



AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Case Number: 01-15-0002-7134

Larry Strong

-vs-

Comcast

AWARD OF ARBITRATOR

I, JOHN S. MONACAL, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and oral hearings having been waived in accordance with the Rules, and having fully reviewed and considered the written documents submitted to me by counsel for the parties, do hereby, AWARD, as follows:

Findings of Fact

On October 13, 2011 and again on January 21, 2014, Claimant and Respondent entered into a contract for Respondent to provide telephone and television services to Claimant. These contracts each incorporated Comcast's "Business Services Customer Terms and Conditions" (hereinafter, "Conditions", Claimant's Exhibit 2 and Respondent's Exhibit D). The Conditions contained the following definition:

Termination Charges: Charges that may be imposed by Comcast if, prior to the end of the applicable Service Term (a) Comcast terminates Services for cause or (b) Customer terminates any Service without cause. Termination Charges with respect to each Service terminated during the initial Service Term shall equal, in addition to all amounts payable by Customer in accordance with Section 5.3, seventy-five percent (75%) of the remaining monthly fees that would have been payable by Customer under the applicable Service Order if the terminated Service(s) had been provided until the end of the initial Service Term, and one hundred percent (100%) of any amount paid by Comcast in connection with Custom Installation, as that term is defined in Section 2.7, for the Services provided by Comcast under such Service Order.

In November 2014, Claimant's services were terminated and Respondent charged Claimant's account with a termination charge of \$4,341.68. Claimant states that he asked for termination and Respondent states that Respondent terminated the Services for cause. Claimant has provided insufficient evidence that his termination (if requested) was 'with cause'. Accordingly, in either event, the Termination Charge definition is met if the termination was prior to the end of the applicable "Service Term", which the Conditions defined as:

Service Term: The duration of time (commencing on the Service Commencement Date) for which Services are ordered, as specified in a Service Order.

Service Order: A request for Comcast to provide the Services to Service Location(s) submitted by Customer to Comcast ... through a Comcast electronic or verbal order processing system designated for that purpose.

Service Commencement Date: The date(s) on which Comcast first makes Service available for use by Customer. A single Service Order containing multiple Service Locations or Services may have multiple Service Commencement Dates.

Service Commencement Date: Upon installation and connection of the necessary facilities and equipment to provide the Services, or in the case of Voice, the day Voice Service is activated, Comcast shall notify Customer that the Services are available for use, and the date of such notice shall be called the "Service Commencement Date."

The 2011 contract was entered through a Comcast form electronically signed by Claimant on October 13, 2011 the (2011 Service Order", Respondent's Exhibit A). The 2011 contract provides:

AGREEMENT

This Comcast Business Class Service Order Agreement sets forth the terms and conditions under which [Comcast] will provide the Services to Customer. This Comcast Business Class Service Order Agreement consists of this document ("SOA"), the standard Comcast Business Class Terms and conditions ("Terms and Conditions") and any jointly executed amendments ("Amendments"), collectively referred to as the "Agreement." In the event of inconsistency among these documents, precedence will be as follows: (a) Amendments; (2) Terms and Conditions, and (3) this SOA. ... The Agreement shall terminate as set forth in the Terms and Conditions... All capitalized terms not defined in this SOA shall reflect the definitions given to them in the Terms and Conditions.

General Special Instructions: Promotion Code CENTRAL24.95VoiceUpsell - \$24.95
Voice for Life Contract as Upsell to Existing Customer.

The 2014 contract was entered through a Comcast form electronically signed by Claimant in January 2014 (the "2014 Service Order", Respondent's Exhibit B) and constitutes a Service Order. The 2014 Service Order provides language identical to the language cited above from the 2011 Service Order, except that its General Special Instruction ("GSI") section states:

General Special Instructions: Promotion Code CS\$29.95BV_D50-\$20_WVI_Cen-\$10 MRC discount off Business Voice full features lines 1-3 for discounted rate of \$29.95 each when adding BV to an existing Business Account. \$10 MRC Discount off Business Internet Deluxe 50 (\$109.95) for discounted rate of \$89.95. Standard install Waived. Existing Services require re-contracting at current pricing. Existing account must be in good standing. BV & BI MRC Discounts roll to rate card end of original term. Minimum 2 year term required. Taxes, Usage, Fees and Equipment are extra.

Preliminary Matters

Claimant's Reply Brief argued that, because Respondent failed to produce the 2014 Service Order or the Affidavit of Nicholas Lokan in discovery or during pre-submission exhibit exchange that this arbitrator should refuse to consider these submissions. On September 16, 2015, Respondent filed a Motion to File

Response to Claimant's Reply Brief arguing that the failure to produce the 2014 Service Order was inadvertent, that the failure to produce the affidavit was the custom and practice between the parties, and offering to allow Claimant additional time to respond to these matters if needed to ensure a fair hearing. The 2014 Service Order is the very core of this case and should have been produced in discovery. The affidavit should have been produced as part of the pre-submission exhibit exchange. As this case must be determined by the contract documents, the affidavit of Nicholas Lokan is relatively unimportant to the case and this arbitrator grants the motion with regard to the affidavit. The 2014 Service Order, by comparison, is perhaps the most crucial document in the case and refusing to consider it would be too harsh a sanction for Respondent's failure to produce it. Accordingly, Claimant's motion is denied as to the 2014 Service Order.

Reasons for Award

Claimant's statement of claim contains two counts: (I) breach of contract; and (II) violation of the Illinois Consumer Fraud Act.

Breach of Contract

To prove a claim for breach of contract, Claimant must prove: (i) the existence of a valid and enforceable contract; (ii) breach by defendant; (iii) damages; and (iv) performance of conditions precedent by Claimant. Clearly, Claimant and Respondent did have a contract. The Crux of Claimant's argument is that Respondent breached the contract by charging an undisclosed termination fee. Claimant argues that the GSI from the 2014 Service Order is "ambiguous in meaning and should be interpreted against the Respondent". This arbitrator agrees that the GSIs are confusing. Respondent could easily have plainly stated "[List Services] Services shall commence on the Service Commencement Date of [fill in date] and continue for a Service Term of [fill in length of time Service is being ordered]. Instead, Respondent relies upon confusing GSIs that appear to this arbitrator to be instructions for internal processing by Respondent. The phrase 'Minimum 2 year term required' appears to refer to the "duration of time ... for which Services are ordered" and may therefore meet the definition required of a Service Term, but the Conditions make clear that different Services have different Service Terms and Service Commencement Dates. This arbitrator could not match this Service Term with a specific Service or Service Commencement Date. This arbitrator finds that the written contract does not sufficiently "specify in a Service Order" the "duration of time for which Services were ordered" and, accordingly, that Respondent cannot collect a termination fee based solely on the documentation this arbitrator received. Parole evidence has not been submitted regarding the intent of the parties and the Conditions include an integration clause, which requires that all terms of the contract be reflected in the contract itself.

Respondent argues that Claimant has failed to prove damages. This arbitrator agrees that, because Claimant has not proven that Claimant paid the termination fee, no monetary damages owed to Claimant have been proven. However, this arbitrator believes that the existence of a charge that Respondent may later seek to collect is, in itself, damage. This damage is capable of remedy. This arbitrator concludes that it is within his authority to order reversal of the termination charge as an alternative to an award of monetary damages.

Respondent argues that Claimant has failed to perform his obligations under the contract. This arbitrator finds that performance by Claimant is not a condition precedent to Respondent's obligation to accurately charge Claimant's account.

Consumer Fraud

To prove a claim under the Consumer Fraud Act, Claimant must prove: (i) a deceptive act or practice; (ii) in the course of trade or commerce; (iii) intent that Claimant rely upon the deceptive act or practice; and (iv) damages proximately caused by the deceptive act or practice. Claimant argues that the termination fee was not disclosed and that the GSI from the 2014 Service Order, in light of its language and placement is "misleading, deceptive, and unfair."

Claimant has not met his burden of proving consumer fraud. Although the Service Term may not have been adequately reflected in the written contract, it does not mean that Respondent failed to fully and fairly advise the Claimant about the Service Term or termination fee. No evidence was submitted reflecting the original promotion or communications between Claimant and Respondent. Without those communications (which very likely may have advised Claimant of the Service Term), this arbitrator will not conclude that Respondent engaged in a deceptive practice, that Respondent intended Claimant to rely upon any deceptive information, or that Claimant was damaged by the deception.

AWARD

For the reasons specified above, award is entered in favor of Claimant and against Respondent as follows:

- a. Respondent shall reverse the termination charge on Claimant's account;
- b. To the extent that Respondent's reversal of the termination charge on Claimant's account results in a net credit balance in the account, Respondent shall refund that credit balance to Claimant within forty-five (45) days of this Award;

The administrative fees of the American Arbitration Association (AAA) totaling \$\$1,700.00 shall be borne as incurred, and the compensation of the arbitrator totaling \$\$750.00 shall be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

9-29-2015
Date

John S. Monical
John S Monical, Arbitrator