



Appeal No. 2100799

DOITT v. CityBridge

September 23, 2021

APPEAL DECISION

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

Respondent appeals from three recommended decisions by Hearing Officer H. Ferino (Brooklyn), dated April 29 and 30, 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:

Table with 5 columns: Summons, Law Charged, Hearing Determination, Appeal Determination, Penalty. Rows include summons numbers 900000173, 900000191, and 900000210, all with a penalty of \$0.

BACKGROUND

In the summonses, the issuing officers (IOs) affirmed observing that Respondent failed to provide working ppt and operator services at: 771 Eighth Ave, Manhattan (Manh.) on February 16, 2021 (summons 173); 49-18 Queens Blvd., Queens on February 4, 2021 (summons 191); and 230 W. 95th St., Manh. on February 12, 2021 (summons 210).

At the consolidated telephonic hearing, held on April 23, 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 173: The IR indicated there was no phone connection and no operable keypad, speaker, microphone, or headset jack on February 11, 12, and 16 of 2021. Summons 191: The IR indicated that on January 29, 2021 there was no phone connection and no operable keypad, speaker, microphone, headset jack, or tablet, while on February 3 and 4 of 2021 there was no phone connection, no operable virtual keypad, speaker, or microphone. Summons 210: The IR indicated that on February 9, 2021 the link was dark, and the tablet, phone, keypad, speaker, microphone, and headset jack were inoperable, and that on February 11 and 12 of 2021 there was no phone connection and no operable keypad, speaker, microphone, or headset jack.

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 also asserted that the IOs who attested to the violations were not necessarily the same people who had inspected the ppts since no inspector's name was on the individual reports.

Petitioner's representative replied that typically the same IO does all three inspections and issues the summons affirming under penalty of perjury that he observed the violation according to the rules at the time and date on the summons. He therefore argued the summonses made out prima facie cases.

In the decisions sustaining the violations, the hearing officer credited Petitioner's evidence and found it legally sufficient to establish the cases. She also found that Respondent had not established a valid 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 191 and 210 established one period of inoperability lasting more than 24 hours since the second inspections were conducted at least two calendar days after the first inspection. 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 on the next day. The IR for summons 173 established one period of inoperability lasting more than 24 hours since the third inspection was conducted four days after the second one. However, the second inspection was done the day immediately after the first with no indication that more than 24 hours had elapsed between those inspections. 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. Nor are the IO's affirmations on the summonses sufficient, as each summons cited only a single occasion when the ppt was inoperable. 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*