



Appeal No. 2000489

DOITT v. City Bridge LLC

June 18, 2020

APPEAL DECISION

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

Respondent appeals from a recommended master decision by Hearing Officer H. Ferino (Brooklyn), dated February 13, 2020, sustaining 13 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 decision is not supported by the law and a preponderance of the evidence, except as to summonses 107 and 640. Therefore, the Board finds as follows:

Table with 5 columns: Summons, Law Charged, Hearing Determination, Appeal Determination, Penalty. Rows list 13 summonses with their respective legal charges, hearing outcomes, appeal outcomes, and penalties.

BACKGROUND

In the summonses, the issuing officers (IOs) affirmed observing that Respondent failed to provide working ppt and operator services at various locations in the Bronx, Manhattan, and Queens on February 7, 2019 (summons 438); February 8, 2019 (summons 429); February 19, 2019 (summonses 092, 346, and 364); February 20, 2019 (summons 382); February 22, 2019 (summons 400); February 26, 2019 (summonses 678 and 696); February 27, 2019 (summonses 640 and 669); March 7, 2019 (summons 048); and November 8, 2019 (summons 107).

At the consolidated hearing, held on February 7, 2020, the representative for Petitioner, Department of Information Technology and Telecommunications (DOITT), offered inspection reports (IR) for all summonses except summonses 048, 678, and 696. The inspection reports showed that each ppt had been inspected three times during the course of one week and more than 24 hours apart. Petitioner's representative argued that Respondent's evidence was insufficient to show that the ppts were operable during the intervals between the IOs' inspections, and that under 67 RCNY § 6-05(e), Respondent needed to show that it corrected the underlying problem preventing the ppts from working properly to establish a defense.

Respondent's representative argued that it was not in violation since each of the ppts had a dial tone during the week the ppt was inspected. In support, she submitted affidavits for the ppts

from an employee of Labra Telecom Inc. (Labra), the company that services Respondent's ppts, which state that it calls the ppts to detect a dial tone and if none is detected, it sends out a technician to repair the ppt. Along with each affidavit was a dial tone report (DTR) indicating whether its remote testing system detected a dial tone during the inspection intervals, and in some cases, logs of calls made from the ppts during the inspection intervals.

In the decision sustaining all 13 violations, the hearing officer credited all the evidence but found that Respondent's evidence did not establish a legally valid defense to the violations.

On appeal, Respondent's representative asserts that Petitioner's evidence was insufficient to establish that the ppts were continuously inoperable for two 24 hour periods, and that Respondent's evidence was sufficient to refute the charges.

Petitioner did not answer the appeal.

ISSUES ON APPEAL

The issues on appeal are (1) whether Petitioner established its cases for violations of 67 RCNY § 6-05(b) by showing that inspections disclosed that telephone service was unavailable on two occasions each lasting for at least 24 hours within a 90 day period, and (2) whether Respondent refuted that the ppts were continuously inoperable during those periods pursuant to 67 RCNY § 6-05(e).

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.

* * * * *

(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 decision and dismisses the summonses, except for the part of the decision sustaining summonses 107 and 640, which the Board affirms.

With respect to summonses 048, 678, and 696, the Board finds that Petitioner did not establish that Respondent failed to maintain the cited ppts on at least two occasions. Under 67 RCNY § 6-05(e)(2), a summons may only be issued for a violation of 67 RCNY § 6-05(b) "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." None of these three summonses cites an occasion other than the single date of occurrence contained in the summons when the respective ppt was inoperable. These summonses are therefore insufficient to meet the requirements under 67 RCNY § 6-05(e)(2) without further evidence, which Petitioner failed to provide at the hearing. *See NYC v. City Bridge LLC*, Appeal No. 1700356-57 (June 15, 2017).

With respect to summonses 092, 669, 346, 364, 382, 400, 429, and 438, the Board finds that Petitioner's evidence was sufficient to establish that ppt service was unavailable on two occasions, each lasting for at least 24 hours within a 90 day period, for the ppt in each summons. However, a defense to the violation may be established if the owner of the ppt can demonstrate that the underlying condition was corrected within the period between inspections. *See 67 RCNY § 6-05(e)(5)*. Further, a ppt provider "may rebut a charge that a ppt did not have a dial tone through the use of *call records that show calls were made from the ppt* within the period between inspections." [Emphasis supplied] *See NYC v. BAS Communications, Inc.*, Appeal No. 0900277 (December 3, 2009). Here, the call logs submitted by Respondent for each of these summonses showed that calls of sufficient duration were made from the ppts between the inspection dates set forth in Petitioner's evidence. Consequently, Respondent's evidence refuted the allegations that there was no dial tone continuously during the interval between Petitioner's inspections. *See DOITT v. City Bridge LLC*, Appeal No. 1600438 (June 30, 2016); *NYC v. BAS Communications, Inc.*, Appeal No. 0900665 (April 29, 2009).

Finally, with respect to summonses 107 and 640, the Board finds that Petitioner's evidence was sufficient to establish that ppt service was unavailable on two occasions, lasting for at least 24 hours within a 90 day period, for the ppt in each summons, and that Respondent failed to refute or establish a defense to the charges. Although Respondent presented evidence of remote dial tone detection from the cited ppts, no evidence showed that any calls were made *from* the ppts during the intervals between Petitioner's inspections. Consequently Respondent's evidence was insufficient to show that the ppts were not continuously inoperable for at least two 24-hour periods, or otherwise establish a defense. *See DOITT v. City Bridge LLC*, Appeal Nos. 1901938 & 2000142 (February 20, 2017).

Accordingly, the Board reverses the hearing officer's decision and dismisses the summonses, except for the part of the decision sustaining summonses 107 and 640 and imposing civil penalties of \$2,000 for each violation, for total civil penalties of \$4,000.

By: OATH Hearings Division Appeals Unit