STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6067

Investigation Re: Petition of the Department	)
of Public Service for sanctions against Business	)
Discount Plan, Inc. for violation of Board Rule	)
4.700	)

Order entered: 5/5/2000

PRESENT: Judith M. Kasper, Esq., Hearing Officer

APPEARANCES: Sarah Hofmann, Esq.
for the Vermont Department of Public Service

Michael P. Drescher, Esq.
Sheehy, Brue, Gray & Furlong
for Business Discount Plan, Inc.

Summary of Proceedings

On February 23, 1998, the Vermont Department of Public Service ("Department") petitioned the Public Service Board ("Board") to determine whether Business Discount Plan, Inc. ("BDP") should be fined and its Certificate of Public Good revoked for alleged violation of Public Service Board Rule 4.700 and for allegedly engaging in misleading business practices. The Department asserted that it had received complaints that BDP failed to obtain express permission from customers before switching their interexchange carriers, a practice commonly referred to as "slamming." The petition also requested the BDP be ordered to reimburse customers for any financial loss they incurred as a result of BDP's allegedly deceptive practices.

On March 31, 1998, the Board opened an investigation and appointed Judith M. Kasper as Hearing Officer.

On April 8, 1998, a prehearing conference was held.

On April 14, 1998, a scheduling order was issued. Included therein was a deadline for intervention by other parties. No other parties intervened.

On June 2, 1998, the Department filed with the Board the prefiled testimony of Deena L. Frankel and Bennett Truman.

On October 26, 1998, the parties filed with the Board a Memorandum of Understanding ("MOU") as their proposed resolution of this docket. Also on October 26, 1998, BDP filed a Memorandum in Support of Settlement.

On November 20, 1998, a duly noticed technical hearing was held at the Public Service Board Hearing Room. At that hearing, (1) certain previously submitted prefiled testimony was entered into evidence, (2) additional testimony was presented by Ms. Frankel and Mr. Truman, and (3) the MOU, with attachments, was entered into evidence. At that time, Attachment A to the MOU was accepted by the Hearing Officer as a confidential document, and on December 10, 1998, a Procedural Order Re: Protective Agreement was issued to preserve the confidentiality of Attachment A.

On December 4, 1998, the Department filed with the Board a Memorandum Re: Special Fund for Consumer Education/Protection Program. The Department requested that this memorandum be admitted into the record as evidence, and asserted that BDP had no objection thereto. BDP did not file an objection. Therefore, I now formally grant this request.

On the basis of the terms of the MOU, and the testimony and other evidence in this docket, I report the following to the Board, pursuant to 30 V.S.A. § 8.

Findings of Fact

1. BDP holds a Certificate of Public Good ("CPG") to provide intrastate telecommunications services in the State of Vermont. CPG No. 282, issued May 19, 1997.

2. BDP engaged in telemarketing practices in Vermont commencing in July 1997 and ending in mid-January 1998. A total of one hundred thirty-three (133) complaints of slamming by BDP were made to the Department, the Vermont Attorney General's Office and BDP relative to that six-month period. Tr. at 23-24.

3. In response to the Department's request that BDP voluntarily cease its telemarketing efforts in Vermont, BDP ceased these efforts in mid-January 1998. Tr. 11/20/98, at 39; tr. 11/20/98, at 7C, n. 1 (Frankel).

4. The Department has asserted claims against BDP for alleged misrepresentations in soliciting customers to switch their long distance telephone service, for alleged unauthorized switching of customers' long distance telephone service, and for improper verification of authorizations for changes in long distance telephone service. MOU at paragraph 5.

5. BDP does not admit that it engaged in any wrongdoing. MOU at paragraph 5,

6. Nevertheless, the Department and BDP have agreed to settle these claims in a mutual effort to avoid the costs, delays and risks associated with litigation. MOU at paragraph 5.

7. The parties have agreed that BDP shall not market, in any fashion, telecommunications in the State of Vermont unless and until BDP first submits to the Department and obtains the Department's approval of the following: the telemarketing sales script(s) it intends to use with respect to Vermont customers; the verification script it will require its independent verifiers to use with Vermont customers; and, all promotional information it will use in Vermont. MOU at paragraph 3.

8. The parties have agreed that BDP shall be allowed to retain its CPG to do business in Vermont, and that BDP may continue to serve any customers it presently has as long as those customers choose to remain BDP customers. However, if at any time in the first three years after BDP resumes marketing in Vermont, the Department receives a cumulative total of five or more customer complaints within any twelve-month period, and the Department's Consumer Affairs and Public Information Division ("CAPI"), after investigation, finds such complaints to be justified, then the parties agree that BDP must come before the Board at a hearing to show cause why BDP's CPG should not be revoked immediately. MOU at paragraph 3.

9. In addition, if at any point in the first three years after BDP resumes marketing in Vermont, the Department receives a cumulative total of five or more customer complaints within any twelve-month period, and CAPI, after investigation, has found such complaints to be justified, then BDP agrees to voluntarily cease marketing in Vermont until BDP and the Department agree that BDP has adequately remedied any problems giving rise to the complaints, provided that such agreement from the Department shall not be unreasonably withheld. MOU at paragraph 3.

10. The parties further have agreed that a justified complaint is defined as one in which, following investigation, CAPI staff believes that the utility's actions failed to conform with Public Service Board rules or orders, or relevant Vermont statutes. MOU at paragraph 3.

11. BDP has agreed to pay fifty dollars ($50.00) to each Vermont customer who complained of unauthorized transfer of long distance service, when such complaint was made to the Department, the Office of the Vermont Attorney General, or directly to BDP between June 15, 1998, and October 26, 1998, the date of execution of the MOU. These Vermont customers are listed in Attachment A to the MOU. In addition to these listed customers, any Vermont customer who complains against BDP on or before April 26, 2000, and who is found by the Department to have a justified complaint of BDP having switched the customer's telephone carrier without express authorization, also shall receive a fifty dollar ($50.00) payment from BDP. BDP agrees to inform the Department of any complaint alleging unauthorized switching of the complainant's telephone carrier by BDP that is filed directly with BDP on or before April 26, 2000. The parties agree that the fifty dollar ($50.00) payments described in this paragraph shall be in addition to the re-rating of the customer's charges to the amount he or she would have paid to the customer's preferred carrier, refund of PIC change fees, and any other adjustments which are agreed to between the customer and BDP. The parties agree that the fifty dollar ($50.00) payments described in this paragraph shall be accompanied by correspondence substantially identical to the "Text of Agreed Letter to Customers Receiving $50.00" appended to the MOU. MOU at paragraph 1.

12. The parties have agreed that BDP shall pay the sum of twenty-five thousand dollars ($25,000) into an escrow account which shall be transferred to a State of Vermont special account, when lawfully created, that will fund a consumer education/protection program on telecommunications issues. MOU at paragraph 2.

13. The entry of an Order by the Board in accordance with the terms of the MOU is intended by BDP and the Department not to constitute an admission by either party with respect to the merits of any of the claims alleged in the litigation or the defenses to those claims and is intended not to support any finding of fact or conclusion of law with respect to any of the activities that are the subject of this docket. The parties have agreed that the MOU should not

be construed by any party or tribunal as having any other impact on, or precedential effect in, proceedings involving other utilities. MOU at paragraph 5.

14. The Department and BDP have agreed that the MOU is a full, final and statewide settlement of claims by or on behalf of the Department against BDP arising prior to the date of execution of the MOU. The Department and BDP have further agreed that individuals might have individual claims against BDP that are not precluded by the MOU. MOU at paragraph 6.

15. The Department and BDP have stipulated to the entry of a Board order that is consistent with the provisions of the MOU. MOU at paragraph 8.

Discussion

"Slamming" is the switching of a customer's interexchange carrier without first obtaining his or her express permission. It is a widespread deceptive business practice that has been targeted by consumer protection legislation and agency rule-making at both the Federal and Vermont state levels.[1] In Vermont, a customer's interexchange carrier may not be changed unless and until he or she gives authorization for such in accordance with the provisions of 30 V.S.A. § 208a and Public Service Board Rule 4.700. These provisions are designed to ensure that consumers clearly understand that an interexchange carrier change is being proposed and affirmatively agree to any such change.

The Department's petition in this case alleges that BDP did not unambiguously tell consumers that it was soliciting interexchange carrier changes, thereby misleading consumers and causing them financial harm. The MOU poses a remedy for these alleged actions that provides direct compensation to customers who allegedly were slammed, requires BDP to make a lump sum payment to the State of Vermont, and authorizes the Department to closely monitor future marketing efforts by BDP in Vermont. For the reasons set forth below, I

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1. *See*, 47 CFR §§ 64.1100, 64.1150, 64.1160 64.1170, 64.1180, and 64.1190; 30 V.S.A. § 208a, Public Service Board Rule 4.700.

Federal Communications Commission Commissioner Susan Ness has reported that the FCC receives more complaints about slamming than any other telephone-related complaint. *See*, Statement of Commissioner Susan Ness Re: Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, CC Docket No. 94-129, 12/17/98.

conclude that this remedy serves the interests of the State of Vermont, and therefore, I recommend that the Board approve the MOU in settlement of this docket.

The MOU is designed to benefit Vermont consumers. First, any BDP customer who complains that he or she was slammed will be paid $50, even if that customer's charges are re-rated to the amount he or she would have paid to his or her preferred carrier, even if PIC change fees are refunded, and even if other adjustments are agreed upon between the customer and BDP. Thus, the $50 payment directly compensates injured customers for the inconvenience of having been slammed, but does not foreclose the opportunity for additional recovery where justified.[2]

Second, BDP will make a lump sum payment of twenty-five thousand dollars ($25,000) to the State of Vermont, to be used to fund a consumer education/protection program on telecommunications issues.[3] The Department has drafted a preliminary outline and budget for a project that will utilize posters, brochures and a web site with detailed information about telecommunications consumer issues (such as selecting a provider and protecting against fraudulent marketing practices).[4] Thus, the lump sum payment not only serves to deter BDP (and, hopefully, other companies) from engaging in deceptive marketing practices, it will also

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2. MOU at paragraph 10. *See,* tr. 11/20/98 at 12-16.

Subsequent to the violations alleged in this petition, 30 V.S.A. § 208a was amended to specifically authorize the Board to order full refunds of all charges and costs to the customer arising as a result of an unauthorized interexchange carrier change. The provisions of the MOU in this case provide harmed consumers with the opportunity to obtain similar relief.

3. MOU at paragraph 2.

The "special account" anticipated by the MOU will be established through the office of the Vermont Division of Budget and Management ("VDBM"). *See*, the Department's Memorandum Re: Special Fund For Consumer Education/Protection Program, 12/4/98, at 2. The VDBM is part of the Vermont Department of Finance and Management. 32 V.S.A. § 585 defines a "special fund," in relevant part, as "a fund created by the commissioner of finance and management to account for and manage such proceeds as those of court settlements." 3 V.S.A. § 809(d), which governs administrative proceedings, states that in contested cases "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default." And, 30 V.S.A. § 9 grants the Board all the "powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this state." I conclude that these statutory provisions authorize the Board to approve the proposed lump sum payment.

4. *See*, the Department's Memorandum Re: Special Fund For Consumer Education/Protection Program, 12/4/98.

provide Vermont consumers with information that will help them protect themselves against unauthorized interexchange carrier changes that any company attempts to impose.

Finally, the marketing practices of BDP will be monitored closely by the Department. In cooperation with the Department, BDP voluntarily ceased marketing in Vermont in mid-January 1998.[5] Under the terms of the MOU, before BDP may resume marketing telecommunications in Vermont it must first obtain the Department's approval not only for the language to be used by BDP's telemarketers and verifiers, but also for all promotional information BDP will use in Vermont.[6] In addition, during the three-year period following BDP's resumption of marketing, if five (5) slamming complaints are filed against BDP within any 12-month period, then BDP must immediately cease marketing in Vermont and appear before the Board to show cause why its CPG should not be revoked.[7] Thus, specific measures are in place to protect Vermont consumers against BDP engaging in the type of telemarketing practices which are prohibited by Vermont law.

I am persuaded that approval of the proposed settlement in this case is justified because of the benefits to be realized directly by Vermont consumers under the MOU. Moreover, the parties support their request that this settlement be approved by the Board with assertions that: (1) they desire to avoid the substantial costs of litigation; and (2) there are unresolved questions concerning state and/or federal jurisdiction over certain slamming complaints.[8] Finally, although BDP does not admit that it engaged in any wrongdoing, it has cooperated with the Department from the outset of this case, and it has agreed to make payments which, along with its costs of litigation, will total a sum that exceeds the amount of its Vermont gross revenues for the six-month period during which it marketed its services in Vermont.[9]

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5. Tr. 11/20/98, at 39; tr. 11/20/98, at 7C, n. 1 (Frankel).
6. MOU at paragraph 3.
7. MOU at paragraphs 8 and 9.

Although the petition in this case requested that the Board consider revoking BDP's CPG, the Department offered testimony that the oversight of BDP's activities as set out in the MOU give the Department greater control than it typically might have in a new CPG application process should BDP's CPG be revoked and BDP later apply for a new CPG. Tr. 11/20/98 at 28.

8. Tr. 11/20/98 at p. 71; BDP's Memorandum in Support of Settlement, 10/26/98 at 6, n. 4.
9. MOU at paragraph 5; BDP's Memorandum in Support of Settlement 10/26/98 at 6, n. 4; tr. 11/20/98 at 36 and 39.

Conclusion

For the reasons discussed above, I conclude that the MOU between the parties in this case serves the interests of the State of Vermont. I therefore recommend that the proposed settlement as embodied in the MOU be approved by the Board in resolution of this docket.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8. The Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

DATED at Montpelier, Vermont, this 27th day of April, 2000.

s/Judith M. Kasper

Judith M. Kasper
Hearing Officer

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and conclusions of the Hearing Officer are adopted.

2. The Memorandum of Understanding between the Vermont Department of Public Service ("Department") and Business Discount Plan, Inc. ("BDP") is approved.

3. BDP shall pay the sum of twenty-five thousand dollars ($25,000) into an escrow account which shall be transferred to a State of Vermont special account, when lawfully created, that will fund a consumer education/protection program on telecommunications issues.

4. If, at any time in the first three years after BDP resumes marketing in Vermont, the Department receives a cumulative total of five or more slamming complaints against BDP within any twelve-month period, and the Department's Consumer Affairs and Public Information Division, after investigation, finds such complaints to be justified, then BDP must immediately cease marketing in Vermont, and BDP must come before the Board at a hearing to show cause why BDP's Certificate of Public Good should not be revoked forthwith.

5. This docket is closed.

DATED at Montpelier, Vermont, this 5th day of May, 2000.

s/Michael H. Dworkin	)	
	)	PUBLIC SERVICE
	)	
s/Suzanne D. Rude	)	BOARD
	)	
	)	OF VERMONT
s/David C. Coen	)	

OFFICE OF THE CLERK

Filed: May 5, 2000

Attest: s/Susan M. Hudson
Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board with ten days of the date of this decision and order.