

Decision 15-12-026 December 17, 2015

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of New Day Broadband One, LLC to Determine Whether New Day Broadband One, LLC, Violated the Laws, Rules, and Regulations of this State in Operating in California without the Required Franchise.

Investigation 14-08-015  
(Filed August 14, 2014)

**DECISION FINDING NEW DAY BROADBAND ONE, LLC, IN VIOLATION OF THE PUBLIC UTILITIES CODE AND FEDERAL REGULATIONS AND IMPOSING A PENALTY**

**Summary**

This decision regarding the Investigation into the actions of New Day Broadband One, LLC, (New Day), finds that New Day violated the laws, rules and regulations of this state by operating without the required state franchise from the California Public Utilities Commission (Commission) from 2008 through 2014 in violation of Public Utilities Code (Pub. Util. Code) § 5840,<sup>1</sup> failing to collect and remit franchise fees in violation of Pub. Util. Code § 5860, and failing to notify the Federal Communications Commission of its acquisition of video franchises in violation of 47 CFR 76.1610. This Decision imposes a penalty of \$10,000 against New Day pursuant to Pub. Util. Code §§ 2108 and 2111 for these violations, and closes the Investigation.

<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

## **1. Background and Procedural History**

The Commission opened this Investigation after receiving complaints from several city and county governments that New Day was operating without a valid video franchise and did not remit franchise fees to the local governments. The Commission also received consumer complaints about New Day regarding lack of service, service disconnections and poor customer service. Commission staff worked for several months with officials of New Day in an effort to bring them into compliance with applicable franchise requirements, but New Day failed to complete the application process for a video franchise.

The Commission's Safety and Enforcement Division (SED) recommends that the Commission impose a penalty of \$10,000 against New Day pursuant to Pub. Util. Code §§ 2108 and 2111. SED believes this penalty is warranted because New Day operated a video service without the required franchise from October 16, 2008 through December, 2014, in violation of § 5840(k), failed to collect and remit franchise fees pursuant to § 5860, and failed to notify the Federal Communications Commission (FCC) when it acquired video franchises from New Wave Broadband and DCA Cablevision, and later discontinued providing video service in violation of 47 CFR 76.1610.

A prehearing conference (PHC) was held on August 11, 2015, in the Commission's courtroom in San Francisco. New Day was notified of the PHC, but did not attend or otherwise participate. A scoping memo was issued on August 25, 2015. The allegations in SED's staff report are undisputed.

### **1.1. Findings of the Investigation**

SED's investigation revealed that New Day, a Las Vegas-based company, acquired video franchises from New Wave Broadband and DCA Cablevision, and began providing video and high speed internet service in small, rural

California markets on October 16, 2008. New Day did not report their acquisition of these services to the FCC as required by federal law<sup>2</sup>. New Day ceased all operations in California in December, 2014. New Day was formally notified of this Investigation but did not respond to the Commission's notice of the Investigation, or participate in any other way. A brief summary of SED's investigation follows.

On or about December 11, 2012, the City Manager of the City of Portola in Plumas County, California, notified a Communications Division (CD) program manager that New Day was providing video services without a franchise, and was delinquent in paying franchise fees to the City.

On January 25, 2013, the Tehama County Board of Supervisors sent a letter to New Day CEO Neal Schnog, informing him that New Day was operating without a valid franchise in violation of Pub. Util. Code § 5840(k), Govt. Code § 53066 and Tehama County Code § 6.20.850. The letter further directed New Day to obtain a valid franchise, and pay unpaid franchise fees from 2005<sup>3</sup> to date.

On February 12, 2013, a CD senior regulatory analyst contacted New Day's Operations Manager, Tina Ravelo, and offered to assist the company in obtaining a franchise. Over the course of the next six months, New Day's CEO Neal Schnog reported to Commission staff he was having difficulty completing

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<sup>2</sup> 47 CFR 76.1610 provides "The Operator shall inform the [Federal Communications] Commission on FCC Form 324 whenever there is a change of cable television system operator; change of legal name, change of the operator's mailing address or FCC Registration Number (FRN); or change in the operational status of a cable television system. Notification must be done within 30 days from the date the change occurs ...."

<sup>3</sup> There is no evidence New Day provided video service in California prior to October 16, 2008.

the application. Commission staff then offered to review the application and provide census tract data and other required information.

On March 14, 2013, the Tehama County Counsel sent a letter to Mr. Schnog outlining various grievances,<sup>4</sup> and giving New Day 21 days to take remedial action. On May 21, 2013, the Tehama County Board of Supervisors advised Mr. Schnog that the Board was considering adopting a resolution requiring New Day to cease and desist providing unauthorized video services by July 1, 2013. On May 29, 2013, Mr. Schnog replied to the Tehama County Counsel, providing financial reports for the period August, 2012 to May, 2013, for customers in unincorporated areas of Tehama County, reporting gross revenue of \$738.05 and remitting a check in that amount to the County as forfeiture of this revenue pursuant to Tehama County Code § 6.20.160.<sup>5</sup> Mr. Schnog reported that no franchise fees were charged or collected prior to September 2012, when New Day began collecting franchise fees in anticipation of obtaining a franchise and upgrading the system, neither of which occurred.

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<sup>4</sup> New Day was alleged to be operating an unauthorized cable system in the unincorporated Los Molinos area of Tehama County under the expired franchise of New Day's predecessor, DCA Cablevision; failing to collect and remit franchise fees in violation of Tehama County Code §§ 6.20.400 and 6.20.160; providing inferior service; failing to maintain insurance and bonding as required by County Code §§ 6.20.410 and 6.20.430; and failing to provide the information necessary to determine the amount of franchise fees due and owing, in violation of County Code §§ 6.23.030, 6.20.040 and 6.20.430.

<sup>5</sup> Tehama County Code § 6.20.160 provides, in relevant part "In the event of any such holding over [continuing to operate following expiration of a franchise], in direct contravention by grantee of the final valid order of the county expressed by resolution, upon notice, requiring grantee to cease and desist all operations upon a certain date, then and in that event, the grantee shall pay to the county reasonable compensation and damages of not less than one hundred percent of its gross revenue, derived from all sources within the county during said period."

Service to these customers was discontinued in May 2013, due to the franchise being unprofitable, leaving 75 customers without any service because no other cable options were available to them. Mr. Schnog further reported that New Day was considering filing for bankruptcy protection and liquidating its assets, although it did not anticipate there would be any buyers for these assets.

On June 25, 2013, the Tehama County Board of Supervisors adopted Resolution 70-2013, finding New Day liable for reasonable compensation and damages for its unauthorized operations in Tehama County.<sup>6</sup>

On July 31, 2013, the Safety & Enforcement Division (SED) Utility Enforcement Branch Chief sent a letter to New Day, requesting that New Day either register for a franchise or cease and desist operations, with a deadline of August 9, 2013, to comply. On August 20, 2013, New Day's Controller Dennis Healy responded, and asked SED how to register for a franchise.

On September 20, 2013, New Day filed an application for a video franchise with the Commission. New Day requested a state video franchise for the City of Portola, and portions of Trinity, Plumas and Sierra counties. When CD reviewed the application, it found that New Day's bond would expire within one month and requested a new bond. New Day reported they were trying to get a new bond but did not do so. On October 21, 2013, the Commission's Executive Director issued a letter notifying New Day their application was incomplete, and set a deadline of November 22, 2013, to provide evidence of a new bond. When New Day missed that deadline, CD referred the matter back to SED for

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<sup>6</sup> New Day Broadband's predecessor, DCA Cablevision, had a 20-year franchise which expired in 2003. DCA transferred its expired franchise to New Day in 2008 without notice to or authorization from Tehama County.

assistance in bringing New Day into compliance. To date, New Day has not provided evidence of a new bond. New Day notified the Commission that it ceased all operations in California as of December, 2014.

## **1.2. Jurisdiction**

The Commission is the sole franchising authority for a state franchise to provide video service.<sup>7</sup> Any person or corporation who seeks to provide video service in this state for which a franchise has not already been issued ... shall file an application for a state franchise with the Commission.<sup>8</sup>

## **2. Issues Before the Commission**

The issues before the Commission as set forth in the Order Instituting Investigation (OII) which initiated this proceeding are:

1. Whether New Day Broadband violated any laws, rules or regulations by operating without the required franchise from the Commission in violation of code section 5840;
2. If it is found that New Day Broadband was operating without authority, whether the Commission should impose fines or penalties pursuant to §§ 2108 and 2111;
3. Whether New Day Broadband violated 47 CFR 76.1610 by failing to notify the Federal Communications Commission (FCC) of any change of cable system operator, legal name, mailing address, FCC Registration Number (FRN) or any change in the operational status of a cable television system; and

Whether there are any safety considerations resulting from New Day Broadband's actions.

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<sup>7</sup> Pub. Util. Code § 5840(a).

<sup>8</sup> Pub. Util. Code § 5840(c).

### **3. Discussion and Analysis**

This Investigation was opened to determine whether New Day violated any state or federal laws, rules or regulations by operating a video service without a valid state video franchise, failing to collect and remit franchise fees, and failing to notify the FCC of changes to the operational or organizational status of a video service franchise.

#### **3.1. Video Service Franchise**

Any person or organization that operates a video service franchise in California must obtain operating authority from this Commission.<sup>9</sup> The findings of the SED Investigation are uncontested that New Day operated a video service franchise in California from October 16, 2008, until December, 2014, without obtaining a state franchise from the Commission.

#### **3.2. Franchise Fees**

Video service operators are required to collect franchise fees from their subscribers, and to remit those franchise fees to local jurisdictions.<sup>10</sup> The findings of the SED investigation are uncontested that New Day failed to collect franchise fees most of the time it operated in California, and never remitted them to the appropriate local governments.<sup>11</sup>

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<sup>9</sup> Pub. Util. Code § 5840.

<sup>10</sup> Pub. Util. Code § 5860.

<sup>11</sup> New Day collected franchise fees from its rural Tehama County system subscribers from September, 2012, to May, 2013, when it ceased operation of this system because it was found to be unprofitable. New Day did not remit those franchise fees to the local government.

### **3.3. FCC Notification**

Federal law requires that any changes in the status of a video service franchise be reported to the FCC within 30 days of the change taking effect.<sup>12</sup> Repeated inquiries from Commission staff revealed that New Day failed to notify the FCC of the change of status of the video service franchises it acquired from New Wave Broadband and DCA Cablevision, and when it began offering and later shut down video service in California. The findings of the SED investigation in this regard are uncontested.

### **3.4. Penalty Assessment**

SED recommends a financial penalty of \$10,000 be assessed against New Day for the violations discussed above. In assessing the reasonableness of the penalty, we look to the criteria set forth in Decision (D.)98-12-075 for guidance. The factors we consider are: 1) the severity of the economic or physical harm resulting from the violation; 2) the conduct of the utility or other actor to prevent, detect, disclose and rectify the violation; 3) the utility or other actor's financial resources; 4) the public interest involved; 5) the totality of the circumstances; and 6) Commission precedent.

In this case, New Day failed to obtain operating authority for the service it provided, and failed to collect most of the franchise fees it was obligated to collect and remit to local governments. When New Day determined that its operations in California were not profitable, it ceased operation, leaving its customers without service, and sold those assets it could sell. New Day's actions caused economic harm to competitors who incurred the expense and burden of collecting and remitting their franchise fees, and to their customers who paid for

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<sup>12</sup> 47 CFR 76.1610.

services they did not receive. New Day took no action to prevent, detect, disclose and rectify their violations. New Day has limited financial resources in California from which to pay the penalty, although they may have resources outside of California of which the Commission is not aware. A penalty of \$10,000 will serve as a deterrent from similar conduct in the future, but if New Day were to become financially viable, this penalty would not be sufficient to harm that financial viability. Based on these factors, we conclude that a penalty of \$10,000 is reasonable.

#### **4. Conclusion**

Based on the uncontested SED investigation, we find that New Day violated Pub. Util. Code § 5840 by failing to obtain a video franchise from the Commission when it began operating video services in California. It violated § 5860 when it failed to collect and remit franchise fees. Further, New Day violated 47 CFR 76.1610 by failing to notify the FCC of the change of operational status of the video franchises it acquired and began operating in California on October 16, 2008.

As discussed above, a penalty of \$10,000 pursuant to §§ 2108 and 2111 is appropriate for New Day's violation of these laws, rules and regulations.

#### **5. Categorization and Need for Hearing**

This proceeding was preliminarily categorized as adjudicatory and that hearings would be necessary. It is not necessary to disturb the preliminary categorization, but as New Day did not participate in the Investigation, the Assigned Commissioner determined in the Scoping Memo and Ruling issued August 25, 2015, that the matter can be resolved through comprehensive briefing and hearings are not necessary.

## **6. Comments on Proposed Decision**

The proposed decision in this matter was served on the parties in accordance with Public Utilities Code § 311, and comments are allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were received.

## **7. Assignment of Proceeding**

Michel Peter Florio is the assigned Commissioner and Dan H. Burcham is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. The Commission is the sole video service franchise authority in California pursuant to Pub. Util. Code § 5840(a).

2. Any person or corporation who seeks to provide video services in California is required to obtain a video franchise from the Commission pursuant to Pub. Util. Code § 5840(c).

3. The holder of a state franchise that offers video service within a local jurisdiction shall calculate and remit to the local entity a state franchise fee, and the obligation to remit the franchise fee to a local entity begins immediately upon provision of video service within that local entity's jurisdiction pursuant to Pub. Util. Code § 5860.

4. A video service provider is required to inform the Federal Communications Commission within 30 days of a change of cable television system operator or change of name, mailing address, FCC Registration Number or a change in the operational status of a cable television system pursuant to 47 CFR 76.1610.

5. New Day Broadband, LLC acquired small expired video franchises of New Wave Broadband and DCA Cablevision in rural parts of Trinity, Plumas, Tehama, Sierra and Shasta Counties.

6. New Day Broadband, LLC did not notify the Federal Communications Commission of its acquisition of expired video franchises of New Wave Broadband and DCA Cablevision.

7. New Day Broadband, LLC offered video service in California from October 16, 2008, until December, 2014.

8. New Day Broadband, LLC never obtained a valid video franchise from the Commission.

9. New Day Broadband, LLC only collected franchise fees from its rural Tehama County system subscribers from September, 2012, to May, 2013, but did not remit those franchise fees to the local government, in violation of Pub. Util. Code § 5860.

10. The Commission is authorized to impose financial penalties for violations of the laws, rules or regulations of this state pursuant to Pub. Util. Code §§ 2108 and 2111.

11. By operating a video service in this state without a valid franchise from the Commission and failing to collect and remit franchise fees from its subscribers, New Day Broadband, LLC violated the laws, rules and regulations of this state.

12. A financial penalty of \$10,000 is an appropriate penalty for New Day Broadband, LLC's violation of the laws, rules and regulations of this state.

13. New Day Broadband, LLC's actions in providing video services to subscribers in this state without obtaining a franchise from the Commission caused harm to the regulatory process.

14. New Day Broadband, LLC's actions in failing to collect and remit franchise fees caused economic harm to its competitors who did collect and remit the required fees.

15. New Day Broadband, LLC's actions in discontinuing video service in May, 2013, to 75 rural Trinity County subscribers with no other video option available to them created a public safety risk for those customers who had no other reliable source of emergency information.

16. The Commission may impose a financial penalty of not less than \$500 or more than \$50,000 per offense pursuant to Pub. Util. Code §§ 2108 and 2111 for violations of the laws, rules or regulations of this state.

### **Conclusions of Law**

1. New Day Broadband, LLC violated Pub. Util. Code § 5840(c) by operating a video service in California from October 16, 2008 until December, 2014, without obtaining a video service franchise from this Commission.

2. New Day Broadband, LLC violated Pub. Util. Code § 5860 by failing to collect or remit franchise fees from its customers during the time it operated in California, from October 2008 to December 2014.

3. New Day Broadband, LLC violated 47 CFR 76.1610 by failing to notify the Federal Communications Commission of the change of cable system operator, legal name, mailing address, FCC Registration Number or change in the operational status when it acquired the expired video franchises of New Wave Broadband and DCA Cablevision, and began providing and later shut down its video services.

4. The Commission should impose a penalty of \$10,000 pursuant to Sections 2108 and 2111.

5. Investigation 14-08-015 should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. New Day Broadband, LLC shall immediately cease and desist operating any video, internet or other service within the State of California for which a license or franchise from this Commission is required.

2. New Day Broadband, LLC must pay a fine of \$10,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, California 94102, within 30 days of the effective date of this order, and must write on the face of the check or money order "For deposit to the General Fund per Decision 15-12-026."

3. If New Day Broadband, LLC, or its principals Neal Schnog, Dennis Healy or Tina Ravelo, under these or any other names, applies for operating authority of any kind from this Commission, they shall include with that Application a copy of this Decision and provide proof that the penalty imposed pursuant to Public Utilities Code Sections 2108 and 2111 has been fully satisfied.

4. Investigation 14-08-015 is closed.

This order is effective today.

Dated December 17, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners