



Appeal No. 2100797

DOITT v. CityBridge

September 23, 2021

**APPEAL DECISION**

The appeal of Respondent, public pay telephone (ppt) services provider, is **granted**.

Respondent appeals from five recommended decisions by Hearing Officer H. Ferino (Brooklyn), dated April 30, May 6, and May 10, 2021, sustaining violations of § 6-05(b) of Title 67 of the Rules of the City of New York (RCNY) for failing to provide working ppt services. Having fully reviewed the record, the Board finds that the hearing officer’s decisions are not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
900000229 (229)	67 RCNY § 6-05(b)	In Violation	Reversed – Dismissed	\$0
900000238 (238)	67 RCNY § 6-05(b)	In Violation	Reversed – Dismissed	\$0
900000256 (256)	67 RCNY § 6-05(b)	In Violation	Reversed – Dismissed	\$0
900000274 (274)	67 RCNY § 6-05(b)	In Violation	Reversed – Dismissed	\$0
900000283 (283)	67 RCNY § 6-05(b)	In Violation	Reversed – Dismissed	\$0

**BACKGROUND**

In the summonses, the issuing officers (IOs) affirmed observing that Respondent failed to provide working ppt and operator services at: 1530 Third Ave, Manhattan (Manh.) on February 25, 2021 (summons 229); 1788 Third Ave., Manh. on February 26, 2021 (summons 238); 69-02 Queens Blvd., Queens on March 2, 2021 (summons 256); 100 W. 125<sup>th</sup> St., Manh. on March 3, 2021 (summons 274); and 1945 Third Ave., Manh. on March 3, 2021 (summons 283).

At the consolidated telephonic hearing, held on April 30, 2021, the representative for Petitioner, Department of Information Technology and Telecommunications (DOITT), submitted inspection reports (IR) for each summons showing that each ppt had been inspected three times during the course of one week and photographs of the ppt kiosks as follows. Summons 229: The IR indicated there was no phone connection and no operable keypad, speaker, microphone, or headset jack on February 22, 24, and 25 of 2021. Summons 238: The IR indicated that on February 24, 2021 the phone and tablet were inoperable, the ppt kiosk was dark and graffiti was present, while on February 25 and 26 of 2021 there was no phone connection and no operable keypad, speaker, microphone, or headset jack. Summons 256: The IR indicated that the tablet was inoperable on February 26, 2021 and that on March 1 and 2 of 2021 neither the virtual keypad nor the phone operated. Summons 274: The IR indicated that neither the speaker nor the USB port operated on February 24, 2021 and the speaker was still inoperable on March 2 and 3 of 2021. Summons 283: The IR indicated that there was no phone connection and no operable keypad, speaker, microphone, or headset jack on March 1, 2, and 3 of 2021.

Respondent’s representative moved to dismiss all the summonses for failing to establish a prima facie case. He asserted that 67 RCNY§ 6-05(e)(2) requires Petitioner to show that there were two periods, each lasting at least 24 hours within 90 calendar days, when the ppt was inoperable. He argued that since the inspections in the reports were not time-stamped, as was Petitioner’s prior practice, Petitioner had not proved that the inspections on two adjacent calendar dates were

more than 24 hours apart. He acknowledged that a qualifying period longer than 24 hours would be shown when there was an intervening calendar date between two inspections even if there was no timestamp. He also asserted that the IOs who attested to the violations were not the same people who had inspected the ppts. On the merits as to summons 274, he argued that Petitioner had not established that the ppt was inoperable because the IR did not state the speaker was tested at an audible volume. He claimed that a user could adjust the speaker volume on the tablet and Respondent was not responsible for users who may not have used the equipment properly. In support, he submitted into evidence call logs, a tablet indicator report, and an affidavit stating that the logs and report were ordinary business records for the cited ppt.

Petitioner's representative replied that the IOs do not go back to inspect the ppts unless the proper time has elapsed in accordance with the rules. He argued that Respondent failed to show that the ppts were actually working when they were inspected. As to summons 274, he claimed that the IO's would use the ppt equipment like any member of the public without needing to adjust volume levels. He argued that if calls connected, Respondent's evidence did not show that the callers could be heard by those receiving the calls.

In the decisions sustaining the violations, the hearing officer credited Petitioner's evidence. She found that Petitioner had established the cited ppts were out of service on two occasions, each lasting for at least 24 hours within a period of 90 calendar days based on the presumption set forth in 64 RCNY § 6-05(e)(5) that the violations are considered to have continued from the time of the first inspection on through the times of the next two inspections when they occurred within one week. She concluded that Respondent had neither rebutted nor established a defense to the charges.

On appeal, Respondent repeats its hearing argument that Petitioner failed to show that the ppts were inoperable continuously for the two required 24-hour periods. For the first time on appeal, it asserts that it remotely monitors and calls the ppts every business day and routinely visits the ppts to check for maintenance issues, but no hardware can be in perfect condition continuously. Per 48 RCNY § 6-19(f)(2), the Board will not consider any evidence or factual assertions not presented to the hearing officer.

Petitioner did not answer the appeal.

### **ISSUE ON APPEAL**

The issue on appeal is whether Petitioner established that the ppts were continuously inoperable for two periods, each lasting at least 24 hours.

### **APPLICABLE LAW**

Section 6-05(b) of 67 RCNY requires that a ppt be operated and maintained in a condition to enable a call to be completed when proper payment has been made and to provide access to operator service without use of a coin or other payment device.

Section 6-05(e) of 67 RCNY provides, in pertinent part:

(2) A [summons] may be issued for a violation of subdivision (b) of this section where inspections have disclosed that telephone service was unavailable on two occasions, each such occasion *lasting for a duration of at least twenty-four (24) hours*, within a period of ninety (90) calendar days. Each twenty-four hour period in which a failure to provide telephone service continues shall constitute a separate occasion on which an offense has occurred. [Emphasis added]

\* \* \* \* \*

(5) A violation shall be considered to have continued throughout a period specified in this subdivision when a condition set forth in subdivision . . . (b) . . . of this section has been identified upon at least two inspections that encompass such period within one hundred sixty-eight (168) hours; provided that, demonstration by an owner that the condition underlying such violation was corrected within such period shall be a defense to an action pursuant to § 6-05.

### ANALYSIS

For the following reasons, the Board reverses the hearing officer's decisions.

On this record, the Board finds that Petitioner failed to establish that the ppts were continuously inoperable for two periods within 90 calendar days, each lasting at least 24 hours, as 67 RCNY § 6-05(e)(2) requires. Here, the summonses only record the times of the third inspections. The IRs for summonses 229, 256, and 274 established one period of inoperability lasting more than 24 hours since the second inspections were conducted at least two calendar days after the first inspections. However, no second period of more than 24 hours can be ascertained since no time was provided for the second inspection dates and the third inspections were performed the next day. The IRs for summonses 238 and 283 indicate that the inspections were conducted on three immediately succeeding calendar days. Therefore, Petitioner at most established one 24-hour period between the first and third inspection dates. Although 67 RCNY § 6-05(e)(5) considers that a violation continued throughout a period of at least 24 hours when both inspections occurred within a week of each other, Petitioner is not relieved from establishing two separate periods of inoperability, each lasting at least 24 hours. As Petitioner failed to establish its prima facie cases, the burden did not shift to Respondent to rebut or establish a defense to any of the summonses. *See NYC v. Telebeam Telecommunications Corp.*, Appeal No. 1201115 (March 28, 2013).

Accordingly, the Board reverses the hearing officer's decisions and dismisses the summonses.

*By: OATH Hearings Division Appeals Unit*