any of the following remedies or forfeitures:

(C)(1) Require the public utility to comply or undertake any necessary corrective action;

(C)(2) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched in the amount of all charges the consumer would have paid that particular service provider for the same or comparable service had the violation or failure to comply not occurred;

(C)(3) Require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched for any costs that the particular service provider incurs as a result of making the consumer whole as provided in division (B)(4) of this section or of effecting the resumption of the consumer's service;

(C)(4) Assess upon the public utility forfeitures of not more than one thousand dollars for each day of each violation or failure to comply. However, if the commission finds that the public utility has engaged or is engaging in a pattern or practice of committing any such violations or failures to comply, the commission may assess upon the public utility forfeitures of not more than five thousand dollars for each day of each violation or failure.

(C)(5) Require the public utility to file with the commission a security deposit payable to the state in such amount and upon such terms as the commission determines necessary to ensure compliance and payment of any forfeitures assessed pursuant to division (C)(4) of this section;

(C)(6) Rescind the public utility's authority to provide natural gas service or public telecommunications service within the state.

The Ohio statutes, Commission rules, and FCC rules identified above, and any additional, pertinent rules or statutes, will be discussed, as they apply to the facts in this case, in the following section.

III. DISCUSSION OF THE ISSUES

A. Jurisdiction

ValTech, in previous motions to dismiss, asserted that COI's amended complaint should be dismissed for lack of Commission jurisdiction over the subject matter and for COI's failure to set forth reasonable grounds for complaint, as required by the provisions of Section 4905.26, Revised Code. As noted above, ValTech's motion to dismiss was denied by attorney examiner entry on January 19, 2005. ValTech filed a motion for certification of an interlocutory appeal on January 24, 2005. By entry issued March 25, 2005, the attorney examiner certified ValTech's interlocutory appeal to the Commission. The Commission denied ValTech's interlocutory appeal, by its entry issued May 18, 2005. In that entry, the Commission noted:

> [W]hether or not ValTech has violated any statute or rule is the issue to be determined as raised by the allegations in the Complaint.
>
> In support of this determination, we note that ValTech argues that it did obtain letters of authority from various customers prior to switching those customers from another local exchange carrier. COI has the right to contest the validity of those letters. However, if the letters of authority are valid, then it would appear that no violation of Section 4905.72, Revised Code, or Rule 4905:1-5-08, O.A.C., has occurred. On the other hand, paragraph A of Rule 4901:1-5-07, O.A.C., of the Commission's Minimum Telephone Service Standards (MTSS), provides, in part, that "No telecommunications provider shall commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction." The MTSS, in accordance with Section 4905.231, Revised Code, are the minimum standards for the provisioning of adequate telephone service. The Commission adopted the MTSS rules and telephone companies are required to comply with them. Failure to comply may result in: (a) a finding that ValTech is providing inadequate service, (b) forfeitures pursuant to Section 4905.54, Revised Code, and/or (c) pursuant to Section 4905.381, Revised Code, the Commission prescribing revised practices to be adopted and observed by the company.

(May 18, 2005 Entry, Finding [15] at 7.)

ValTech, in its initial brief, contends that the Commission does not have jurisdiction to hear [decide] this complaint, under Section 4905.26, Revised Code, because COI failed to meet the "preconditions" for filing a formal complaint. ValTech argues that there are mandatory "preconditions" provided in Section 4905.72, Revised Code; Rule 4901:1-5-08, O.A.C.; and 47 C.F.R. § 64.1150, and, therefore, "[a]s a matter of law, COI cannot maintain this formal complaint proceeding having failed to offer proof that its agents made the referrals for informal resolution that the law requires." (ValTech Initial Br. at 31-33.)

We find no merit in ValTech's argument. Each of the statutes and rules referenced by ValTech were developed to provide consumer protection from an unauthorized change in service providers, not to establish prerequisites to the filing of a formal complaint under Section 4905.26, Revised Code.

B. COI's Amended Complaint

In its amended complaint, COI alleges that ValTech converted COI customers to ValTech in a manner that resulted in those customers being "slammed." COI identified the following 13 customers whom it believes were converted to ValTech as a result of the alleged subscriber slamming:

1. On or about March 25, 2004, Cornell Webb Automotive informed COI that it switched to ValTech after an agent for ValTech, believed to be Darren Boatwright, contacted Cornell Webb Automotive and made material misrepresentations including but not limited to misrepresentations that COI had changed its name to ValTech.
2. On or about March 30, 2004, Sidney Auto Service informed COI that it switched to ValTech after an agent for ValTech, believed to be Miriam Noble, contacted Sidney Auto Service and made material misrepresentations including but not limited to misrepresentations that COI was bought out by ValTech.
3. On or about April 1, 2004, Tim's Automotive Specialties informed COI that it switched to ValTech after an agent for ValTech, believed to be Darren Boatwright, contacted Tim's Automotive Specialties and made material misrepresentations including but not limited to misrepresentations that COI's upper management was now with ValTech.
4. On or about April 9, 2004, Pro Auto Body informed COI that it switched to ValTech after an agent for ValTech, believed to be William Cody, contacted Pro Auto Body and made material misrepresentations including but not limited to misrepresentations that COI had changed its name to ValTech.
5. On or about April 12, 2004, National Salt Distributors informed COI that it switched to ValTech after an agent for ValTech contacted National Salt Distributors and made material misrepresentations including but not limited to misrepresentations that COI had changed its name to ValTech.
6. On or about April 13, 2004, American Boot Outlet informed COI it switched to ValTech after an agent for ValTech contacted American Boot Outlet and made material misrepresentations including but not limited to misrepresentations that COI had changed its name to ValTech.

7. On or about April 19, 2004, Shearer Equipment informed COI that it switched to ValTech after an agent for ValTech, believed to be Doug Miller, contacted Shearer Equipment and made material misrepresentations including but not limited to claiming to be the owner of COI.
8. On or about April 21, 2004, Mansfield Hotel Partnership informed COI that it switched to ValTech after an agent for ValTech contacted Mansfield Hotel Partnership and made material misrepresentations including but not limited to misrepresentations that COI was bought out by ValTech and that Mansfield Hotel Partnership needed to sign new paperwork in order for service to continue.
9. On or about April 29, 2004, Automotive Supplies of Danville informed COI that it switched to ValTech after an agent for ValTech, believed to be William (Bill) Cody, contacted Automotive Supplies of Danville and made material misrepresentations including but not limited to misrepresentations regarding COI and ValTech.
10. On or about April 29, 2004, Automotive Supplies of Mt. Vernon informed COI that it switched to ValTech after an agent for ValTech, believed to be William (Bill) Cody, contacted Automotive Supplies of Danville and made material misrepresentations including but not limited to misrepresentations regarding COI and ValTech.
11. On or about May 5, 2004, Arbor Creek Gardens informed COI that it switched to ValTech after an agent for ValTech, believed to be Darren Boatwright, contacted Arbor Creek Gardens and made material misrepresentations including but not limited to misrepresentations that COI was bought out by ValTech.
12. On or about May 6, 2004, Herald's Appliances informed COI that it had been converted to ValTech after an agent for ValTech contacted Herald's Appliances and made material misrepresentations.
13. On or about July 9, 2004, Grand Slam [Sports &] Collectibles informed COI that it had been converted to ValTech after an agent for ValTech contacted Grand Slam Sports & Collectibles and made material misrepresentations.

Next, COI alleges that ValTech, through its agents and employees, has converted COI customers using practices that are in violation of Local Service Guidelines Appendix A. Section XVII(C), specifically:

1. Certain members of ValTech have supplied ValTech agents, including but not limited to, Doug Miller, William (Bill) Cody, Darren Boatwright, Miriam Noble, and Talbert Jones, with documents and other information to prepare them to disseminate false and

misleading information about COI to COI customers with the specific intent of taking COI's customers and transferring those customers to ValTech.

2. Certain members of ValTech have directed ValTech's agents, including but not limited to, Doug Miller, William (Bill) Cody, Darren Boatwright, Miriam Noble, and Talbert Jones, to approach COI customers and tell those customers incorrect and false information to mislead those customers, and to defame and slander COI's reputation, for purposes of getting those customers to switch from COI to ValTech.

3. ValTech agents Doug Miller, William (Bill) Cody, Darren Boatwright, Miriam Noble, and Talbert Jones have knowingly, intentionally, and wrongfully used the documents and information provided to them by ValTech's members to contact numerous COI customers and provide the customers with incorrect and false and misleading information and, thereafter, requested that COI customers switch their service to ValTech.

Further, COI alleges that, as a direct and proximate result of the dissemination of false and misleading information to COI customers about COI by ValTech, through ValTech's agents, and through Doug Miller, William (Bill) Cody, Darren Boatwright, Miriam Noble, and Talbert Jones, individually, COI has lost numerous customers to ValTech and is suffering ongoing monetary damages.

Last, COI requests that the Commission order: (1) ValTech to pay compensatory damages, in an amount equal to all charges paid by slammed subscribers who previously selected COI as their local exchange carrier; (2) ValTech to cease and desist all efforts to obtain subscribers using methods that do not comply with Local Service Guidelines, Appendix A, Section XVII(C); (3) reasonable attorney fees, interest, and costs; and (4) any and all other relief to which COI may be entitled.

In its Initial Brief, COI seeks a Commission finding that ValTech violated Section 4905.72, Revised Code, and Rule 4901:1-5-08, O.A.C., when ValTech "slammed 259 of COI's customers, thereby stealing 887 lines." COI also requests that it be awarded:

(1) $14,000 for the money it spent on newspaper, radio, and billboard advertisements to rehabilitate its reputation, plus statutory interest;

(2) $34,603.18 for the monthly revenues that it did not earn as a result of its sales promotions (1st and/or 13th month free) to win back 51 of the customers that ValTech slammed, plus statutory interest;

(3) Reasonable attorney fees, costs, and expense it incurred bringing the instant action; and

(4) Any other relief deemed necessary and just by the Commission.

Last, COI requests that the Commission require ValTech to undertake the necessary corrective actions. (COI Initial Br. at 14-15.)

As discussed previously under Section II. Applicable Law, Rule 4901:1-5-08, O.A.C., replaced the earlier slamming language in the Local Service Guidelines at Section XVII.C, and also incorporated revisions triggered by changes in federal slamming policy and Ohio Sub. H.B. 177. Accordingly, the Commission will analyze the allegations in COI's amended complaint using the applicable statutes and rules in effect at the time of the alleged events.

C. Whether the marketing practices used by ValTech to switch COI customers to ValTech violated MTSS Rule 4901:1-5-07, O.A.C.?

At hearing, the testimony presented by COI and ValTech witnesses included discussion of the status of COI's petition for Chapter 11 bankruptcy; the sale of COI services by the sales agents of "Two Minutes to Save"; the subsequent creation of ValTech; and the sale of ValTech services by ValTech's sales agents to COI customers.

COI's Bankruptcy

Throughout this case, ValTech contended that its agents did nothing wrong in discussing whether COI filed for bankruptcy, as this was an actual fact. COI asserted that its Chapter 11 bankruptcy reorganization was completed and should not have been discussed by ValTech's agents with COI's customers. Testimony was presented at hearing by COI and ValTech witnesses concerning whether COI's bankruptcy case was still pending at the time of the events in question. On cross-examination, ValTech president Thomas Duckworth testified that, at some point in 2003, he purchased the majority of COI's debt in the pending bankruptcy case for approximately $750,000. (Tr. II, 6-7.) Mr. Duckworth also testified that his initial plan was to have the COI employees still manage the company, but that plan changed because there was a falling out between himself and Mr. Vogelmeier, COI's president. Mr. Duckworth accused Mr. Vogelmeier of conspiring with Mr. Halliday (one of COI's investors) to try to cheat him out of his creditor position, and stated that he fought Mr. Vogelmeier in more than a year long Bankruptcy court battle. (Tr. II, 8-12; and 111-112.) In response to questions concerning the amount that Mr. Duckworth was paid to be removed from his majority credit holder position, Mr. Duckworth testified that he received around $1.4 million, which included $200,000 spent for a switch, and $300,000 in legal fees to defend his creditor position. (Tr. II, 13.) On direct examination, when questioned about his understanding of why a company would file a Chapter 11 bankruptcy, Mr. Duckworth testified that, in COI's case, there would be a

plan to reduce or eliminate debt so that COI could continue doing business and be a functional entity in the long run. He also testified that the bankruptcy court adopted his reorganization plan. (Tr. II, 44-45.)

Stephen Vogelmeier, COI president, testified that COI's bankruptcy case was filed August 23, 2000. Mr. Vogelmeier further testified that Mr. Duckworth was the major credit holder from August or September 2002 until December 1, 2003. In response to questions concerning when the bankruptcy ended, Mr. Vogelmeier replied that consummation of the bankruptcy and final itemization of the plan was December 1, 2003, when a check was given to Mr. Duckworth. (Tr. II, 110-111.)

On the other hand, ValTech also offered Exhibit 18, which had a different view of whether COI was in bankruptcy during the events in question. A review of ValTech Ex. 18 indicates that it includes the following pertinent documents: (1) pages 1, 27, and 28 of a 28-page bankruptcy case history, and (2) an order dated August 23, 2004, and titled, "Agreed Order Approving Application for Final Report and Decree and Closing Case." A review of the bankruptcy case history, or case docket, indicates the following docket activities: COI filed a voluntary Chapter 11 bankruptcy petition on August 29, 2000 (Ex. 18, at "1 of 28"); the bankruptcy court confirmed COI's bankruptcy plan on November 18, 2003 (*id.*); the bankruptcy court issued a final decree on August 4, 2004; and the bankruptcy case closed on April 8, 2005 (Ex. 18, at "27 of 28"). A review of the August 23, 2004 Bankruptcy court agreed order indicates that COI filed its petition for a final order and decree to close the bankruptcy case on or about March 18, 2004, and that it granted COI's request to be effective July 31, 2004.

Based on the evidence presented above, the Commission finds that COI's bankruptcy case was still pending during the events in question. We note that a Chapter 11 reorganization plan would include date(s) for final payment(s) to all of the secured creditors, such as the $1.4 million payment to Mr. Duckworth. We understand why COI believed that, for all practical purposes, the bankruptcy case was over once the court had approved its reorganization plan on November 18, 2003, and COI made the payment to Mr. Duckworth on December 1, 2003. We note, however, that the real issue is not whether COI's bankruptcy case was completed, but the manner in which COI's pending bankruptcy was presented to the public.

COI Business Customer Testimony

Next, we note that MTSS Rule 4901:1-5-07, O.A.C., was adopted to provide consumer safeguards and that this rule applies to all local exchange carriers operating in the state of Ohio. Specifically, Rule 4905:1-5-07(A), O.A.C., provides that "No telecommunications service provider shall commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction." At hearing, six business customer witnesses testified concerning five businesses:

Automotive Supplies, Inc.

Harold Tomes, general manager of Automotive Supplies, Inc., testified that he was a Sprint customer and switched to COI after Bill Cody (as an agent for COI) explained how he could save on the costs of his telephone service. In response to questions about his second contact with William Cody (Bill Cody), in March 2004 now as an agent for ValTech, Mr. Tomes testified that Mr. Cody explained that Communication Options was going to be in bankruptcy and ValTech was going to be the new company coming out of that bankruptcy. (Tr. I, 30.) Mr. Tomes stated that it was his understanding, after speaking with Mr. Cody, that ValTech was going to purchase COI out of the bankruptcy. (Tr. I, 44.) Mr. Tomes testified it was his understanding that, if he wanted to keep his telephone service, ValTech would be the company he would be dealing with. (Tr. I, 30 and 46.) Mr. Tomes also testified that when he had questions about his ValTech bill, he spoke to COI (in approximately April or May 2004) and was told that COI was not in bankruptcy. (Tr. I, 32 and 50.) Mr. Tomes further testified he was disappointed that Mr. Cody lied to him. Mr. Tomes stated that he was able to switch his service back to COI. (Tr. I, 33.) Mr. Tomes confirmed that his signature was on the ValTech LOA and the ValTech Application. (Tr. I, 33; COI Ex. 2, at 1-2.) On cross-examination, Mr. Tomes stated that he did not read the Letter of Authorization or the Application. He testified that he signed this contract believing COI would no longer be available to provide telephone service for his company. (Tr. I, 34-37 and 46.) Last, Mr. Tomes testified that he was signing for telephone service for three stores, and that he had been the person who previously decided on Sprint and then COI for those stores. On redirect, Mr. Tomes stated that had Mr. Cody not talked to him about the change to ValTech, he would not have called and checked out other companies to make a switch at that point. (Tr. I, 55-56.)

Shearer Equipment

Ivan Maibach testified that Shearer Equipment has two locations: Mansfield and Wooster. He testified that their telephone service was with ALLTEL prior to COI. When asked if he knew Doug Miller prior to March of 2004, Mr. Maibach testified that Doug Miller was the person who talked him into switching from ALLTEL to COI. (Tr. I, 81-82, and 91.) Mr. Maibach stated that he was led to believe that Doug Miller was the president of COI when Mr. Miller first approached them (to switch from ALLTEL to COI.) (Tr. I, 83-84, and 88.) Concerning the March 2004 interaction with Doug Miller, Mr. Maibach testified that Mr. Miller told him that Mr. Miller had had a confrontation with some of the people at COI, and he had a lawsuit against them for some kind of payment of wages. (Tr. I, 83, 89, and 95.) Mr. Maibach further testified that Mr. Miller stated he was taking on a new company called ValTech, which was his own company. Mr. Maibach stated that Mr. Miller told him that Mr. Miller had parted ways with COI and now owned ValTech. Mr. Maibach testifed that he was led to believe that Doug Miller was the owner, just as he was with COI. (Tr. I, 83-84, 86, 88-89, and 93.) Mr. Maibach stated that he was totally confused about the situation and that he did not have a whole lot of time in his business to play with phones. (Tr. I, 84 and 93.) Mr. Maibach testified that the information provided

by Mr. Miller, concerning the lawsuit between COI and Mr. Miller, made Mr. Maibach distrust COI. (Tr. I, 83, 86, and 97.) Mr. Maibach also stated that, "trusting Doug," they stayed with Doug Miller and made the switch to ValTech. (Tr. I, 84, 86, 93, 95, and 97.) Mr. Maibach confirmed that his signature was on the ValTech LOA and the ValTech Application. (Tr. I, 84; COI Ex. 5, at 1-2.) Mr. Maibach also testified that Shearer Equipment is now using Sprint as its telephone service provider. (Tr. I, 84, 87, 95.) When asked why Shearer Equipment switched from ValTech to Sprint, he responded that it was due to distrust of both companies [ValTech and COI]. (Tr. I, 84, 87.) Mr. Maibach also testified that, in March 2004, Shearer Equipment was not looking to change its telephone provider. (Tr. I, 94.)

Pro Auto Body, Inc.

Skip Correll testified that he is the president and owner of Pro Auto Body, Inc., in Mansfield, and that his business has three phone lines, and a dedicated line each for fax and for credit card use. (Tr. I, 100-101.) Mr. Correll testified that he was contacted by Darren Boatwright (whom he knew as a former Pro Auto Body customer) and a supervisor for ValTech. Mr. Boatwright said that COI was going bankrupt and represented that ValTech was taking over, and that we would need to sign with them to avoid any break in service. (Tr. I, 102.) On cross-examination, Mr. Correll testified that he did not remember whether he was told that ValTech was taking over COI's customers or that they were merging. He stated that he did not know what the difference was between the act of taking over versus companies merging. (Tr. I, 109-110.) Mr. Correll testified that he did remember being told that COI was going bankrupt. (Tr. I, 110.) Mr. Correll also stated he was told that ValTech was taking over COI's service, so they would not have any interruption in service. Mr. Correll further testified that they (Mr. Boatwright and his ValTech supervisor) told him that some of the people he had dealt with at COI were coming with them from COI to ValTech, including Bill Cody whom he believed originally signed Pro Auto Body for COI. (Tr. I, 111-112.) In response to questions whether he would have made a switch in service providers if Mr. Boatwright had not come in to his business, Mr. Correll responded that he would not have. (Tr. I, 103, 114.) When asked what he thought would happen if he did not sign the forms that were brought by ValTech, Mr. Correll responded that he believed they would not have a telephone provider. (Tr. I, 114.) Mr. Correll testified that at some later time, they received some information from COI stating that COI was not in bankruptcy and that COI was not going out of business. (Tr. I, 106-107.) Mr. Correll also testified that Pro Auto Body switched back to COI. (Tr. I, 106.)

Peggy Correll testified that she is the vice president of Pro Auto Body and takes care of all the books and payroll. Mrs. Correll confirmed that her signature was on the ValTech LOA and the ValTech Application. Ms. Correll also testified that she signed the forms in response to information from her husband, who had spoken to Mr. Boatwright. When questioned whether they were looking to change who provided their telephone service in March 2004, she stated that they were not. (Tr. I, 116-120; COI Ex. 6, at 1-2.)

Grand Slam Sports & Collectibles

Kelley Ward testified that her boyfriend Troy Jarrett is the owner of Grand Slam Sports & Collectibles. Ms. Ward testified that she is not a paid employee, but would help out in the Mansfield store when asked, until he had a full-time employee for his other store in Sandusky. (Tr. II, 51-53.) Ms. Ward stated that Doug Miller switched the store's telephone service to COI for Troy Jarrett. (Tr. I, 53.) Concerning the March 2004 interaction with Doug Miller, Ms. Ward testified that Mr. Miller showed her a paper and explained that COI was having a lot of trouble with customers complaining that they were not getting the services that they had ordered. Mr. Miller explained that this form was to show that Grand Slam Sports was getting everything that it was paying for. Ms. Ward testified that she remembered the ValTech Application (COI Ex. 2, at 2) and confirmed her signatures on both forms. (Tr. II, 54-56; COI Ex. 2, 1-2.) Ms. Ward also testified that she would never have signed something that said we were changing phone services because the service is not in her name and she did not have authority to sign to switch any kind of utility service. (Tr. II, 56.) On cross-examination, Ms. Ward testified that she would have signed just for what she believed the paper was for. Ms. Ward stated that she did not think there was any harm in signing the form because Mr. Miller was just there to make sure that they were getting all of their services with COI. (Tr. II, 65.) Further, Ms. Ward testified that she did not remember seeing the words "converting" and "first month free" [on the LOA in COI Ex. 2, at 1] because she would have known that she was signing to switch; and Mr. Miller knew that she could not switch service providers. *(Id.)* Ms. Ward testified that Troy Jarrett was not looking to change telephone service providers. She also testified that they had no idea that the phone system had been switched until several weeks later when the store had no long distance, no caller ID, or call waiting. (Tr. II, 56.) Ms. Ward further testified that Troy Jarrett called COI and that is when they were notified that everything was switched. Ms. Ward also testified that Mr. Jarrett made the arrangements to have the telephone service switched back to COI. (Tr. II, 56-60.)

ValTech witness Doug Miller testified that he was the "phone guy" for Kelley Ward, and, by way of example, when she had cellular problems she would call him. He further testified that he could not recall meeting Troy Jarrett, the owner, and denied being told that she did not have authority to sign for a switch of service to ValTech. (Tr. II 192-196.)

Webb's Automotive

Cornell Webb testified that he is the owner of Webb's Automotive and that he was approached by Darren Boatwright, who was one of Mr. Webb's customers. Mr. Webb testified that he understood, from talking with Mr. Boatwright, that COI was going out of business "or for whatever reason" that he did not have a choice; he had to switch over to ValTech. (Tr. I, 57-59.) Mr. Webb also testified that he signed the ValTech LOA based on the information that Mr. Boatwright gave him. (Tr. I, 59-60; COI Ex. 3, at 1.) Mr. Webb further testified that he did not know that he could have stayed with COI. (Tr. I, 61.)

Mr. Webb testified that he absolutely hates switching services, so in March 2004, he was not looking to switch telephone providers. (Tr. I, 62.) Mr. Webb testified that he was pretty upset when he learned that COI was still in business. He also testified that, even though he was angry, he chose to stay with ValTech because that is how much he hates to switch providers. (Tr. I, 62.) On cross-examination, Mr. Webb testified that he did not remember the specifics of what Mr. Boatwright said to him to make him believe that COI was becoming ValTech. Mr. Webb also testified that he contacted Darren Boatwright because he wanted to know from him what had happened. He stated that Darren Boatwright tried to deny telling him that COI was selling out or that they were switching over to ValTech. (Tr. I, 73.) Mr. Webb testified that the whole process of switching him was not proper. (*Id.*) Mr. Webb also testified that, while he did not purchase COI from Darren Boatwright, Mr. Boatwright had let him know that he was with COI. When Darren Boatwright approached him, Mr. Webb thought he was a COI representative making him switch since Mr. Boatwright was now with ValTech. (Tr. I, 76.) Mr. Webb stated that he was led to believe that he had to switch to ValTech, or he would not have done it. (Tr. I, 64-65.) When questioned concerning his understanding of what would happen if he did not switch to ValTech, Mr. Webb stated that his understanding was that he had to find somebody to switch to or he would lose his phone service. (Tr. I. 77.)

Sale of COI Services Through "Two Minutes to Save"

COI witness Mr. Vogelmeier testified that COI had a sales agreement with Doug Miller. (Tr. II, 108.) Doug Miller testified that he was the president of "Two Minutes to Save" and confirmed that his company had a sales agreement with COI. Mr. Miller also testified that he worked through Two Minutes to Save as an independent agent for COI. (Tr. II, 160.) Mr. Miller testified that "Communications Options" was on the door of the Two Minutes to Save office in Mansfield, and "Local Telephone Service Company" was on both windows. He further testified that COI provided his company with shirts, hats, jackets, and clip art for stationery and business cards, to carry out Two Minutes to Save's role as COI's agent. (Tr. II, 162-163.)

Mr. Vogelmeier testified that he met with Doug Miller in January 2004 and that Mr. Miller was concerned that he would not get paid his commission going forward. Mr. Vogelmeier could not remember what Mr. Miller told him, but guessed that Mr. Miller said that he really did not want to be in the telecom business. Mr. Vogelmeier stated that he reminded Mr. Miller of their agreement: "I said as long as he didn't touch the customers, he would get paid, and he did get paid through April." Mr. Vogelmeier further testified that, in March/April 2004, COI received LOAs sent by people with whom Doug Miller had spoken. These LOAs were for ValTech, with Doug Miller's name on the LOAs, while Mr. Miller was still being paid by COI. (Tr. II, 118-119.)

Mr. Miller further testified that he had an ongoing dispute with COI about whether they were paying him properly. (Tr. II, 164-165.) Mr. Miller stated he sent a letter to COI saying that if COI would pay Two Minutes to Save the commissions that it owed Two

getting paid, then he is going to contact those customers and go over to another company and switch them over. (Tr. II, 220.)

Commission Discussion:

The Commission concludes that ValTech's actions were unfair, deceptive, and unconscionable in violation of Rule 4905:1-5-07, O.A.C. First, the Commission disagrees with ValTech's argument that its agents did nothing wrong by mentioning that COI was in bankruptcy. It is true that any statement regarding COI being in bankruptcy at the time of the switches was an accurate fact. However, the testimony of record demonstrated that when COI's bankruptcy status was discussed, the information concerning COI's bankruptcy case was used by ValTech's agents in a manner that implied COI would no longer be able to serve its customers; therefore, the customers were led to believe that they needed to switch. We find this implication was easy to put forth, because, in most cases, the person making the implication was known to the customer as their (former) COI sales agent, who was now selling for ValTech. The Commission finds that it is clear from the testimony of record that ValTech's sales agents used multiple tactics designed to mislead, or at best confuse, these COI customers into thinking that the customer had to sign ValTech's LOA in order to maintain service. We also note that any discussion of Doug Miller's "falling out" with COI aggravated the situation, as this discussion negatively impacted the customer's view of COI, particularly in light of the other misrepresentations described in the record. We find the above actions by ValTech's sales agents to be egregious and in violation of Rule 4901:1-5-07, O.A.C. As each of these small business customers testified, they are concerned about running their businesses and expect their telephone services to work in order to run those businesses. The record demonstrates that none of these business customers were looking to switch telephone providers when they were approached by a ValTech sales agent. Rather, they only switched service to ValTech in order to ensure their telephone service continued uninterrupted. While ValTech insists that its agents only discussed price and service (Tr. II, 91-100; Tr. II, 163- 167; Tr. II, 170-185; Tr. II, 190-193; Tr. III, 124-126; Tr. III, 129-131), most customer testimony indicates otherwise. Accordingly, and based on the record in this proceeding, we find that, for the five business customers identified in this section, ValTech's agents' actions were in violation of MTSS Rule 4901:1-5-07, O.A.C.

D. Whether the marketing practices used by ValTech to switch COI customers to ValTech violated MTSS Rule 4901:1-5-08, O.A.C.?

In its July 27, 2004 answer, ValTech provided signed letters of authorization identified as Exhibits 1 through 13 in support of its assertion that ValTech "has complied with all applicable state and federal requirements for submitting and verifying changes on behalf of subscribers in the subscribers' selection of a telecommunications provider." (ValTech Answer at 7-8.) ValTech argues that no violation of the Commission's slamming rule has occurred because ValTech has produced signed authorizations from COI customers. COI, on the other hand, maintains that merely providing the Commission with

a letter of authority bearing the customer's signature is not enough. (COI Initial Br. at 14.) COI urges the Commission to look beyond the form to determine that the customer has authorized the change through a reasoned decision, not based upon fraud. (COI's Surreply to ValTech's Reply at 3.) COI points out that ValTech's logic would allow any telecommunications provider to avoid liability under Section 4905.72, Revised Code, and the remedies there under, simply by producing a signed authorization form.

Commission Discussion:

The Commission notes that the FCC provides that, in accordance with 47 C.F.R. § 64.1150(d), this Commission has the authority to determine whether an unauthorized change has occurred, as defined by 47 C.F.R. § 64.1100(e). We agree with COI that public policy demands that the Commission not only must look at the form of the LOA itself, but also scrutinize the manner in which the ValTech LOA's were obtained. If LOA's are obtained through lies, manipulation, and duress, the Commission believes that this does not constitute verified consent, and slamming has occurred. To make this determination, we will use the evidence provided by the subscriber and any proof of authorization offered by the carrier.

As we concluded above, it is clear from the evidence of record that ValTech's sales agents used multiple tactics designed to mislead, or at best confuse, those COI customers into thinking that the customer had to sign ValTech's LOA in order to maintain service. The tactics included: advising the customer that COI is in bankruptcy, with the inference being that COI was going out of business; advising the customer that ValTech was purchasing COI; discussing pending lawsuits with the customer to create distrust concerning COI as a provider; and asking the customer to sign forms verifying existing COI services. The record demonstrates that each person signed the relevant LOA based on representations made to them by the ValTech agent making the customer contact, and based on a belief that action was needed to ensure that uninterrupted telephone service was maintained. Based on the evidence of record in this proceeding and pursuant to authority granted by 47 C.F.R. § 64.1150, we conclude that ValTech failed to provide clear and convincing evidence of valid authorized carrier changes for the above customers. Accordingly, we find that ValTech submitted unauthorized change requests, in violation of Rule 4901:1-5-08, O.A.C., and Section 4905.72(B), Revised Code, for the five business subscribers identified in the following COI Exhibits: COI Ex. 1 (Grand Slam Sports & Collectibles); COI Ex. 2 (Automotive Supplies, Inc., identified as "Automotive Supply NAPA," in Danville); COI Ex. 3 (Webb's Automotive); COI Ex. 5 (Shearer Equipment); COI Ex. 6 (Pro Auto Body, Inc.).

E. Whether ValTech's Letter of Agency (LOA) fails to comply with the applicable rules for changes in the subscriber's selection of a telecommunications provider?

In this section, we will address whether ValTech's LOA complied with the applicable rules, both in form and content.

ValTech Letter of Agency – form and content under 47 C.F.R. § 64.1130

First, we analyze whether the signed letters of authority submitted by ValTech meet the requirements of 47 C.F.R. § 64.1130. Through 47 C.F.R. § 64.1130, the FCC defined the form and minimum content that must be in the letter of agency (LOA) used by a telecommunications carrier to obtain authorization for and verification of a subscriber's request to change his or her preferred telecommunications carrier selection. Section 64.1130(a) provides that: "A letter of verification that does not conform [to] this section is invalid for purposes of this part [47 C.F.R. Part 64]." (Emphasis added.) The FCC also defines the term "subscriber" as any one of the following: (1) the party identified in the account records of a common carrier as responsible for payment of the telephone bill; (2) any adult authorized by such party to change telecommunications services or to charge services to the account; or (3) any person contractually or otherwise lawfully authorized to represent such party. (47 C.F.R. §64.1100[h].)

At hearing, COI presented the testimony of six business customer witnesses and the five corresponding ValTech letters of authority: COI Ex. 1, at 1 – Kelley Ward; COI Ex. 2, at 1 – Harold Tomes; COI Ex. 3, at 1 – Cornell Webb (Webb's Automotive); COI Ex. 5, at 1 – Ivan Maibach; COI Ex. 6, at 1– Skip Correll and Peggy Correll, (Pro Auto Body, Inc.). Based on a review of the evidence presented, the Commission finds that ValTech's LOA fails to comply with 47 C.F.R. § 64.1130 for the following reasons:

§ 64.1130(b)

As noted previously, under Section II. Applicable Law, 47 C.F.R. § 64.1130(b) requires that the letter of agency "shall be a separate document . . . containing only the authorizing language" described in § 64.1130(e), and "must be signed and dated by the subscriber to the telephone line(s) requesting the preferred carrier change." (Emphasis added.) As such, we determine that the letter of agency must be an all inclusive document clearly establishing the customer's intention to switch telephone providers. However, the evidence of record demonstrates that ValTech's letter of agency is not all inclusive as it states that the "Customer's name and address for the above services are listed on the attached page titled 'Application For Communication Services'." (Emphasis added.) (*See* COI Exs. 1, 2, 3, 5, and 6, each at 1, "Letter Of Authorization".) A review of the information on ValTech's document titled "Application For Communication Services" (ValTech Application), indicates that this page is a service order form or a service agreement which must read in concert with the ValTech LOA (*See* COI Exs. 1, 2, 3, 5, and 6,

each at 2, "Application For Communication Services.") As such, we find that ValTech's "Letter Of Authorization" (ValTech LOA) does not comply with § 64.1130(b).

Further, a review of COI Ex. 2, at page 1, indicates that this letter of authority was not dated by one of the subscribers, as required by § 64.1130(b). In the two areas set forth above, we find that ValTech's LOA fails to meet the requirements of § 64.1130(b). The content of ValTech's LOA will be addressed in the following section.

§ 64.1130(e)

Next, Section 64.1130(e) requires, at a minimum, that the letter of authority must contain clear and unambiguous language that confirms the information identified in § 64.1130(e)(1) through (e)(5), as noted above, in Section II. Applicable Law. Based on a review of the evidence presented in this case, we find that ValTech's LOA violates 47 C.F.R. § 1130(e), for the following reasons:

First, the ValTech LOA does not satisfy the requirements of § 64.1130(e)(1), which states that the letter of authority must include the "subscriber's billing name and address and each telephone number to be covered by the preferred carrier change order." The ValTech LOAs identified, as page 1, of COI Exs. 1, 2, 3, 5 and 6, do not contain the subscriber's billing address. ValTech's LOA only provides spaces for a "Customer's Signature," "Customer's Printed Name," and "Business Name," and "Applicable Telephone Numbers." As we noted above, the ValTech LOA states that the "Customer's name and address for the above services are listed on the attached page titled 'Application For Communication Services'." Accordingly, we direct ValTech to include the customer's name and address on the LOA and to delete the above reference to its "Application for Communication Services."

Second, we note that ValTech's LOA also provides that the:

> Undersigned represents that he/she has the authority to order changes in the services listed above, which may include Local Telephone, Long Distance, and Toll Free Service. All orders are subject to credit approval. Customer authorizes ValTech Communications to obtain a credit report from any credit reporting agency.

(*See* COI Exs. 1, 2, 3, 5, and 6, each at 1.) We find that the above language does not fully comply with the authorizing language requirements identified in § 64.1130(e), for the following reasons. The first sentence above does not include the term: subscriber. We direct ValTech to modify the first sentence to read: The undersigned represents that he/she is the subscriber and has the authority to order changes in the services listed above, which may include Local Telephone, Long Distance, and Toll Free Service. Next, we find that the second and third sentences noted above are beyond the scope of information permitted by § 64.1130(b) to be included in the LOA. Further, only the

authorizing language described in § 64.1130(e) may be included in the LOA. We direct ValTech to delete the second and third sentences above regarding credit approval from its LOA. We note that the language to be deleted may be more appropriately included in ValTech's Application.

Third, a review of COI Ex. 1, at 1, indicates that this ValTech LOA was signed by "Kelley Ward" and that the other customer and business information was not completed. (Other information items on the form were also not completed.) As discussed earlier, COI witness Kelley Ward testified that she was not a paid employee of Grand Slam Sports & Collectibles, but would help her boyfriend, Troy Jarrett, the owner of the store, when asked. Ms. Ward also testified that she was not authorized to make changes in telecommunications. (Tr. II, 51-53, 59-62.) Ms. Ward testified that she would have signed just for what she believed the paper was for. Ms. Ward stated that she did not think there was any harm in signing the form because Mr. Miller was just there to make sure that they were getting all of their services with COI. (Tr. II, 65.) Based on this testimony, the actual subscriber billing name is also missing from the ValTech LOA purportedly for Grand Slam Sports & Collectibles.

Fourth, a review of COI Ex. 2, at 1 and Ex. 5, at 1, indicates that there is no space provided for the "Business Name," as on the other ValTech LOAs. Therefore, the subscriber billing name also is missing on the ValTech LOAs purportedly for Automotive Supplies, Inc., and Shearer Equipment.

Last, the ValTech LOA violates the requirements of § 64.1130(e)(5), under which the letter of authority must state: "[t]hat the subscriber may consult with the carrier as to whether a fee will apply to the change in the subscriber's preferred carrier." This information is missing from each of the ValTech LOAs. (*See* page 1 of COI Exs. 1-3, & 5-6.) In the five areas set forth above, we find that ValTech's LOA fails to meet the requirements of §64.1130(b).

<u>§ 64.1130(j)</u>

Section 64.1130(j) provides, in pertinent part, that: "[a] telecommunications carrier shall submit a preferred carrier change order on behalf of a subscriber within no more than 60 days of obtaining a written or electronically signed letter of agency." In the case of COI Ex. 1, at 1, the ValTech LOA for Grand Slam Sports & Collectibles was signed on March 30, 2004. At hearing, ValTech witness Mark Cochenour stated that the service for Grand Slam Sports & Collectibles was converted to ValTech within a week or two of the welcome letter, which is dated July 8, 2004. (ValTech Ex. 8; Tr. III, 46-48.) Mr. Cochenour testified that the time lapse was due to ValTech waiting to receive a copy of the customer's COI bill from the customer. Mr. Cochenour stated that when ValTech "finally got a copy of the bill, then I believe we transferred that over." (Tr. III, 47.) Mr. Cochenour testified that his current position with ValTech is vice president of technical operations. (Tr. III, 41.) When questioned, on cross-examination, why he did not direct someone to call the customer and

request a copy of the bill, or why he did not do so, Mr. Cochenour replied that he did not know; he was in charge of the IT stuff. (Tr. III, 85-86.) Based on the record in this proceeding, we find that Mr. Cochenour did not have direct, personal knowledge of what may or may not have occurred with this particular customer. Therefore, in the case of Grand Slam Sports & Collectibles, we find that ValTech violated 47 C.F.R. § 64.1130(j). Accordingly, based on the findings set forth above for §§ 64.1130(b), (e), and (j), we conclude that ValTech's LOA violates the requirements of 47 C.F.R. § 64.1130.

Commission Discussion:

Based on the evidence, the Commission concludes that ValTech's LOA failed to comply with 47 C.F.R. § 64.1130. Under the FCC rules, if the LOA does not conform to § 64.1130, then it is invalid for the purpose of serving as verification of the subscriber's authorization of a change in telecommunications providers. As noted previously, under Section II. Applicable Law, the requirement for telecommunications providers to follow the FCC verification procedures was incorporated into MTSS Rule 4905:1-5-08(D), O.A.C. Therefore, this same LOA violates the requirements of Rule 4901:1-5-08(A), O.A.C., in contravention of Section 4905.72, Revised Code.

IV. REFERRAL TO COMMISSION STAFF

The Commission is concerned that the record in this case, which identifies the manner in which the LOAs were obtained, demonstrates inconsistencies in regulatory compliance by ValTech. Even though the complaint raised no allegations concerning other potential rule violations, the Commission believes that ValTech's actions require clarification of the conduct and compliance expected by the Commission. In addition, the Commission is concerned by COI's limited knowledge concerning the current rules. Therefore, we direct Staff to work with both ValTech and COI to ensure the companies understand their responsibilities under the MTSS rules including the LOA, the welcome letter, and the referral of subscribers to the Commission when they are informed of an unauthorized carrier change.

V. REMEDIES, PENALTIES AND FORFEITURES

Section 4905.73(A), Revised Code, states that the Commission has jurisdiction under Section 4905.26, Revised Code, regarding any violation of Section 4905.72(B), Revised Code, by a public utility. Accordingly, the Commission will discuss the appropriate remedies, penalties, and/or forfeitures, based on the findings in this proceeding.

First, we note that none of the five business customers requested the Commission to provide any of the consumer remedies available under Section 4905.73, Revised Code, during their testimony as witnesses called on behalf of COI. Accordingly, this Order does not address any individual consumer remedies under Section 4905.73(B), Revised Code, in this case.

Section 4905.73(C)(2), Revised Code

As noted previously, Section 4905.73(C)(2), Revised Code, requires the public utility to compensate the service provider or providers from which the aggrieved consumer was switched in the amount of all charges the consumer would have paid that particular service provider for the same or comparable service had the violation or failure to comply not occurred.

At hearing, COI testified that prior to the actions of ValTech's agents, its normal loss notification, from customers changing to other carriers, was relatively low, from "half a percent to 7/10 of a percent per month." (Tr. II, 120-121.) Mr. Vogelmeier testified to the loss rates presented in COI Exhibit 26, which increased to 2 percent by May 2004 and to 3 percent around July 2004. Mr. Vogelmeier indicated that COI's customer losses did not return to its normal rate until the end of 2004. (Tr. II, 123-124.) Mr. Vogelmeier testified that he believed that the increase in customers leaving COI was caused by ValTech's actions. (*Id.*, 124.) He further testified that COI was able to win back 51 customers, of the 259 customers and 887 lines, which were lost to ValTech as of July 2004. (Tr. II, 134-135, 150-151.) Mr. Vogelmeier also testified that the net loss of 208 customers was from a base of 4300 COI customers. (Tr. II, 151-153.) Perry Moody, COI controller, testified concerning the revenues COI lost by offering the 1st month and 13th month free to win back 51 of COI's lost customers. Mr. Moody testified that the total revenue lost through this promotion was $34,603.18. (Tr. III, 11-13; COI Ex. 28.) While the above evidence demonstrates a significant customer loss, we find that COI failed to present any testimony concerning the alleged slamming of the 51 customers which COI won back. Furthermore, COI failed to present any specific evidence to support an award under Section 4905.73 (C)(2), Revised Code, concerning the monthly charges that the slammed customers would have paid to COI for the same or comparable service had the switch to ValTech not occurred. The Commission also notes that COI presented no evidence concerning whether any of the 5 business customers, who testified in this proceeding, were actually included in the 51 customers who returned from ValTech during its sales promotion. Instead, COI is seeking the total revenues lost for these 51 customers, who may or may not have been slammed. Based on the record in this proceeding, and in accordance with Section 4905.73(C)(2), Revised Code, we find it appropriate to afford COI the opportunity to present documentation pertaining to the lost revenues for the customers who testified in this proceeding. Therefore, COI should present documentation for the monthly revenues lost during the interval that Grand Slam Sports & Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc., were switched to ValTech. COI shall file this documentation in this docket within 60 days of this Opinion and Order.

Also at hearing, ValTech witness Mark Cochenour provided testimony concerning the number of COI customers that switched to ValTech. (Tr. III, 52-55.) We note that, based on ValTech's testimony, the total number of COI customers transferred to ValTech between March 2004 and December 2004 is 385 customers (Tr. III, 53-55, ValTech Initial Br.

at 8.) Based on the evidence in these proceedings, the Commission is concerned that other subscribers may have been slammed and may be entitled to remedies under the Commission's rules. Therefore, ValTech shall publish the following notice one time, at its own expense, in a newspaper of general circulation in each county in the service area that serves the 385 customers, who were transferred from COI to ValTech during the period of March through December 2004:

LEGAL NOTICE

> This notice applies to all customers of Communication Options, Inc., (COI) from March 2004 through December 2004, and who were switched to ValTech Communications, LLC (ValTech) during this time. If you believe that you may have been improperly switched to ValTech from COI, you may call the Public Utilities Commission of Ohio (PUCO) toll free at 1-800-686-7826 or for TDD/TTY at 1-800-686-1570 from 8:00 a.m. to 5:30 a.m. weekdays, or visit www.PUCO.ohio.gov.

Accordingly, we direct Staff to follow the informal complaint procedures to investigate any customer slamming complaints received in response to publication of the above legal notice.

Section 4905.73(C)(3), Revised Code

As noted previously, Section 4905.73(C)(3), Revised Code, provides that the Commission may require the public utility to compensate the service provider or providers from which the aggrieved consumer was switched for any costs that the particular service provider incurs as a result of making the consumer whole as provided in Section 4905.73(B)(4) or of effecting the resumption of the consumer's service.

Based on a review of the evidence presented, we find that COI failed to present any specific evidence concerning the costs that it incurred as a result of making the slammed consumers whole as provided in Section 4905.73(B)(4), Revised Code, or in effecting the resumption of the consumer's service (e.g., the costs to reestablish service with COI). Accordingly, this Order does not address any remedies under Section 4905.73(C)(3), Revised Code.

COI Requests for Compensation

COI requests, among other things, that it be awarded $14,000 for the money it spent on newspaper, radio, and billboard advertisements to rehabilitate its reputation, plus statutory interest. (COI Initial Br. at 14-15; Tr. II, 230; 247; Tr. III, 8-11; COI Ex. 27.) The Commission notes that the specific remedies, penalties, and forfeitures provided under Section 4905.73, Revised Code, do not include the award of either compensatory or punitive damages; therefore, the $14,000 monetary award sought by COI is beyond the

scope of this Commission's jurisdiction. We further note that, based on the nature of the evidence presented in this matter, if we had jurisdiction for such awards, we would find it reasonable to make such awards.

The Commission notes, however, that it does have exclusive jurisdiction to make a determination as to whether a public utility has violated any specific statute or order of the Commission.[12] Accordingly, before a court of common pleas has jurisdiction to consider a claim seeking damages against a public utility for violation of a Commission rule or regulation, a specific public utility statute, or Commission order, there must be a finding by the Commission that such a violation has occurred.[13] As we found above, based on the record in this proceeding, ValTech's agents' actions were in violation of MTSS Rules 4901:1-5-07, O.A.C., and 4901:1-5-08, O.A.C. Further, as we found above, based on the record in this proceeding, ValTech's letter of authority failed to comply with Section 4905.72, Revised Code, and Rule 4901:1-5-08, O.A.C.; therefore, ValTech submitted unauthorized change requests for the following five COI business customers: Grand Slam Sports & Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc. Based on these findings, COI may now pursue the above requests for compensation in the appropriate court of common pleas.

Section 4905.73(C)(4), Revised Code

As noted previously, this section of the statute provides that the Commission may assess upon the public utility forfeitures of not more than one thousand dollars for each day of violation or failure to comply. If, however, the Commission finds that the public utility has engaged or is engaging in a pattern or practice of committing any such violations or failures to comply, the Commission may assess upon the public utility forfeitures of not more than five thousand dollars for each day of each violation or failure. Neither COI nor ValTech presented testimony concerning the number of days that ValTech violated MTSS Rule 4901:1-5-07, O.A.C., and/or Rule 4901:1-5-08, O.A.C., by its actions. We note that the COI customer witness testimony did not specify the number of days that each customer was served by ValTech, rather than COI. However, under the FCC rules, consumer remedies are based on the first 30 days. Thus, if we elected to use a base forfeiture of $1,000.00 per day, for an average of 30 days, for each of the 5 COI business customers who testified, the total forfeiture could be as high as $150,000.00. The Commission emphasizes that the fine for slamming should be large enough to deter the practice of slamming, not so small that a company would consider it a cost of doing business, yet not so large as to put a company at financial risk. Therefore, based on the record in this proceeding, and in accordance with Section 4905.73(C)(4), Revised Code, we find it more appropriate that ValTech shall pay a civil forfeiture in the total sum of

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12 *See, State ex. rel. Northern Ohio Tel. Co. v. Winter*, 23 Ohio St. 2d 6 (1970). *See also, Kazmaier Supermarket, Inc. v. Toledo Edison Company*, 61 Ohio St. 3d 147 (1991).

13 *See, Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191 (1976).

$25,000.00, which consists of $5,000.00 for each of the five violations, given the pattern of violations we found.

Further, in accordance with Section 4905.73(C)(4), Revised Code, ValTech shall pay this civil forfeiture of $25,000.00 within 90 days of this Opinion and Order. Payment should be made by certified check or money order to "Treasurer State of Ohio," and mailed to: Public Utilities Commission of Ohio, Attn: Fiscal Department, 180 East Broad Street, 13 Floor, Columbus, Ohio 43215-3793.

The Commission would also note that Section 4905.54, Revised Code, requires every public utility, or railroad, and every officer of a public utility, or railroad, to comply with every order, direction, and requirement of the Commission. This statute further provides that any public utility or railroad that fails to comply with any order, direction or requirement of the Commission, shall forfeit to the State not more than $10,000.00 for each such failure, with each day's continuance of the violation being considered a separate offense. While this Commission expects ValTech to comply with the directives in this case, ValTech is advised that a failure to do so may result in the assessment of such forfeiture penalties.

CONCLUSION:

The Commission notes that since the inception of local exchange service competition we have consistently set forth consumer safeguards, which include that no telecommunications provider shall use marketing practices that are unfair, deceptive, or unconscionable, before, during, or after a consumer transaction.[14] The Commission emphasizes that engaging in any of these unfair, deceptive, or unconscionable acts or practices constitutes unjust, unreasonable, and inadequate service under Section 4905.26, Revised Code. Moreover, the change of a subscriber's local exchange carrier without prior, verified authorization has also been consistently prohibited.[15]

Last, we emphasize that the consumer safeguards were also incorporated into the MTSS rules under Chapter 4901:1-5, O.A.C., because those safeguards continue to be important. Accordingly, should we encounter a local exchange provider abusing these rules, the Commission will exercise our right to investigate the matter, and will take appropriate action against those telecommunications service providers found in violation,

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14 95-845, Finding and Order, Appendix A, Local Service Guidelines, Section XVIII.B, at 70-72; Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.B at 85-87, issued November 7, 1996; and Entry on Rehearing, Appendix A, Local Service Guidelines, Section Guidelines, Section XVII.B, at 86-88, issued February 20, 1997.

15 *Id.*, 95-845, Finding and Order, Appendix A, Local Service Guidelines, Section XVIII.C, at 72-75; Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.C at 88-90, issued November 7, 1996; and Entry on Rehearing, Appendix A, Local Service Guidelines, Section XVII.C, at 88-91, issued February 20, 1997.

including rescinding the public utility's authority to provide public telecommunications within the state.

Finally, we note any other arguments that were raised by the parties, but not specifically addressed herein, are rejected.

FINDINGS OF FACT:

(1) The complaint in this case was filed on May 3, and amended on July 14, 2004, and alleged that 13 COI business customers were improperly converted to ValTech in a manner that resulted in those customers being slammed.

(2) COI and ValTech are public utilities as defined under Sections 4905.02 and 4905.03, Revised Code. Thus, COI and ValTech are subject to the jurisdiction of this Commission under the authority of Sections 4905.04 through 4905.06, Revised Code.

(3) COI is a competitive local exchange carrier (CLEC) that has been authorized by this Commission to provide basic local exchange service and interexchange telecommunications services in the State of Ohio.

(4) ValTech is a CLEC that has been authorized by this Commission to provide basic local exchange service and interexchange telecommunications services in the State of Ohio.

(5) A prehearing settlement conference was held in this matter on December 1, 2004. The parties were not able to resolve the issues in this case.

(6) On January 19, 2005, the attorney examiner issued an entry that denied ValTech's July 27, 2004 motion to dismiss the amended complaint. On January 24, 2005, ValTech filed a motion to certify an interlocutory appeal of the attorney examiner entry issued January 19, 2005. By entry issued March 25, 2005, the attorney examiner certified ValTech's interlocutory appeal.

(7) On March 3, 2005, ValTech filed a motion to compel responses to its second set of interrogatories and second request for production of documents, and a motion for suspension of the cutoff date for completion of discovery, and memorandum in support. On March 17, 2005, COI filed a memorandum contra ValTech's March 3, 2005 motion. By attorney examiner entry issued July 13, 2005, ValTech's motion to compel discovery was granted in part and denied in part. ValTech's motion for suspension of the discovery cutoff date was denied as being moot.

(8) By entry issued May 26, 2005, this case was set for hearing on August 22, 2005.

(9) On August 2, 2005, ValTech filed a motion to dismiss under Rule 4901-1-23(F)(4), O.A.C., and for the award of attorney fees, with a memorandum in support. On August 9, 2005, COI filed a memorandum contra ValTech's August 2, 2005 motion. ValTech filed a reply to the COI's memorandum contra on August 11, 2005.

(10) On August 10, 2005, ValTech filed a motion for leave to conduct additional discovery, for rescheduling of the hearing set to begin on August 22, 2005, with a request for an expedited ruling. On August 11, 2005, COI filed a memorandum contra ValTech's August 10, 2005 motion. By attorney examiner entry issued August 26, 2005, ValTech's August 2, 2005 motion to dismiss was held in abeyance, in accordance with Finding (3); ValTech's August 10, 2005 motion to conduct additional discovery was granted in accordance with Finding (4); and a revised case schedule was established that included a hearing scheduled to begin October 24, 2005.

(11) The evidentiary hearing in this matter was held on October 24, 25 and 26, 2005. COI presented the testimony of eleven witnesses and ValTech presented the testimony of four witnesses. No witness testimony was presented concerning the alleged slamming of the following COI business customers referenced in COI's amended complaint: Sidney Auto Service; Tim's Automotive Specialties; National Salt Distributors; American Boot Outlet; Mansfield Hotel Partnership; Arbor Creek Gardens; and Herald's Appliances.

(12) Perry Moody, COI controller, testified that COI experienced a loss of monthly revenue in the total sum of $34,603.18, because of its sales promotion to win back 51 of its customers that were switched to ValTech.

(13) No witness testimony was presented concerning the alleged slamming of the 51 customers that COI won back from ValTech through COI's sales promotion.

(14) ValTech chose to use a letter of agency, or LOA, as its method for verifying subscriber consent of a change in the subscriber's telecommunications service provider, in accordance with 47 C.F.R § 64.1120(c).

(15) Each COI customer witness testified that he or she signed the ValTech forms (which included the LOA) based on the statements made by the ValTech sales agent who approached their company.

(16) The parties filed their briefs, after receiving an extension of time, on December 21, 2005, and January 11, 2006. On January 17, 2006, COI filed a supplement to its January 11, 2006 reply brief. On January 18, 2006, ValTech filed a motion to strike portions of complainant's reply brief. COI filed a memorandum contra ValTech's motion to strike on February 2, 2006.

CONCLUSIONS OF LAW:

(1) This case is properly before this Commission, pursuant to the provisions of Section 4905.26, Revised Code.

(2) The Commission has jurisdiction to decide complaints that allege violations by a utility of the MTSS Rules under Chapter 4901:1-5, O.A.C.

(3) ValTech's August 2, 2005 motion to dismiss under Rule 4901-1-23(F)(4), O.A.C., should be denied as being moot.

(4) ValTech's January 18, 2006 motion to strike should be denied.

(5) In a complaint case, such as this one, the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189, 214 N.E. 2d 666 (1966).

(6) Based on the record in this proceeding, the complainant failed to sustain its burden of proof with regard to the slamming of the following COI business customers named in COI's amended complaint: Sidney Auto Service; Tim's Automotive Specialties; National Salt Distributors; American Boot Outlet; Mansfield Hotel Partnership; Arbor Creek Gardens; and Herald's Appliances; therefore, COI's complaint with regard to these entities should be denied.

(7) Based on the record in this proceeding, the actions of ValTech's agents, with the purpose of obtaining the signatures of COI customers on ValTech LOAs, were unfair, deceptive, and unconscionable, and failed to comply with MTSS Rule 4901:1-5-07, O.A.C., with regard to the following five COI business customers named in COI's amended complaint: Grand Slam Sports & Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc.

(8) Based on the record in this proceeding, the actions of ValTech's agents, with the purpose of obtaining the signatures of COI customers on ValTech LOAs, failed to comply with Section 4905.72, Revised Code, and MTSS Rule 4901:1-5-08, O.A.C.; therefore, ValTech submitted unauthorized change requests for the following five COI business customers named in COI's amended

complaint: Grand Slam Sports & Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc.

(9) Under 47 C.F.R. § 64.1130, a letter of agency, or LOA, that does not conform to this section is invalid for the purpose of serving as a letter of agency to satisfy the verification of a subscriber's consent for a change in telecommunications service provider, in accordance with 47 C.F.R. § 64.1120.

(10) ValTech's LOA fails to include information required by 47 C.F.R. § 64.1130; this same LOA also contains information that should not be included under 47 C.F.R. § 64.1130, which makes it invalid for the purposes of serving as a letter of authority.

(11) Under Section 4905.72, Revised Code, no telecommunications provider shall submit or execute a change in the subscriber's selection of a telecommunications provider prior to obtaining verification in accordance with the Commission rules promulgated under Section 4905.72(D), Revised Code. This section provides that the procedures necessary for verifying consumer consent shall be consistent with the FCC's rules prescribing verification requirements.

(12) Under Rule 4901:1-5-08, O.A.C., no telecommunications provider shall submit or execute a change in the subscriber's selection of a telecommunications provider prior to obtaining verification in accordance with the verification requirements prescribed by the FCC in 47 C.F.R. § 64.1120.

(13) Based on the record in this proceeding, ValTech's letter of authority failed to comply with Section 4905.72, Revised Code, and Rule 4901:1-5-08, O.A.C.; therefore, ValTech submitted unauthorized change requests for the following five COI business customers: Grand Slam Sports & Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc.

(14) Based on the record in this proceeding, and in accordance with Section 4905.73(C)(2), Revised Code, COI shall be compensated by ValTech for the monthly charges that Grand Slam Sports Collectibles; Automotive Supplies, Inc.; Webb's Automotive; Shearer Equipment; and Pro Auto Body, Inc. would have paid to COI had the switch to ValTech not occurred. Accordingly, COI will be given the opportunity to file this documentation in this docket within 60 days of this Opinion and Order.

(15) The specific remedies, penalties, and forfeitures provided under Section 4905.73, Revised Code, do not include the award of either compensatory or punitive damages.

ORDER:

It is, therefore,

ORDERED, That this complaint is granted, in part, and denied, in part, as set forth above. It is, further,

ORDERED, That ValTech shall make the required changes to its LOA consistent with this Opinion and Order. It is, further,

ORDERED, That ValTech shall pay the assessed amount of $25,000.00 for violation of Rule 4901:1-5-08, O.A.C., and Section 4905.72, Revised Code, within 90 days to the State of Ohio, as set forth above. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this Opinion and Order. It is, further,

ORDERED, That Staff shall work with both ValTech and COI, as set forth above in Section IV. It is, further,

ORDERED, That, in accordance with Section 4905.73(C)(2), Revised Code, COI shall submit the documentation as set forth above, in Section V. It is, further,

ORDERED, That ValTech shall publish the legal notice in accordance with this Opinion and Order and shall file proof of publication in this docket. It is, further,

ORDERED, That ValTech's August 2, 2005 motion to dismiss under Rule 4901-1-23(F)(4), O.A.C., is denied as being moot. It is, further,

ORDERED, That ValTech's January 18, 2006 motion to strike is denied. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Valerie A. Lemmie

Donald L. Mason

JKS:ct

Entered in the Journal

SEP 13 2006

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Communication Options, Inc.,	)	
Complainant,	)	
v.	)	Case No. 04-658-TP-CSS
ValTech Communications LLC,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) On September 13, 2006, the Commission issued its Opinion and Order (Order) in this case finding, among other things, that based on the record in this proceeding, the actions of agents for ValTech Communications LLC (ValTech) failed to comply with the Minimum Telephone Service Standards (MTSS) set forth in Rules 4901:1-5-07, and 4901:1-5-08, Ohio Administrative Code (O.A.C.), which were adopted in accordance with Section 4905.72, Revised Code.

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(3) On October 12, 2006, ValTech filed an application for rehearing. ValTech's application raised a number of assignments of error associated with the Commission's September 13, 2006 Order.

(4) On October 23, 2006, Communication Options, Inc. (COI) filed a motion for an extension of time until November 6, 2006, to respond to ValTech's application for rehearing. By attorney examiner entry issued October 24, 2006, COI was granted an extension of time until October 25, 2006, to file its response to ValTech's application. On October 24, 2006, COI filed a memorandum contra ValTech's application. In its memorandum contra, COI argued that ValTech has not raised any arguments that warrant rehearing.

(5) The Commission grants ValTech's application for rehearing. We believe that sufficient reason has been set forth by ValTech to warrant

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further consideration of the matters specified in the application for hearing.

ORDER:

It is, therefore,

ORDERED, That ValTech's application for rehearing is granted for further consideration of the matters specified in the application for rehearing. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Valerie A. Lemmie

Donald L. Mason

JKS:ct

Entered in the Journal
NOV 08 2006

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Communication Options, Inc.,	)	
Complainant,	)	
v.	)	Case No. 04-658-TP-CSS
ValTech Communications LLC,	)	
Respondent.	)	

SECOND ENTRY ON REHEARING

The Commission finds:

(1) On September 13, 2006, the Commission issued its opinion and order in this case finding that, based on the record in this proceeding, the actions of agents for ValTech Communications LLC (ValTech) failed to comply with the Minimum Telephone Service Standards (MTSS) set forth in Rules 4901:1-5-07, and 4901:1-5-08, Ohio Administrative Code (O.A.C.), which were adopted in accordance with Sections 4905.231 and 4905.72, Revised Code.

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(3) On October 12, 2006, ValTech filed an application for rehearing. ValTech's application raised seven assignments of error associated with the Commission's September 13, 2006, opinion and order which are addressed below.

(4) On October 23, 2006, the complainant, Communication Options, Inc. (COI), filed a motion for an extension of time until November 6, 2006, to respond to ValTech's application for rehearing. By attorney examiner entry issued October 24, 2006, COI was granted an extension of time until October 25, 2006, to file its response to ValTech's application. On October 24, 2006, COI filed a memorandum contra ValTech's application. In its

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memorandum contra, COI argued that ValTech has not raised any arguments that warrant rehearing. In an entry on rehearing issued on November 8, 2006, the Commission granted rehearing in order to further consider the matters specified in the application for rehearing.

(5) In its first assignment of error, ValTech claims that the Commission erred as a matter of law in holding that the requirement to refer alleged unauthorized carrier changes to the Commission is not a mandatory precondition to filing a formal complaint under Section 4905.26, Revised Code. ValTech asserts that Rule 4901:1-5-08(C), O.A.C., requires the exhaustion of the informal complaint procedures and remedies prescribed by the Federal Communications Commission (FCC) before filing a formal complaint pursuant to Rule 4901:1-5-08(D), O.A.C. ValTech maintains that, in this instance, COI did not exhaust its informal complaint remedies before filing this formal complaint under Section 4905.26, Revised Code. Therefore, the Commission had no jurisdiction to consider this as a formal complaint.

Rehearing is denied on ValTech's first assignment of error. Initially, we note that the issue of Commission jurisdiction under the circumstances presented in the complaint has been thoroughly briefed and addressed by the Commission on more than one occasion. The Commission first affirmed its jurisdiction over this complaint on May 18, 2005, in denying an interlocutory appeal of an attorney examiner's ruling on jurisdiction. The Commission next addressed this issue on pages 14 and 15 of the September 13, 2006, opinion and order in this matter where we found in part that "[E]ach of the statues and rules referenced by ValTech were developed to provide consumer protection from an unauthorized change in service providers, not to establish prerequisites to the filing of a formal complaint under Section 4905.26, Revised Code." Notwithstanding having already addressed the issue of jurisdiction as least twice previously, we will, again, address the jurisdiction issue below.

We find nothing in either the FCC's rules or in the MTSS that requires the exhaustion of informal procedures before filing a formal complaint under Section 4905.26, Revised Code. In fact, were we to determine that such a prerequisite exists, we would

be treating those entities alleging instances of unauthorized provider changes more stringently than any other complaint proceeding brought before the Commission which could have the undesired effect of discouraging entities from pursuing allegations of unauthorized provider changes and thereby improperly rewarding telecommunications providers for unauthorized conduct.

Rule 4901:1-5-08(C), O.A.C., clearly does not make compliance with this rule a prerequisite to filing a formal complaint under Section 4905.26, Revised Code. Rule 4901:1-5-08(C), O.A.C., stated, in relevant part, that "[A]ny telecommunications provider that is informed by a subscriber or the commission of an unauthorized provider change shall follow the informal complaint procedures and remedies prescribed by the federal communication commission for the resolution of informal complaints of unauthorized changes..." (Emphasis added). Rule 4901:1-5-08(C), O.A.C., clearly applies the FCC's informal complaint procedures for an unauthorized provider change when a telecommunications provider is informed by a subscriber or by the Commission that an unauthorized provider change has occurred. Procedurally, this case was not brought by a subscriber or by the Commission but rather by another carrier that believed itself to be the authorized carrier for the involved subscribers. Therefore, Rule 4901:1-5-08(C), O.A.C., had no applicability to this proceeding.

Rule 4901:1-5-08(D), O.A.C., also does not establish any prerequisite that must be met before filing a complaint under Section 4905.26, Revised Code. Rule 4901:1-5-08(D), O.A.C., merely states that "[A]ny subscriber or telecommunications provider whose complaint cannot be resolved informally may file a formal complaint under section 4905.26 of the Revised Code..." (Emphasis added). There is no reference in this rule back to the informal procedures identified in either Rule 4901:1-5-08(C), O.A.C., or to the informal complaint procedures and remedies prescribed by the FCC. Thus, an authorized telecommunications provider, such as COI in this instance, could pursue either informal mediation of its complaint with the Commission outside the setting of a formal complaint proceeding or within the formal complaint at a prehearing settlement conference held specifically in an effort to resolve the complaint without going to a formal hearing as the

Commission schedules in nearly all formal complaint cases. As a final matter regarding this assignment of error, we note that any ambiguity caused by prior MTSS rules pertaining to unauthorized carrier changes has been addressed by the Commission in the new MTSS in paragraphs (C) and (D) of Rule 4901:1-5-09, O.A.C.

(6) The Commission next erred, according to ValTech, by applying the evidence of fraudulent and deceptive sales practices as evidence of an unauthorized provider change violation, under Rule 4901:1-5-08, O.A.C., when COI made no such allegations. ValTech continues that the Commission impermissibly combined two separate and distinct sets of prohibited conduct into a single violation and applied sanctions and penalties reserved for proof of an unauthorized change in carrier to purported circumstances involving fraudulent and deceptive sales practices.

Rehearing on ValTech's second assignment of error is denied. Even assuming, arguendo, that the Commission's decision went beyond the scope of COI's complaint, ValTech was provided ample notice that the Commission would consider "whether or not ValTech has violated any statute or rule is the issue to be determined" by this complaint (May 18, 2005, Commission entry ruling on ValTech's interlocutory appeal, finding 15, at page 7). The Commission then went on to discuss specifically, in the May 18, 2005 entry, Rules 4901:1-5-07 and 4901:1-5-08, O.A.C. Thus, ValTech clearly had notice that the Commission would be evaluating the evidence presented in this complaint not only under the slamming provisions of Rule 4901:1-5-08, O.A.C., but also under the consumer safeguard provisions against unfair, deceptive, and unconscionable practices set forth in Rule 4901:1-5-07, O.A.C.

ValTech also infers that it was error for the Commission to have applied evidence demonstrating that ValTech's sales agents used multiple tactics to mislead, or at best confuse, customers of COI to find that an unauthorized change in provider had occurred under Rule 4901:1-5-08, O.A.C. As we noted in the September 13, 2006, opinion and order, public policy demands that the Commission not only look at the form of the letter of authorization (LOA) itself, but also scrutinize the manner in which the LOA's were obtained by ValTech. If the

LOA's are obtained through deception and duress, the Commission stated that verified consent does not exist and slamming has occurred. Applying ValTech's logic to the facts of this case would allow ValTech, or any telecommunications provider, to avoid liability under Section 4905.72, Revised Code, simply by producing a signed authorization form whether valid or fraudulent. Such a result can not be countenanced. Rehearing is, therefore, denied.

(7) In its third assignment of error, ValTech claims that its motion for sequestration of witnesses, under Ohio Evidence Rule 615, was denied improperly. Therefore, the testimony of subpoenaed witnesses was inherently unreliable and prejudicial to ValTech.

Ohio Evidence Rule 615 does require the exclusion of witnesses so long as the witness is not party to the proceeding and Section 4903.22, Revised Code, generally requires the rules of evidence to apply to Commission proceedings as the rules would apply to proceedings in civil actions. Nonetheless, the Ohio Supreme Court, in *Chesapeake & RY. Co. v. Pub. Util. Comm.* (1955), 163 Ohio St. 252, 263, recognized that the Commission, being an administrative body, is not and should not be inhibited strictly by the rules of evidence which prevail in courts regarding the admissibility of evidence. Moreover, as the Ohio Supreme Court found in *Elyria Telephone Co. v. Pub. Util. Comm.* (1953), 158 Ohio St. 353, the Commission has very broad discretion in the conduct of its proceedings. The Ohio Supreme Court has likewise held that the court will not reverse an order of the Commission as unreasonable or unlawful so long as the error did not prejudice the party seeking such reversal. See, *Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353.

In this instance, the Commission finds that the ruling of the examiner at hearing, even if in error, did not prejudice ValTech. Counsel for ValTech made his motion for exclusion of witnesses very early in the proceeding before opening statements and before the first witness testified (Tr. I at 6-7). The attorney examiner stated that she was holding a ruling in abeyance until such time as she heard some of the witnesses' testimony. In so ruling, however, the attorney examiner cautioned the witnesses that their testimony should be limited

to their interaction and not what they heard from other parties (Id. at 7-8). Counsel for ValTech renewed his motion during the opening statement of COI's counsel. The attorney examiner instructed counsel for COI to limit or eliminate any arguments of potential testimony that might be presented by the witnesses so as not to influence such witness testimony (Id. at 12-13). ValTech's counsel never again made his motion nor did he object to the admission of the witnesses' testimony. Moreover, ValTech's counsel had a full and complete opportunity to cross-examine each witness on the witnesses' testimony. Under these circumstances, we find no prejudice to ValTech in not favorably ruling on counsel's request for sequestration of witnesses.

(8) ValTech next argues that the Commission erred in failing to require clear and convincing proof of fraudulent misrepresentation in this matter. ValTech maintains that, because the remedies set forth in the September 13, 2006, opinion and order involve rescission of the LOA's signed by subscribers and reformation of the service agreements thereby authorized, it was error to apply the less demanding preponderance of the evidence standard. Moreover, ValTech submits, the Commission could only find fraudulent misrepresentation if all elements of fraudulent misrepresentation had been proven by clear and convincing evidence. COI's proof falls woefully short of meeting the clear and convincing evidence standard applicable here ValTech asserts.

ValTech's fourth assignment of error is denied. The FCC's procedures for resolution of unauthorized preferred carrier changes, 47 C.F.R. §64.1150, clearly provides that it is the obligation of the alleged unauthorized carrier, ValTech in this case, that has the burden of producing valid verification of a preferred carrier change through clear and convincing evidence. Based on the evidence of record, we found, at page 26 of the September 13, 2006, opinion and order, that ValTech had failed to provide clear and convincing evidence of valid authorized carrier changes involving certain customers. Thus, we utilized both the appropriate evidentiary standard and applied that evidentiary standard to the proper party. Rehearing is, therefore, denied.

(9) ValTech next contends that the Commission's September 13, 2006, opinion and order is manifestly against the weight of the evidence adduced at the hearing in this matter. Moreover, ValTech submits that the recitation of evidence as to the subscriber witnesses is replete with generalizations, oversimplifications, and simple misstatements of the testimony. We disagree. The Commission thoroughly summarized, in its 40-page opinion and order, the evidence of record and set forth findings of fact that supported the ultimate decisions rendered in the September 13, 2006, opinion and order. ValTech's argument presumes that a complete recitation of the entire evidentiary record would result in a different outcome. ValTech has failed to point to any statute or case law to support its proposition. In fact, the relevant statutes and case law, as discussed below, support the Commission.

Section 4903.09, Revised Code, requires that, in all contested cases heard by the Commission, a complete record of the proceedings be made of all testimony and all exhibits and the Commission must set forth findings of fact and written opinions setting forth the reasons for the decisions arrived at based upon said findings of fact. The Ohio Supreme Court found in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, (1988) 38 Ohio St. 3d 266, that the purpose of Section 4903.09, Revised Code, is to enable the Ohio Supreme Court to review an action of the Commission without reading the voluminous records in Commission cases. The Ohio Supreme Court has also found that the purpose of this statute governing written opinions filed by the Commission in all contested cases is to provide the court with sufficient details to enable the court to determine how the Commission reached its decision. See *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, (1994) 70 Ohio St. 3d 202. The Commission's September 13, 2006, opinion and order satisfies the requirements of Section 4903.09, Revised Code, as well as the applicable case law. Rehearing is, therefore, denied.

(10) In the company's sixth assignment of error, ValTech maintains that the Commission's determinations of technical non-compliance with the FCC rules on format and content of an LOA do not justify a determination that the submitted LOAs are invalid.

In making this argument, ValTech ignores the applicable provision of 47 C.F.R. §64.1130 which establishes the appropriate form and content of an LOA. As pointed out in the September 13, 2006, opinion and order at page 27, the FCC has determined that an LOA that does not conform with 47 C.F.R. §64.1130 is invalid. Tellingly, ValTech did not challenge, on rehearing, the Commission's discussion of how the involved LOAs failed to comply with the applicable provisions of 47 C.F.R. §64.1130. Accordingly, there was no error in the Commission's determination that the LOAs discussed in the September 13, 2006, opinion and order were invalid. ValTech's sixth assignment of error is denied.

(11) In its last assignment of error, ValTech claims that the Commission's September 13, 2006, opinion and order assesses remedies, penalties, and forfeitures that are improper as a matter of law. Regarding forfeitures, ValTech claims that the sanctions imposed by the Commission are disproportionate and improper because the record lacks competent evidence of a pattern of violations to justify the imposition of a $25,000 penalty against ValTech. The Commission fully discussed at pages 33-34 of the September 13, 2006, opinion and order the justification for the $25,000 forfeiture in this matter. In fact, as the Commission noted, the forfeiture could have been as high as $150,000 based on a forfeiture of $1,000 per day, over an average of 30 days, for each of the 5 business customers who testified in this matter. The Commission emphasized, however, that the forfeiture should be large enough to deter the practice of slamming, not so small that a company would consider it a cost of doing business, yet not so large as to put a company at financial risk. After weighing each of these factors, the Commission settled on an amount of approximately $166.66 per day for each of the instances of slamming determined in the September 13, 2006, opinion and order. The Commission's determination of the forfeiture was fully discussed and justified; therefore, rehearing is denied.

(12) In its second argument in support of this last assignment of error, ValTech maintains that it was clearly erroneous to afford COI a post-hearing opportunity to supplement the record to provide information concerning lost revenues. While the Commission did, indeed, afford COI a 60-day opportunity to file documentation pertaining to lost revenues for the

customers who testified in the proceeding, a review of the docket reveals that COI presented no such documentation. Therefore, the issue is moot and need not be further addressed on rehearing.

(13) ValTech's final argument in support of its last assignment of error, is that the Commission's directive for ValTech to publish newspaper notice is not authorized as a remedy under the Commission's rules and regulations, is overly broad, unjust, and unreasonable. Moreover, ValTech asserts that a more effective notification would be direct notification to the involved subscribers. Pointing to record testimony and exhibits presented at the hearing, ValTech claims that such direct customer notification has already taken place. First, we do not agree with the premise of ValTech's argument that the Commission's authority to remedy acts of slamming is limited to the remedies outlined in Section 4905.73, Revised Code. Rather, Section 4905.381, Revised Code, affords the Commission, after hearing, ample authority to determine the rules, regulations, and practices that should be adopted and observed by a utility going forward. Thus, we find that it was not unreasonable for us, at the time, to have directed ValTech to notify other similarly situated subscribers that they could contact the Commission if they believed they may have been improperly switched between March and December 2004.

We now note, however, that under the FCC rules, records to document verification of subscriber carrier changes need only be maintained for two years after obtaining such verification. Given that more than three years, and in some cases four years, have passed since the circumstances that gave rise to this publication requirement occurred, it is highly unlikely that records documenting any perceived improper switch of service providers is still available to verify that an unauthorized switch occurred. Therefore, we will not require ValTech to fulfill the publication of notice requirement outlined in the September 13, 2006, opinion and order.

(14) Finally, the Commission determines that any remaining assignments or allegations of error not specifically addressed in this entry on rehearing are denied.

ORDER:

It is, therefore,

ORDERED, That ValTech's application for rehearing is denied as discussed herein. It is, further,

ORDERED, That a copy of this second entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

JRJ/vrm

Entered in the Journal

MAR 5 2008

Reneé J. Jenkins
Secretary