

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SAEID SHAFIZADEH)	
)	CASE NO.
COMPLAINANT)	2003-00400
)	
v.)	
)	
CINGULAR WIRELESS)	
)	
DEFENDANT)	

O R D E R

Saeid Shafizadeh (“Complainant”), who is an attorney, filed a formal complaint against BellSouth Mobility, LLC d/b/a Cingular Wireless (“Cingular”). His complaint is that Cingular erroneously claimed he had not paid his service bill for June 18, 2003, in an amount of \$55.46. Though Complainant’s bank account indicated the check had cleared on July 18, 2003, his service was terminated after receiving a past-due notice. Complainant asserts that Cingular willfully, deliberately, and purposely disconnected his wireless service. Moreover, Complainant indicates that he had sporadic service in July, but that he was without service from August 1, 2003 until he filed his complaint on October 22, 2003. Complainant asserts that he was fraudulently charged a connection charge of \$1.24 for the periods when service remained disconnected. According to Complainant, though his bill was paid at all times, when Cingular was made aware of this, instead of correcting the problem, it “resorted to deliberate and conscious acts of disconnecting consumer’s wireless service and defaming consumer by continuous

broadcasting of the non-payment message.” Complaint at ¶ 20. Complainant also asserts that his Social Security number was inappropriately displayed and used. In response to an Order to Satisfy or Answer, Cingular asserts that it has attempted to satisfy the complaint directly with the Complainant. Cingular does admit that the Complainant’s July 8, 2003 check was inadvertently applied to the wrong account and that Cingular mistakenly believed that Complainant had not paid his July 18, 2003 bill. Answer at ¶ 8. Cingular also admits that the Complainant was sent a past-due notice and that Complainant’s service was suspended or disconnected on the following dates: July 25, 2003, August 8, 2003 through August 12, 2003, and August 25, 2003 through November 6, 2003. Answer at ¶ 13. In response to the allegations that Cingular had broadcast defamatory information, Cingular asserts that Complainant may have received a message on his cellular phone that he should contact Cingular’s customer service department regarding his bill. Moreover, Cingular admits that during this time Complainant may have been automatically redirected to a customer service representative when he attempted to place a call. Answer at ¶¶ 20 & 21. Moreover, Cingular admits that the Complainant continued to pay his wireless bills. Answer at ¶ 28. Regarding the use of Complainant’s Social Security number, Cingular asserts that it had advised Complainant that he may set up a password of his choosing in his account so that the last four digits of his Social Security number would not be used. Cingular asserts that Complainant did not avail himself of this option. Answer at ¶ 33.

In December 2003, Complainant filed a motion to strike sham and frivolous pleading. He asserted that Cingular inappropriately responded to the allegations regarding the use of his Social Security number. Complainant asserted that “this self-

-serving claim is an outright lie and fabrication and should be stricken.” In its response to the motion to strike, Cingular asserted that disagreement with allegations is not a sufficient basis to strike those allegations from a response. Moreover, Cingular asserted that Complainant had not demonstrated that Cingular’s defenses are false on their face.

On February 24, 2004, the Commission entered a procedural Order. Thereafter, Cingular filed a request for an informal conference and a motion to suspend the procedural Order. Cingular asserted that it believed that the formal hearing was not necessary because “no factual questions exist on issues that are within the Commission’s jurisdiction.” Motion at 1. Cingular admits the material facts concerning the dispute of Complainant’s payment of his June 18, 2003 bill. According to Cingular, the only disputes between the parties pertain to the legal consequence of those facts and to Complainant’s notice, or lack thereof, of his ability to change his account password to avoid the use of the last four digits of his Social Security number. Motion at ¶ 3. Cingular argues that many of the issues raised by Complainant in this action are not within the jurisdiction of the Commission and must be brought in a civil action instead. According to Cingular, it is beyond the Commission’s jurisdiction, and indeed would be a waste of the Commission’s resources, to devote time necessary for discovery concerning these issues. Motion at ¶ 6.

In compliance with the procedural Order, both parties submitted discovery requests to each other. By Order dated March 18, 2004, the Commission suspended the procedural schedule and scheduled an informal conference. Complainant contested the suspension of the procedural schedule. He asserted that KRS 278.040(3)

authorizes the Commission to investigate methods and practices of utilities and that KRS 278.260(1) gives original jurisdiction to the Commission regarding practices or acts affecting or relating to the service of the utility. Complainant argued that, according to these statutes, this Commission has jurisdiction over all issues of which he complains.

The informal conference was held, but nothing was resolved. In a letter filed May 25, 2004, after the informal conference, Cingular contended that no facts concerning the cellular telephone service provided, and not provided, to Complainant are in dispute. Thus, this matter is ripe for determination without a formal hearing. According to Cingular, the other issues complained of are not service related.

On July 8, 2004, the Commission issued an Order reestablishing the procedural schedule in this case. Since the entrance of the July 8, 2004 Order, both parties have filed a flurry of procedural motions. The Commission addresses these motions and, for reasons stated herein, dismisses this complaint.

EMERGENCY MOTION FOR ENTRY OF AN ORDER
STRIKING, PROHIBITING DISCLOSURE OF,
AND SUBSTITUTING DOCUMENTS

The July 8, 2004 Order required the parties to file their responses to interrogatories on or before August 12, 2004. On August 12, 2004, Cingular sent via Federal Express to the Commission its responses to Complainant's interrogatories.¹ Counsel for Cingular notified Commission Staff via telephone on August 13, 2004 that certain non-public information² had been included in Cingular's August 12, 2004 filing

¹ The responses were filed in the Commission's overnight filings box.

² The information consisted of billing records of a Cingular customer who is not a party to this case. This is the party to whose account Complainant's check was initially credited.

and requested that the information be struck.³ Cingular filed a motion with the Commission on August 13, 2004 requesting that the information be struck and other information be inserted into its responses.

On August 16, 2004, Complainant filed a document in which he stated his opposition to Cingular's motion to strike. Complainant claimed, among other arguments, that: Cingular's motion does not qualify for confidential treatment; that Cingular cannot enforce a third party's privacy rights; that some of the information about the third party is public information; that the third party waived its right to privacy by not questioning an unexplained credit to its account; and that the information was specifically sought by Complainant.

Some of Complainant's arguments are not without merit. Cingular did not comply with the procedures for requesting confidential treatment. 807 KAR 5:001, Section 7. Cingular may not raise a privacy argument on behalf of a third party. Some of the information of the third party contained on the billing information is public information.⁴ Others of Complainant's arguments are without merit. Complainant's objection that the third party somehow waived its privacy right has no basis in law or fact.

Complainant also did not specifically request the provided information. In Complainant's first set of interrogatories, #27, Complainant requested that Cingular "fully identify the subscriber whose account was credited by the payment of \$55.46 made on behalf of Complainant." The billing information is not necessary to "fully

³ Counsel for Cingular made this request prior to the Commission's receipt of Cingular's responses to Complainant's interrogatories.

⁴ The third party's name and address are publicly available.

identify” the third party. Cingular merely had to provide the third party’s full name to fulfill the request. Similarly, Complainant did not specifically request the information in his request for production.

The Commission denies Cingular’s emergency motion for entry of an order striking, prohibiting disclosure of, and substituting documents. The Commission finds that the filed information is relevant to this proceeding and will assist the Commission in creating a record sufficient upon which to render its final decision. The Commission, however, will not allow the non-public information to be accessed by the public. Cingular’s counsel, upon realizing the disclosure of the non-public information, acted promptly in attempting to prevent the dissemination of the information by contacting the Commission and Complainant prior to the filing of the material in the main case file. Therefore, the Commission, on its own motion, will treat the emergency motion for entry of an order striking, prohibiting disclosure of, and substituting documents as a petition for confidentiality pursuant to 807 KAR 5:001, Section 7, and will grant the same. The Commission notes that the motion does not comply with the procedural requirements of 807 KAR 5:001, Section 7, but the Commission finds good cause to grant deviation from those requirements. 807 KAR 5:001, Section 14. Notwithstanding Complainant’s arguments against this motion, Complainant suffers no harm from the confidential treatment of this information. Accordingly, Cingular shall file, within 10 days of the date of this Order, copies of the non-public information in the manner prescribed by 807 KAR 5:001, Section 7. Upon the filing of this information, Commission Staff will return to Cingular the unredacted copies of the non-public information.

As the third party's information contained in Complainant's opposition to this motion is of public record, Cingular's August 24, 2004 reply to and motion to strike Complainant's opposition to emergency motion is hereby denied.

COMPLAINANT'S MOTION FOR ENLARGEMENT OF TIME
TO CONDUCT DISCOVERY AND MOTION FOR LEAVE TO
SERVE NOTICE TO TAKE DEPOSITION

On August 16, 2004, Complainant filed a motion requesting that the Commission enlarge the procedural schedule so that Complainant might conduct additional discovery. Complainant also requested that the Commission grant leave to depose three employees of Cingular.

As grounds for his motion, Complainant claimed that Cingular's response to his discovery requests "is riddled with non-responsive and evasive answers; it avoids disclosure of the most basic record."⁵ Complainant claimed that Cingular's responses to his discovery requests were not made in good faith, putting him at a disadvantage at hearing. Complainant also opined that a hearing might have to be held to resolve the discovery disputes.

Complainant requested leave to depose three out-of-state employees of Cingular. Complainant alleged that these employees have "knowledge of facts, files, writings, books, papers and documents ... pertaining to transactions between [Cingular] and complainant"⁶ and were, therefore, material witnesses. Complainant also wanted to obtain the testimony of the Commission's Director of Consumer Services.

⁵ Complainant's Motion for Enlargement of Time to Conduct Discovery and Motion for Leave to Serve Notice to Take Deposition at 1.

⁶ Id. at 2.

Cingular filed its opposition to Complainant's motion on August 19, 2004. Cingular argued that no further discovery was necessary, as there were no facts in dispute that were material to the relief that the Commission could provide. Further, Cingular argued that the Cingular employees Complainant sought to depose would not provide any additional material facts that could assist the Commission. Cingular averred that it had provided all necessary and requested documentation and would present witnesses who could testify to the necessary issues.

It does not appear that the requested depositions will assist the Commission in developing the record upon which to base its decision, and, accordingly, leave to take the requested depositions and to conduct additional discovery is denied.

Moreover, Complainant has not filed the prefiled testimony of those witnesses listed in his response to Cingular's interrogatories as required by the Commission's July 8, 2004 Order. Complainant has also not requested an extension of time in which to file the prefiled testimony of his witnesses.⁷

DISCUSSION OF ISSUES

The Commission's jurisdiction over wireless carriers is less comprehensive than its jurisdiction over other utilities or telecommunication carriers. Wireless carriers are not required to maintain tariffs with the Commission⁸ and the Commission has no

⁷ This does not include the testimony of the witnesses he sought to depose. Though the Commission had previously determined that a hearing should be held, its review of the record as it now stands has caused it to conclude otherwise.

⁸ Administrative Case No. 359, Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones, and Administrative Case No. 370, Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers, Order entered August 8, 2000.

jurisdiction over the rates that a wireless carrier charges. The Commission also has no performance regulations for wireless carriers, except that they comply with, among other requirements, 807 KAR 5:006, Section 9, KRS 278.130, KRS 278.140, and KRS 278.150. Wireless carriers operate in a competitive environment.

The Commission is concerned that many of the issues in this case exceed the scope of the Commission's authority. The Commission has original jurisdiction over the rates and services of jurisdictional utilities⁹ and may enter an Order affecting the rates and services of a utility.¹⁰ However, the Commission is also reluctant to order drastic changes in business practices absent compelling evidence that, but for those changes, a utility's customers will seriously suffer.

Complainant has made many allegations against Cingular and requests much in the way of relief from the Commission. As discussed below, the Commission finds that the scope of this proceeding must necessarily be limited to jurisdictional matters. The record, as it now stands, is complete as to these issues.

The Commission has not considered issues pertaining to Cingular's use of Complainant's Social Security number or the alleged dissemination thereof. While these issues may be of great importance to Complainant, the use, or lack of use, of a Social Security number does not affect the provision of service¹¹ or prevent Cingular, or any other utility, from providing "adequate service."¹² Accordingly, the Commission will

⁹ KRS 278.040(2).

¹⁰ KRS 278.260.

¹¹ KRS 278.010(13).

¹² KRS 278.010(14).

not address any arguments or issues concerning Cingular's use of Complainant's Social Security number.

Complainant also raises breach of contract issues. The Commission has no jurisdiction to hear those claims, as those actions lie in courts of local jurisdictions. Likewise, any allegations of breach of any duty lie in those same courts.

The Commission, similarly, has no jurisdiction relating to: (1) the alleged fraudulent behavior of Cingular; (2) Cingular's alleged broadcast of defamatory messages regarding Complainant; (3) Cingular's blocking of caller ID services; (4) claims of emotional distress; (5) damages; (6) alleged coercion in attempts to collect a debt; and (7) alleged violations of KRS 367.170, 15 U.S.C. § 5711 et seq. and 42 U.S.C. § 405(c)(2)(C)(viii)(I). The proper venue for these claims, should they be pursued, lies in a local court of competent jurisdiction.

As noted above, the wireless telecommunications industry is highly competitive. If Complainant is dissatisfied with areas of Cingular's business practice over which the Commission has no jurisdiction, he may select another wireless carrier. Number portability ensures that Complainant and his daughter may keep their current wireless numbers regardless to which wireless carrier Complainant may switch his service.

Cingular admits its error in attributing monies to a different account than that to which they should have been attributed. The monies have been redirected to the appropriate account. Complainant's service has been restored. Cingular Wireless has satisfied the complaint. There are no matters outstanding of which this Commission has jurisdiction. The service questions, which Complainant asserts must be corrected by this Commission, are not appropriate for this Commission to review.

Possibly one issue remains: whether Cingular appropriately credited Complainant's account for the August through November 2003 time during which he had no service.

IT IS HEREBY ORDERED that:

1. This complaint is dismissed as satisfied.
2. Within 10 days of the date of this Order, Cingular shall file information verifying that it appropriately credited Complainant's account for August through November 2003.
3. Within 10 days of the date of this Order, Cingular shall file copies of the non-public information in the manner prescribed by 807 KAR 5:001, Section 7.
4. The particular requests contained in Cingular's motion for entry of an order striking and prohibiting disclosure of and substituting documents are denied, except to the extent that confidential treatment shall be granted to the non-public information, as described herein.
5. Cingular's August 24, 2004 motion to strike Complainant's opposition to its motion is hereby denied.
6. Complainant's August 16, 2004 motion for enlargement of time to conduct discovery and motion for leave to serve notice to take depositions are denied.
7. Complainant's December 19, 2003 motion to strike Cingular's pleading is denied.

Done at Frankfort, Kentucky, this 23rd day of March, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:



Executive Director

Case No. 2003-00400