

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

FCC 03M-54
02841

In the Matter of)	EB Docket No. 03-85
)	
BUSINESS OPTIONS, INC.)	File No. EB-02-TC-151
)	
Order to Show Cause and Notice of)	NAL/Acct. No. 200332170002
Opportunity for Hearing)	FRN: 0007179054
)	

MEMORANDUM OPINION AND ORDER

Issued: December 8, 2003

Released: December 9, 2003

PRELIMINARY STATEMENT

1. This is a ruling on Enforcement Bureau's Motion for Partial Summary Decision filed by the Enforcement Bureau ("Bureau") on October 27, 2003. Opposition to the Enforcement Bureau's Motion for Partial Summary Decision was filed by Business Options, Inc. (BOI) on November 18, 2003.

2. This case concerns "slamming" by BOI,¹ a reseller of long distance telephone service. "Slamming" involves the submission or execution of an unauthorized change in a subscriber's selection of a provider of telecommunications service. See U.S.C. § 258, 47 C.F.R. §§ 64.1100, 1120, 1130, 1140, and § 64.1195. The Bureau's Motion does not request rulings on the issue to determine whether BOI has made misrepresentations or engaged in a lack of candor. Nor does the Bureau request rulings on revocation, cease and desist, or forfeiture.

3. The designation order in this case specifies the following issues:

- (a) to determine whether Business Options, Inc. made misrepresentations or engaged in lack of candor;
- (b) to determine whether Business Options, Inc. changed consumers' preferred carrier without their authorization in willful or repeated violation of § 258 of the Act and §§ 64.1100-1190 of the Commission's rules;

¹ BOI is identified for purposes of this case as BOI, Buzz Telecom, US Bell, any affiliates, successor or assignee

- (c) to determine whether Business Options, Inc. failed to file Form FCC 499-A in willful or repeated violation of § 64.1195 of the Commission's rules;
- (d) to determine whether Business Options, Inc. discontinued service without Commission authorization in willful or repeated violation of § 214 of the Act and §§ 63.71 and 63.505 of the Commission's rules;
- (e) to determine, in light of all the foregoing, whether Business Options, Inc.'s authorization pursuant to § 214 of the Act to operate as a common carrier should be revoked;
- (f) to determine whether, in light of all the foregoing, Business Options, Inc., and/or its principals should be ordered to cease and desist from the provision of any interstate common carrier services without the prior consent of the Commission.

Order to Show Cause and Notice of Opportunity for Hearing ("OSC") MM 3566 at Para. 9, released April 4, 1986, 51 Fed. Reg. 22,865 (June 23, 1986).

4. By post-designation ruling, the following issues were added at the Bureau's request:

- (g) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell, Inc. and/or Link Technologies failed to make required contributions to universal service support programs, in violation of § 254(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 254(d), and § 54.706 of the Commission's rules, 47 C.F.R. § 54.706;
- (h) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell Inc. and/or Link Technologies failed to make required contributions to the Telecommunications Relay Services Fund, in violation of § 64.604(c)(5)(iii)(A) of the Commission's rules, 47 C.F.R. § 64.604(c)(5)(iii)(A);
- (i) to determine whether Business Options, Inc., Buzz Telecom Corp., U.S. Bell Inc. and/or Link Technologies failed to file Telecommunications Reporting Worksheets, in violation of §§ 54.711, 54.713, and 64.604(i) of the Commission's rules, 47 C.F.R. §§ 54.711, 54.713, 64.604(c)(iii)(B);

- (j) to determine whether an Order for Forfeiture should be issued pursuant to § 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), against Business Options, Inc., Buzz Telecom Corp., U.S. Bell, Inc. and/or Link Technologies [for] failure to make the required universal service contributions in a timely manner, in violation of § 254(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 54(d) and § 54.706 of the Commission's Rules, 47 C.F.R. § 54.706; \$10,000 for each failure to file the required Forms 499 in a timely manner, in violation of §§ 54.711, 54.713, 64.604(c)(5)(iii)(B) of the Commission's Rules, 47 C.F.R. §§ 54.711, 54.713, 64.604(c)(5)(iii)(B); and (c) \$10,000 for each failure to file required contributions to the Telecommunications Relay Services Fund, in violation of § 64.604(c)(5)(iii)(A) of the Commission's Rules, 47 C.F.R. § 64.604(c)(5)(iii)(A)

Memorandum Opinion and Order, FCC 03M-33, released on August 20, 2003. None of those added issues are sought to be resolved by partial summary decision in this ruling.²

5. The Bureau contends that issues (b), (c) and (d) can be decided by summary decision. Since the Bureau does not seek final resolution of the case by revocation, or a determination of the amount of any forfeiture, this ruling is limited to the requested partial summary decision on three discrete non-dispositive issues.³

Standards for Summary Decision

6. The rules for determining the propriety of summary decision state:

The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, admissions, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

Summary Decision Procedures, 34 F.C.C. 2d 485 (1972).

² On December 2, 2004, the Bureau filed a second Motion for Partial Summary decision on the added issues. A ruling on the second Motion will be issued after completion of the pleading cycle.

³ Commission rules authorize summary decision of "all or any" of the issues set for hearing 47 C.F.R. § 1.251(a). The rules further provide that where only non-dispositive issues are decided, the Presiding Judge "will issue a memorandum opinion and order, interlocutory in character, and the hearing will proceed on the remaining issues." 47 C.F.R. § 1.251(e).

7. The rules further provide that in considering a motion for summary decision:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. § 1.251(a)(1).

8. There is discretion to use or not use the procedure:

The presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision.

and

If it appears from the affidavits of a party opposing the motion that he cannot, for good cause shown, present by affidavit or otherwise facts essential to justify his opposition, the presiding officer may deny the motion, may order a continuance to permit affidavits to be obtained or discovery to be had, or make such other order as is just.

47 C.F.R. § 1.251(d).

9. The Commission has recognized that issues in a complex case (such as this one) are appropriate for summary decision, even though the case as a whole may not. *Summary Decision Procedures, supra* at 488. *Cf. Family Broadcasting, Inc.*, 17 F.C.C. Rcd 6180 (2002) (Commission partially affirms summary decision on violations specified in show cause order, but proposed transfer of control raised genuine issue of material fact concerning revocation that requires hearing). Summary decision can also be used procedurally as a “pretrial determination of what material facts do exist without substantial controversy and in good faith controverted.” *Summary Decision Procedures, supra* at 487–488. In this case, the Bureau has made use of BOI’s answers to interrogatories and requests to admit, and the Bureau supports its Motion with “material obtained by discovery.” 47 C.F.R. § 1.251(c).

Bureau's Burden

10. The Bureau has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures, supra* at 487-88 (1972). In order to sustain its burden, the Bureau must establish that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding factual inferences that may properly be drawn from such facts. *Id. See also Big Country Radio, Inc* , 50 F.C.C. 2d 967-968 (Review Bd. 1975). The Bureau's burden is met by its un rebutted supporting papers consisting to a large extent of party admissions. This case is appropriate for partial summary decision on the limited relief sought.

11. First, it is alleged that BOI "willfully and repeatedly" failed to comply with 47 U.S.C. § 258 and 47 C.F.R. § 64.1120, which require a carrier's compliance with Commission verification procedures before the carrier may switch a customer's telephone service. In nine instances, BOI's verification procedures failed to elicit information prescribed by the Commission's rules, while in seven other instances, BOI switched customers back to its service without seeking permission to do so, and without verifying that it had such permission.

12. Second, it is alleged that BOI "willfully or repeatedly" failed to file timely or accurately FCC Form 499-A, thereby violating the requirements set forth in 47 C.F.R. § 64.1195

13. Third, it is alleged that BOI "willfully or repeatedly" discontinued service to customers in Vermont before receiving Commission authorization to do so contrary to 47 U.S.C. § 214 and 47 C.F.R. § 63.71.

14. While the alleged violations are established by reliable and substantial evidence, the Bureau makes clear that evidence on sanction:

is not yet fully developed and may be affected by the
resolution of this proceeding's other issues.

Thus, as the Bureau acknowledges, dispositive relief as to sanction (revocation, cease and desist, and/or forfeiture) may not be granted on Issues (b), (c), or (d) by this partial summary decision.

BOI's Opposition

15. The summary decision rule contemplates the consideration of opposing affidavits, and directs that "a party opposing the motion may not rest upon mere allegations or denial." 47 C.F.R. § 1.251(d). BOI states in its Opposition pleading that it believes that under the facts as fully litigated it can show that it "unintentionally violated the Commission's rules." In that regard, BOI acknowledges that it made "mistakes" that were based on "lack of sophistication" and placed reliance on individuals "without

telecommunications expertise or legal qualification” to contact Commission staff and to make Commission filings. However, BOI does not offer contrary or mitigating facts through counter affidavit(s) BOI merely focuses in its pleading on sanctions, argues that “there are material facts that remain open that directly bear on liability as a matter of law (and thus still must be litigated),” and states “we have not included affidavits in support of any contentions ” After reviewing BOI’s papers, it is concluded that BOI fails to raise any genuine issue of material fact, and it appears that BOI has not raised significant issues against findings and conclusions that are based on the substantive facts offered by the Bureau in support of its Motion ⁴

16. Even though BOI has not supported its Opposition with affidavit(s), the moving party’s papers must be “carefully scrutinized,” while the opposing party’s papers are to be treated with “considerable indulgence.” *Summary Decision Procedures, supra* at 488. Partial summary decision will be granted because the violations are “willful” and “repeated” as a matter of law. However, additional proof is expected to be introduced by BOI on factual mitigating circumstances such as BOI’s actual intentions, or the qualifications of BOI’s agents who were dealing with the Commission at the time of the violations, and BOI’s explanation for using those agents.

Willful and Repeated Violations

17 Issues (b), (c), and (d) were set by the Commission to determine whether the violations, if proven, were in “willful or repeated” violation of the Act or the Rules. The Act defines the term “willful” and the term “repeated” as follows:

- (1) The term “willful,” when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act, or any rule or regulation of the Commission --- ⁵
- (2) The term “repeated --- means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

47 U.S.C. § 312(f).

⁴ As indicated, the Bureau relies on facts that are established by discovery from BOI. Therefore, for the most part, BOI has first-hand knowledge of the evidence used in support of this ruling.

⁵ The Commission has held consistently in litigated cases that the term “willful” means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Commission’s rules. *Southern California Broadcasting Co.*, 6 F.C.C. Rcd 4387 (1991), *MCI Telecommunications Corp.*, 3 F.C.C. Rcd 509, 514 n.22 (1988), *Hale Broadcasting Corp.*, 79 F.C.C. Rcd 169, 171 (1980)

18. It is noted that BOI admits to “technical violations,” but contests that its violations warrant revocation and/or any monetary forfeiture. That argument does not provide an affirmative defense because BOI fails to show by affidavit or otherwise that it had not acted willfully or repeatedly with respect to its admitted “technical violations.” Therefore, it must be concluded that BOI intended to perform the acts which were in violation of the Communications Act and the Commission regulations with regard to: (1) changing customers’ preferred carrier without authorization; (2) failing to file a timely and acceptable FCC Form 499-A; and (3) discontinuing service to customers without Commission authorization.

ANALYSIS AND DISCUSSION

Issue (b) Changing Preferred Carriers

19 Section 258(a) of the Act provides: “No telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.”⁶ Part 64 of the Commission’s rules sets forth, *inter alia*, the procedures a carrier must follow before it can change a consumer’s telephone toll service. Specifically, § 64.1120(a)(1)(ii) of⁷ the Commission’s rules requires that submitting carriers obtain verification of a subscriber’s authorization in accordance with prescribed procedures. Thus, before submitting a change order, the carrier must verify the order either by obtaining from the subscriber: (1) his written or electronically signed authorization;⁸ (2) his electronic authorization from the telephone number on which the preferred carrier is to be changed;⁹ or (3) his oral authorization through use of an appropriately qualified “independent third party” who must elicit, at a minimum, the identify of the subscriber, confirmation that the person on the call is authorized to make the change, confirmation that the person on the call wants to make the change, the names of the carriers affected by the change, the telephone number to be switched, and the types of service involved.¹⁰ In addition, when a carrier is selling more than one type of service (for example, intraLATA/intrastate toll and interLATA/interstate toll), each authorization must be verified separately.¹¹ With respect to eight separate customers, BOI did not

⁶ 47 U.S.C. § 258(a).

⁷ 47 C.F.R. § 64.1120(a)(1)(ii).

⁸ 47 C.F.R. § 64.1120(c)(1).

⁹ 47 C.F.R. § 64.1120(c)(2).

¹⁰ 47 C.F.R. § 64.1120(c)(3).

¹¹ 47 C.F.R. § 64.1120(b).

follow the Commission's prescribed procedures for verifying the customers' changes in long distance telephone service. BOI's "re-provisioning" practices also resulted in repeated changes of consumers' long distance service without their authorization and without BOI having taken any steps to verify those changes.

20. The Bureau alleges that on multiple occasions, BOI changed customers' long distance service without obtaining verification in the manner required.¹² The Motion papers show that BOI verifiers failed to elicit the name of the affected carrier and the fact that customers' in-state long distance service was about to be changed. By failing to mention the carrier to be changed, BOI may have left subscribers with the impression that a preferred carrier was not being changed. And by never mentioning that an in-state provider was going to change, customers might have no reason to know that they would be paying substantially more for BOI's in-state long distance service.

Issue (b) Verification Procedures

21. BOI "willfully and repeatedly" failed to comply with 47 U.S.C. § 258 and 47 C.F.R. § 64.1120, which require a carrier's compliance with Commission verification procedures before the carrier may switch a customer's long distance telephone service. Before submitting a change order, the carrier must verify the order by obtaining (1) subscriber's written or electronically signed authorization; (2) subscriber's electronic authorization from the telephone number on which the preferred carrier is to be changed; or (3) oral authorization through a qualified "independent third party" verifier. 47 C.F.R. §§ 64.1120(c)(1), (2), (3). In nine instances, BOI's verification procedures failed to elicit information prescribed by Commission rules, and in seven other cases, BOI switched customers back to its service without seeking permission to do so, and without verifying that it had permission.

22. The Commission requires that a verifier be a "qualified independent third party" which is one that is not "owned, managed, or controlled" by the carrier or the carrier's agent. 47 C.F.R. § 64.1120(e)(3). BOI paid the verifiers, all of whom occupied offices in the same building as BOI's telemarketers and the bulk of its staff. Therefore, BOI's verifications failed to use independent verifiers that are required by the Commission's rules.

23. After April 8, 2002, BOI "re-provisioned" customers to its own service. Such "re-provisioning" involved BOI's switching a customer's long distance service back to BOI without BOI obtaining authorization or using verification methods prescribed by the Commission. *See* 47 C.F.R. § 64.1120(c)(1), (2), (3). This "re-provisioning" occurred

¹² The Bureau represents that seven of the unauthorized changes took place before April 8, 2002; nine occurred thereafter. The seven changes that occurred before April 8, 2002 are outside the time limit set by 47 U.S.C. § 503(b)(6) and will not be used for the purpose of establishing liability for a forfeiture. *OSC*, 18 FCC Rcd at 6994-95 ¶39. Therefore, the seven pre-April 8 charges will not be considered as evidence of wrongdoing in this case.

even though the customer had elected to terminate BOI's service.¹³ There is a sufficiently convincing record provided by the Bureau and unopposed by BOI, to conclude that where "re-provisioning" occurred, BOI did not comply with the Commission's rules governing verification.

24. Also, when a carrier is selling more than one type of service (intraLATA and interLATA), each authorization must be verified separately. 47 C.F.R. § 64.1120(b). When BOI solicited a prospective customer to purchase its long distance service, including both in-state and state-to-state service, BOI did not obtain a separate authorization or verification for each type of service in violation of § 64.1120(b).

Issue (c)
Form 499-A

25. BOI "willfully and repeatedly" failed to file its FCC Form 499-A, contrary to the requirements set forth in 47 C.F.R. § 64.1195. BOI had not filed the Form which had been due on April 1, 2002. BOI filed its FCC Form 499-A more than one year late in September 2003. Effective April 2, 2002, BOI was required to file registration information under oath and penalty of perjury on Form 499-A, reflecting the carrier's name and address, its principal offices, a regulatory contact or designated agent, previous business names, and each state in which the carrier provides telecommunications services. The Bureau has shown that BOI has operated as a common carrier since January 1, 2000, and has had between 40,000 to 52,000 customers. BOI was required to file the information on Form 499-A by April 1, 2002, but as indicated above, BOI failed to file timely.

Issue (d)
Discontinued Service

26. Section 214 of the Act prohibits a common carrier from discontinuing service to a community until it has obtained a certificate from the Commission certifying that neither present nor future public convenience and necessity will be adversely affected. An application for discontinuing service is not deemed to be filed until the Commission releases public notice of the filing. An application must contain the date, nature and extent of the planned service discontinuance, and a description of dates and methods of notice to affected customers. Usually, a non-dominant carrier can expect to have its application granted thirty-one days after filing.

¹³ BOI's "re-provisioning" appears to have occurred as a consequence of a decision of BOI's top management to address the loss of customers. *See, generally*, Motion at ¶ 8. *See* Motion at ¶ 15 (the Beesons in March 2002); Motion at ¶ 24 (Paul Brackett in January 2002); Motion at ¶ 31 (Norman Crowley in January 2002); Motion at ¶ 38 (the Guptills in February 2002), Motion at ¶ 52 (the Harts in February 2002); Motion at ¶ 62 (the Michaelises in April 2002); and Motion at ¶ 70 (the Violettes in February 2002). In the case of Bessie Goodbrake, whose switch occurred in April 2002, BOI did not elicit the name of the carrier that was being changed. *See* Motion at ¶ 47

27. BOI and the State of Vermont agreed on a stipulation on September 18, 2002, that subject to approval by a state board, BOI would cease providing service in Vermont. On November 19, 2002, a state government attorney notified BOI by letter of the stipulation and reminded BOI of its obligation to initiate the FCC's discontinuance process. BOI's discontinuance application was received at the FCC on December 27, 2002. The application did not conform to the rules and therefore BOI did not receive FCC approval to discontinue service to Vermont. Nonetheless, without authorization, BOI stopped serving customers in Vermont even before the FCC received its application. Therefore, BOI discontinued service to customers in Vermont in violation of 47 U.S.C. § 214 and 47 C.F.R. § 63.71.

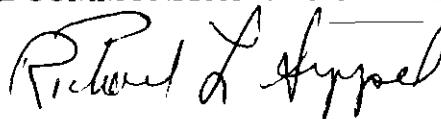
CONCLUSION

28. BOI filed no opposing affidavits or other reliable factual materials to refute the documentary proof underlying the Bureau's Motion for Partial Summary Decision on three non-dispositive issues. BOI has thereby failed to raise genuine issues of substantial material fact. Thus, there is no genuine issue preventing summary determination of violations of the Communications Act 47 U.S.C. § 214, 47 U.S.C. § 258, and related Commission Rules 47 C.F.R. §§ 63.71, 63.505, 64.1100-1190, 64.1195, as alleged. Issues (b), (c) and (d) are resolved in this ruling against BOI, with sanctions of revocation, cease and desist, and/or any forfeiture to await testimonial evidence, cross-examination, and possible demeanor findings.¹⁴

ORDER

Accordingly, IT IS ORDERED that the Enforcement Bureau's Motion for Partial Summary Decision filed on October 27, 2003, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION¹⁵



Richard L. Sippel
Chief Administrative Law Judge

¹⁴ In its discretion as the party carrying the burden of proof, the Bureau counsel should mark, identify, and offer into evidence at the hearing documents submitted with its Motion for Partial Summary Decision as hearing evidence. Such properly identified evidence will be available as evidence for questioning witnesses, and will provide a complete hearing record for post-hearing proposed findings of fact and conclusions of law and initial decision. 47 C.F.R. §§ 1.263, 264, 267.

¹⁵ Courtesy copies of this *Memorandum Opinion and Order* were sent to counsel for the parties by fax or e-mail on the day of its release.