

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT FILED)	ORDER GRANTING
BY ROBERT A. FOGG, JR., MARTIN, SOUTH)	SUMMARY JUDGMENT;
DAKOTA, AGAINST CELLULARONE)	FINAL DECISION AND
REGARDING BILLING)	ORDER; NOTICE OF ENTRY
)	OF DECISION AND ORDER
)	CT02-032

On August 8, 2002, the Public Utilities Commission (Commission) received a complaint filed by Robert A. Fogg, Jr., Martin, South Dakota (Complainant), against Western Wireless Corporation d/b/a CellularOne (CellularOne) regarding billing. On August 12, 2002, the complaint was faxed to CellularOne. Pursuant to ARSD 20:10:01:09, CellularOne was notified that it must satisfy the complaint or file an answer in writing with the Commission by September 3, 2002. On September 3, 2002, the Commission received a response from CellularOne (Answer).

On October 25, 2002, the Commission served an Order for and Notice of Hearing setting the matter for hearing at 12:00 P.M. MST on November 7, 2002. On October 31, 2002, CellularOne filed a Motion for Summary Judgment Pursuant to SDCL 1-26-18 (Motion) requesting summary judgment in favor of CellularOne on all issues raised by the complaint. On November 4, 2002, the Commission issued an Order Continuing Hearing continuing the November 7 hearing until further notice in order to consider the Motion. At its regular meeting on November 20, 2002, the Commission considered the Motion. Complainant and CellularOne appeared by teleconference. The Commission voted unanimously to schedule the Motion for decision at a later date. On December 5, 2002, the Commission served an Order for and Notice of Hearing scheduling the Motion for hearing at the Commission's regular meeting at 2:00 p.m. on December 19, 2002, in Room 464 of the State Capitol Building, Pierre, South Dakota. At the hearing on the Motion on December 19, 2002, the Commission voted unanimously to grant the Motion in favor of CellularOne and against Complainant as to all issues in the complaint.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto, the affidavits filed by the parties and the oral arguments of the parties at the hearing, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

1. The service ordered by Complainant from CellularOne that is the subject of the complaint was standard commercial cellular mobile telephone service. This service is a commercial mobile radio service (CMRS). Motion at p. 1.

2. The Affidavit of Nathan Glazier (Glazier Affidavit) filed by CellularOne in support of the Motion states that at the time Complainant sought to activate his CMRS from CellularOne, Complainant was presented with CellularOne's Service Agreement, which he signed. Glazier Affidavit at paragraph 5; Glazier Affidavit Exhibit A. Complainant has presented no affidavit or other evidence that he did not sign the Service Agreement or that his signature was procured by fraud or duress.

Issue 1. That CellularOne conducted a credit check on Complainant before initiating wireless service to him.

3. CellularOne admitted in its Answer and Glazier Affidavit that it conducted a check of Complainant's credit history prior to activation of service to Complainant. CellularOne used Lightbridge, a third party transaction services contractor, to perform the service activation functions for Complainant's account. As part of this process, Lightbridge used credit information provided by a credit reporting agency to generate a credit score for Complainant. Answer at 2; Glazier Affidavit at paragraphs 6 and 7; Glazier Affidavit Exhibit B.

4. The Service Agreement signature page contains an authorization for CellularOne to "obtain from anyone information about Customer's or its agent's credit history." This authorization is set forth in the paragraph immediately above the signature line. Glazier Affidavit Exhibit A.

5. There is no issue of fact presented as to whether CellularOne conducted a credit check of Complainant before activating service.

6. We find that CellularOne conducted a credit check of Complainant using a credit score generated by a credit reporting agency as part of the acceptance and activation process for Complainant's service.

Issue 2. That CellularOne failed to provide a copy of Complainant's credit report upon request.

7. CellularOne admits that it did not provide Complainant a copy of his credit report upon Complainant's request which occurred in late May. Glazier Affidavit at paragraph 8.

8. CellularOne only retains the credit information used to generate a credit score and calculate the deposit amount for fourteen days. Since Complainant's request for the credit report was more than fourteen days after the transaction, CellularOne no longer possessed the information. CellularOne did provide Complainant a letter instructing him how he could obtain his credit report from the credit reporting agency. Glazier Affidavit at paragraph 8 and Exhibit B.

9. There is no issue of fact presented as to whether CellularOne provided Complainant a copy of his credit report upon his request. CellularOne did not provide Complainant with a copy of the credit report but did provide him with information as to how he could obtain a copy.

Issue 3. That CellularOne assessed a \$350 deposit as a condition of initiating service.

10. CellularOne admits that it required a \$350 deposit as a condition of initiating service to Complainant.

11. Complainant executed a contract at the time of initiating service on which a box entitled "DEPOSIT" containing the number "350" is prominently displayed on the same page as Complainant's signature appears. Glazier Affidavit Exhibit A.

12. Complainant paid the \$350 deposit at the time he signed the Services Agreement.

13. There is no issue of fact as to whether CellularOne required Complainant to pay a \$350 deposit in order to activate service.

14. Complainant made no showing as to what his credit report contained.

15. Complainant has not demonstrated any evidence upon which the Commission could base a conclusion that a genuine issue of fact exists as to whether his deposit amount may have been unreasonably or discriminatorily determined.

Issue 4. That CellularOne failed to post the \$350 deposit payment in a timely manner on the first bill (4/22 - 5/14).

16. CellularOne admits it had not posted Complainant's deposit payment in the amount of \$350 at the time CellularOne sent Complainant his first bill for the billing period from activation on April 22, 2002 and May 14, 2002. Glazier Affidavit at paragraph 12.

17. Complainant activated his service through Luck's TV and Appliance (Luck's), a CellularOne authorized third party dealer. At the time of activation, Complainant delivered a check to Luck's in the amount of \$350 to cover the deposit. Glazier Affidavit at paragraph 3 and 9.

18. Luck's did not immediately forward Complainant's \$350 deposit to CellularOne. If CellularOne does not receive a customer deposit payment, the required deposit will be stated as an outstanding charge on the customer's account. Because Luck's had not forwarded Complainant's deposit as of the close of the first billing period on Complainant's account, CellularOne included the \$350 deposit amount on Complainant's first bill. Glazier Affidavit at paragraphs 11 - 12.

19. After receiving his first bill, Complainant called CellularOne and advised the company that his bill contained a charge for the \$350 deposit he had already paid. Following this call, CellularOne took immediate action to locate Complainant's check, which was still in the possession of Luck's, sent a manager from Rapid City to Martin to personally pick up the check, forwarded the check to CellularOne's billing center and posted the payment to Complainant's account. Complainant's payment had been posted and was displayed as a credit against the \$350 charge on his second bill for the period 5/15/02 - 6/14/02.

20. Complainant has provided no evidence to dispute CellularOne's version of the facts.

21. We find that CellularOne's actions in dealing with Complainant's deposit payment did not constitute an unlawful or unreasonable practice. CellularOne immediately took action to locate and post Complainant's payment once it learned of the problem. Complainant's next bill correctly reflected a credit in the amount of the payment, and Complainant did not incur any late charge or other charge or penalty as a consequence of the delay in posting.

Issue 5.a. That CellularOne incorrectly billed for the \$350 deposit on the first monthly bill (4/22 - 5/14) that had already been paid to CellularOne's sales agent at time of sign-up.

22. There is no genuine issue of material fact as to whether a \$350 deposit charge was included on Complainant's first bill for the period 4/22/02 - 5/14/02 or as to the facts and circumstances which led to the inclusion of the charge and CellularOne's actions to correct the problem. Attachments to Complainant and Answer; Findings 16-21.

23. For the same reasons stated in Findings 16-21, we find that CellularOne's inclusion of the \$350 deposit charge on Complainant's first bill did not constitute an unlawful or unreasonable practice.

Issue 5.b. That CellularOne included a "continuation of the corrupt double billing scam" on the 5/15 - 6/14 bill.

24. There is no issue of fact as to what Complainant's bill for the period 5/15/02 - 6/14/02 contains. A copy of this bill was attached to the complaint and to the Answer, and the document speaks for itself.

25. We find that there was no double billing on Complainant's second bill for the period 5/15/02 - 6/14/02. The \$350 item on the second bill is not a charge but a credit reflecting Complainant's payment of the deposit.

26. CellularOne did not engage in an unreasonable practice in posting a \$350 credit on Complainant's bill.

Issue 5.c. That the charge of \$100.65 on the 6/15 - 7/14 bill is "carryover double billing."

27. The copies of Complainant's bills attached to the Answer demonstrate a complete billing history for the account from activation of service through the 6/15 - 7/14 bill. Attachments to Answer.

28. The \$100.65 total consists of new charges in the amount of \$50.41 for the billing period 6/15/02 - 7/14/02, plus the unpaid portion of the balance from Complainant's previous bill in the amount of \$50.24.

29. Complainant has offered no evidence that he had paid the outstanding balance of \$50.24 prior to the statement date of 7/14/02. CellularOne has offered evidence to show that the company received a payment of \$50.24 at its corporate headquarters in Washington on July 30, 2002. Glazier Affidavit at paragraph 24. There is no genuine issue of material fact as to whether the \$100.65 total on Complainant's bill is double billing.

30. We find that CellularOne did not engage in an unlawful or unreasonable practice in carrying forward an unpaid outstanding balance onto the next month's bill.

Issue 6. That CellularOne threatened to assess a \$25 reconnection fee if service were disconnected due to non-payment of past due balance of \$100.65.

31. CellularOne admits that it threatened to assess a \$25 reconnection fee if it was required to disconnect service to Complainant due to non-payment of the past due balance. The \$25 reconnection fee is a standard fee charged by CellularOne when service is disconnected due to non-payment. Motion at p. 5.

32. Although Complainant's service was briefly disconnected for late payment, CellularOne has stated that the \$25 reconnection fee was never charged. Motion at p. 5. Complainant has offered no evidence to contradict this assertion.

33. We find that CellularOne did not engage in an unlawful or unreasonable practice when it threatened to charge Complainant a reasonable reconnection fee if his service was disconnected for non-payment.

Issue 7. That CellularOne refused to provide Complainant the full name and address of CellularOne's customer service representative upon request.

34. CellularOne admits that it refused to provide Complainant with the full name and address of its customer service representatives. Motion at p. 6. There is accordingly no issue of fact with respect to this issue.

35. We find that CellularOne did not engage in an unlawful or unreasonable practice when it refused to provide Complainant with the full name and address of its customer service representatives.

Issue 8. That CellularOne refused to provide Complainant with copies of all tape recordings of conversations between Complainant and CellularOne's service representatives.

36. CellularOne's affidavit states that any recording of telephone conversations between customers and its customer service representatives is done on a random basis and that the company does not maintain copies of any recorded conversations. Glazier Affidavit at paragraph 28.

37. Complainant did not seek a subpoena or other process from the Commission to obtain from CellularOne any recordings or transcripts of conversations between Complainant and CellularOne's customer service representative.

38. There is no genuine issue of material fact presented as to this issue. There is no evidence from which the Commission could find that CellularOne maintained tape recordings of conversations between its employees and Complainant, that Complainant sought any form of legal process from the Commission to compel production of such recordings or that he sought the assistance of Commission Staff to prepare and obtain such process.

Issue 9. That CellularOne verbally agreed to pay interest on the deposit at the rate of 28%, compounded monthly, and has not accounted for nor paid this interest.

39. Complainant alleged that CellularOne "verbally agreed to" pay a 28% rate of interest, compounded monthly, on his \$350 deposit amount. CellularOne disputes this contention. Motion at p. 7.

40. A 28% interest rate compounded monthly equals an annual percentage rate of 31.8%.

41. The General Terms and Conditions to the Service Agreement signed by Complainant at the time of activation provides in paragraph 6 that no interest would be earned by the subscriber on the deposit. Glazier Affidavit at Exhibit A.

42. We find that although a theoretical issue of fact may be raised by Complainant's allegation that he was promised a 28% interest rate, compounded monthly, on his deposit, a genuine issue of fact is nevertheless not presented. Complainant signed a written agreement that provides in the terms and conditions that no interest would be earned on the deposit. Furthermore, even if the

agreement's terms are not dispositive of the issue, we find that Complainant's assertion is not sufficiently credible to raise a genuine issue of fact. According to information published on the United States Department of the Treasury's web site, the one-year yield on Treasury instruments declined from 2.76% to 2.35% during the month of April 2002. It is not reasonable to conclude either (i) that CellularOne's agent would represent to a customer that he would earn an APR of 31.8% on a security deposit securing a one year contract or (ii) that Complainant either did, or had a justifiable right to, rely on such a representation in any case. If Complainant's assertion were true, CellularOne would be holding out its security deposit as one of the best investment opportunities in America at this time. We do not find Complainant's assertion to be sufficiently credible to raise a genuine issue of material fact requiring CellularOne to incur the expense of a hearing on this issue.

CONCLUSIONS OF LAW

1. SDCL 1-26-18 provides that:

[E]ach agency, upon the motion of any party, may dispose of any defense or claim:

(1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law; . . .

2. CellularOne is a CMRS. The standard cellular phone service ordered by Complainant from CellularOne is a CMRS. 47 U.S.C. Sec. 332(d).

3. 47 U.S.C. Sec. 332(c)(3) preempts state authority to regulate the entry of or the rates charged by any CMRS. This preemption of state authority to regulate entry prohibits states from requiring that telecommunications companies obtain a state certificate of authority as a condition of providing CMRS within the state. CellularOne is accordingly not required to be, and is not, certified within the state of South Dakota to provide CMRS.

4. ARSD Chapter 20:10:08, containing rules relating to telecommunications credit and deposits, is not applicable to CellularOne because CellularOne is not a telecommunications company "certified within the state of South Dakota which is regulated by the Commission for noncompetitive or emerging telecommunications services." ARSD 20:10:05:01.

5. Although not subject to the Commission's credit and deposit rules, the credit evaluation procedures employed by CellularOne are governed by the federal Fair Credit Reporting Act (FCRA). The Commission has not been designated by the State to enforce the FCRA and does not have jurisdiction under the FCRA to adjudicate compliance with its provisions. 15 U.S.C. Sec. 601 through 625, inclusive.

6. Complainant's Issues 1 and 2 are governed by the FCRA, and the Commission is without jurisdiction to decide these issues. The complaint is dismissed as to Issues 1 and 2. Although we are without jurisdiction to adjudicate the issue, the Commission would recommend that CellularOne consider implementing procedures to ensure compliance by its personnel and authorized dealers with the requirement, under 47 U.S.C. Sec. 615, that notification of adverse action be given to the consumer at the time such action is taken.

7. For the reasons stated in Conclusions 3 and 4, ARSD 20:10:08:06 is inapplicable to CellularOne's CMRS to Complainant. Since the evidence presented provides no basis upon which the Commission might otherwise conclude that the \$350 deposit was unreasonable or discriminatory, the Commission need not reach the issue of whether a basis exists in law for it to render a decision as to the reasonableness or discriminatory application of a deposit for CMRS. Summary judgment is accordingly granted in favor of CellularOne as to Issue 3.

8. 47 U.S.C. Sec. 332(c)(3) does not prohibit a state from regulating the "other terms and conditions" of CMRS. Pursuant to SDCL 49-13 and 49-31, particularly 49-13-13, 49-31-3, 49-31-5, 49-31-7 through 49-31-7.4, 49-31-38, 49-31-38.1, 49-31-38.2, and 49-31-38.3, the Commission accordingly may exercise jurisdiction over terms and conditions of service other than entry into the market and rates for service. The billing practices of a CMRS may be regulated by the Commission as "other terms and conditions" of CMRS under 47 U.S.C. Sec. 332(c)(3). *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 2000 WL 114057 (2000); *Union Ink Co., Inc. v. AT&T Corp.*, 2002 WL 1396769 (N.J. Super. A.D. 2002).

9. As to Complainant's Issues 4 through 8, based upon the undisputed facts, the Commission concludes that CellularOne did not engage in an unreasonable practice and is entitled to judgment as a matter of law. Summary judgment is accordingly granted as to Issues 4 through 8.

10. As to Complainant's Issue 9, the Commission concludes that Complainant failed to raise a genuine issue of material fact as to CellularOne's authorized dealer's representation concerning the interest that CellularOne would pay on Complainant's deposit and that Complainant executed a contract with CellularOne agreeing to the deposit interest terms offered by CellularOne. For the reasons stated in Conclusions 3 and 4, ARSD 20:10:08:10 through 20:10:08:13 are not applicable to CellularOne's CMRS to Complainant. The Commission concludes that it has no legal basis on this record for concluding as a matter of law that the deposit interest term of CellularOne's service agreement constitutes an unreasonable practice per se and that CellularOne is entitled to judgment as a matter of law. Summary judgment is accordingly granted to CellularOne as to Issue 9.

11. The findings and conclusions contained in this decision are based upon and limited to the particular facts of this case involving ordinary commercial cellular phone service and are not applicable to other situations, such as (but not necessarily limited to), the provision by a wireless service of a universal service offering.

It is therefore

ORDERED, that Summary Judgment is granted in favor of CellularOne and against Complainant on all issues raised by the complaint and that Complainant shall be awarded no relief under his complaint.

PLEASE TAKE NOTICE that this Final Decision and Order was duly entered on this 3rd day of January, 2003. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Final Decision and Order. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision within thirty (30) days after the date of service of this Notice of Decision and Order.

Dated at Pierre, South Dakota, this 3rd day of January, 2003.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Maime Kolbo

Date: 1/6/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Robert K. Sahr
ROBERT K. SAHR, Commissioner