

Decision PROPOSED DECISION OF ALJ BURCHAM (Mailed 3/4/2016)

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

In the Matter of the Application of  
Vodafone U.S. Operations Inc. for a  
Certificate of Public Convenience and  
Necessity to provide Resold Interexchange  
Telecommunications Service within  
California Pursuant to the Provisions of  
Public Utilities Code Section 1001.

Application 14-01-028  
(Filed January 30, 2014)

**DECISION DENYING AS MOOT THE VODAFONE US OPERATIONS, INC.  
APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY AND IMPOSING PENALTIES  
FOR OPERATING WITHOUT AUTHORITY**

**Summary**

This decision denies as moot the application of Vodafone U.S. Operations, Inc. (Vodafone US Ops) for a Certificate of Public Convenience and Necessity (CPCN), denies Vodafone US Ops' motion for reconsideration of a ruling dismissing its motion to withdraw this Application, and imposes a financial penalty of \$16,000 pursuant to Pub. Util. Code §§ 2107 and 2108<sup>1</sup> for operating without authority between April 20, 2012 and November 30, 2014. This proceeding is closed.

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

## 1. Background

On January 30, 2014, Vodafone US Ops' predecessor in interest, Cable & Wireless Americas Operations, Inc. (Cable & Wireless), initially filed its application for a CPCN to provide resold interexchange telecommunications services. Cable & Wireless previously held a CPCN issued by the California Public Utilities Commission (Commission). This CPCN was revoked pursuant to Resolution T-17359, issued April 20, 2012, for failure to post a performance bond and remit user fees to the Commission.

After Cable & Wireless' CPCN was revoked, the company was acquired by the Vodafone family of companies under the umbrella of Vodafone BV in Europe. Cable & Wireless was renamed Vodafone US Operations, Inc. effective April 1, 2014. The company continued in operation, providing exactly the same services as Vodafone US Ops as it had provided while operating as Cable & Wireless under CPCN (U-6835-C), until it ceased operations on December 1, 2014.<sup>2</sup>

A prehearing conference (PHC) was held on August 26, 2014, during which counsel for the Applicant indicated the initial application did not accurately reflect the services provided by the Applicant. The assigned Administrative Law Judge (ALJ) directed the Applicant to file an amended application which accurately reflected the services provided and all of the information necessary to satisfy the application requirements set forth in Decision (D.)13-05-035.<sup>3</sup>

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<sup>2</sup> Prehearing Conference Transcript at 8, 9

<sup>3</sup> D.13-05-035 to Rulemaking (R.) 11-11-006, issued June 3, 2013, set forth new information requirements for CPCN applications

At the PHC, counsel for the Applicant made an oral motion to withdraw this Application, arguing that Vodafone did not need a CPCN to operate because they offer predominately interstate data transfer services and are therefore exempt from the Commission's jurisdiction on two theories:

1. Federal Communication Commission (FCC) rules<sup>4</sup> removed Vodafone from the Commission's jurisdiction because more than 10 percent of the transmissions were interstate in nature; and
2. The services provided by Vodafone fall under the definition of IP-enabled services as defined in code section 239(a), and as such the Commission lacks jurisdiction under section 710,<sup>5</sup> which restricts the Commission's regulatory authority over Voice over Internet Protocol (VoIP) and IP-enabled services.

Following revocation of Vodafone's CPCN, Vodafone US Ops continued to report intrastate revenue and pay user fees to the Commission for approximately two years. On October 29, 2014, the assigned ALJ issued a ruling denying Vodafone US Ops' motion to withdraw the application, finding Vodafone US Ops to be a public utility subject to the Commission's jurisdiction pursuant to code §§ 216(a) and 234. This ruling also held that the 10 percent rule did not serve to reclassify the nature of Vodafone US Ops' business operations or remove the Commission's jurisdiction to regulate Vodafone US Ops' activities in California, and Vodafone US Ops required a CPCN for the period of time it operated in California. On November 17, 2014, Vodafone US Ops filed a motion

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<sup>4</sup> 47 CFR 136, § 154(a), referred to as "the 10 percent rule."

<sup>5</sup> Pub. Util. Code § 710, Ch. 733 Stats. 2012, effective January 1, 2013.

for reconsideration of the ALJ's ruling. By this Decision we affirm the ALJ's ruling and deny Vodafone US Ops' request for reconsideration of that ruling.

The October 29, 2014, ruling also found Vodafone US Ops to be in violation of the Commission's Order revoking Vodafone US Ops' CPCN beginning April 21, 2012.<sup>6</sup> Vodafone US Ops was directed to respond to the ALJ's finding that Vodafone US Ops could be subject to a penalty of up to \$32,450,000 under §§ 2107 and 2108. On November 21, 2014, Vodafone US Ops responded to the ALJ's ruling, stating that any monetary fine or penalty would have to be paid from what it considered to be interstate resources.

## **2. CPCN Required While Operating in California**

Vodafone US Ops needed a CPCN for the entire time it was operating in California. As Vodafone US Ops ceased operation in California and was merged into another Vodafone subsidiary, Vodafone US, Inc., as of December 1, 2014, its Application for a CPCN became moot as of that date. However, as it was found Vodafone US Ops was operating without a valid CPCN, it is appropriate to address the issue of whether financial penalties are warranted.

## **3. Liability for Penalties Under §§ 2107 and 2108**

Pub. Util. Code § 2107 provides that any public utility that violates or fails to comply with any provision of the State Constitution, the Public Utilities Code, or any order, decision, decree, rule, direction, demand or requirement of the Commission, is subject to a penalty of not less than \$500 nor more than \$50,000 for each offense, and each day of a continuing violation is a separate and distinct offense under § 2108. Vodafone US Ops provided services under the jurisdiction

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<sup>6</sup> Declaration of Megan Doberneck dated October 8, 2015, confirming that Vodafone U.S. Operations, Inc. was merged into Vodafone U.S., Inc. and ceased operation as of December 1, 2014.

of this Commission and without authority to do so for all or part of 32 calendar months, beginning April 21, 2012, and ending November 30, 2014, a total of 649 days.

When the Commission imposes a fine under §§ 2107 and 2108, we first look to Decision (D.)98-12-075 and its progeny for guidance as to the appropriateness of the fine, and in doing so we consider the following factors:

1. The severity of the offense. As we have stated previously, providing service without a CPCN is a serious offense because it causes harm to the integrity of the regulatory process.<sup>7</sup>
2. The conduct of the utility before, during and after the offense (aggravating and mitigating factors). The application was voluntarily filed by Vodafone US in an effort to reinstate operating authority after Vodafone learned of the revocation of Cable & Wireless' prior CPCN. This is not an enforcement proceeding, and SED did not protest the application.
3. The financial resources of the company. The applicant company is no longer operating and has been dissolved. Any fines or penalties imposed would be paid by the applicant's parent company, a large international telecommunications provider.
4. The totality of the circumstances. The applicant voluntarily came before the Commission and later developed a good-faith but incorrect belief that a CPCN was not required during its final months of operation. As this applicant is no longer in business, it no longer poses any risk to consumers or the regulatory process.

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<sup>7</sup> D.04-01-089 at 6

5. Prior Commission decisions. While the imposition of fines and penalties under §§ 2107 and 2108 is the Commission's standard practice, we have not always required a mechanical interpretation of their provisions, but rather have looked to ensure that a penalty is sufficient to deter future violations and is reasonable under the circumstances. In D.04-01-039, after noting "Pursuant to § 2107, the Commission may impose fines ranging from \$500 to \$20,000<sup>8</sup> for each violation" we imposed a fine of \$500 against a telecommunications company that provided service for less than a year without a CPCN, finding the penalty to be "sufficient to deter applicant and others from future violations."<sup>9</sup> In D.04-05-049, after noting the "purpose of a fine is to deter future unlawful conduct by applicant and others" we accepted a "voluntary contribution to the State of California General Fund of \$11,000 in lieu of a fine" for selling prepaid phone cards without a CPCN for 5 ½ years, after finding the applicant in that case had "access to substantially greater resources than the utility addressed in D.04-01-039."<sup>10</sup> In D.09-05-032 we adopted a settlement agreement imposing a fine of \$500 for operating without a CPCN for approximately three months after considering the nature of the violation, the company's financial resources and the inadvertent nature of the offense.<sup>11</sup> More recently, in D.14-12-001, establishing our Electric Safety Citation Program in Rulemaking (R.)14-05-013,<sup>12</sup> we stated "In assessing a penalty, staff shall determine penalties for each violation at

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<sup>8</sup> The upper limit of fines imposed under § 2107 was raised from \$20,000 to \$50,000 effective January 1, 2012

<sup>9</sup> D.04-01-039 to A.03-05-024 at 6

<sup>10</sup> D.04-05-049 to A.03-11-026 at 8

<sup>11</sup> D.09-05-032 to A.08-05-031 at 5

<sup>12</sup> Order Instituting Rulemaking on the Commission's Natural Gas and Electric Safety Citation Programs pursuant to California Senate Bill 291, Stats. 2013, Ch. 601.

the maximum set out in § 2107. Pursuant to § 2108, each violation is a separate and distinct offense and to the extent that a violation is ongoing, each day's continuance is a separate and distinct citable offense which staff may cite. Thus, staff shall initially determine potential penalties based on the number of days that the violation has taken place. However, staff then has the discretion to assess penalties on something less than a daily basis and thus to reduce the maximum penalties based on consideration of the factors set forth in § 1702.5(a)(1), § 2104.5, D.98-12-075, and Resolution ALJ-277 issued April 20, 2012."<sup>13</sup>

If we were to impose a penalty for daily violations for the 649 days Vodafone US operated without authority before it ceased operations, Vodafone would be subject to a minimum fine of \$324,500 and a maximum fine of \$32,450,000 under a strict interpretation of §§ 2107 and 2108. The imposition of penalties this severe would be unreasonably harsh under the circumstances now before us.

As Vodafone US Ops voluntarily came before the Commission with its application, then developed a good faith, albeit incorrect, belief that it did not need a CPCN, and as Vodafone US Ops is no longer operating in California and no longer poses any risk to consumers or the regulatory process, only a minimum financial penalty of \$500 per offense is warranted. For the purposes of this Decision, an offense is defined as all or part of a calendar month during which Vodafone US Ops operated without authority. Vodafone US Ops should be liable for \$16,000 penalty under §§ 2107 and 2108, based on \$500 per month for each of the 32 calendar months (or portions thereof) it operated without authority.

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<sup>13</sup> *Ibid.*, at 12, 13.

#### **4. Safety Considerations**

This Application poses no safety considerations because the Applicant is no longer operating in California.

#### **5. Requests to File Under Seal**

Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, Vodafone US Ops has filed two motions for leave to file Exhibits C and D of its application under seal, as well as material filed on November 21, 2014 in response to ALJ Ruling. Vodafone US Ops represents that the exhibits and other filing contain sensitive financial information. We have granted similar requests in the past and do so here.

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

On February 27, 2014, Resolution ALJ 176-3331 preliminarily categorized this proceeding as ratesetting and determined that no hearings are necessary. We confirm those preliminary determinations.

#### **7. Comments on Proposed Decision**

The proposed decision in this matter was mailed to the parties in accordance with § 311 of the Public Utilities Code and comments are allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on March 23, 2016 by Vodafone US Ops. No reply comments were received.

#### **8. Assignment of Proceeding**

Michael Picker is the assigned Commissioner and Dan H. Burcham is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. Vodafone US Ops was a public utility while it was operating in California.
2. Vodafone US Ops provided regulated services subject to the Commission's jurisdiction.

3. Vodafone US Ops required a valid CPCN to provide regulated services in California.

4. Vodafone US Ops provided regulated services in California without valid operating authority from April 21, 2012 through November 30, 2014.

5. Vodafone US Ops discontinued operating in California as of December 1, 2014.

6. The Commission may impose penalties under §§ 2107 and 2108 for violation of statutes, regulations and rules of the Commission.

7. Vodafone US Ops has requested to file financial information under seal.

### **Conclusions of Law**

1. Vodafone US Ops is a public utility subject to this Commission's jurisdiction.

2. The services provided by Vodafone US Ops formerly known as Cable & Wireless Americas Operations, Inc., are subject to this Commission's jurisdiction.

3. When Vodafone US Ops ceased operating in California as of December 1, 2014, its application for a CPCN became moot.

4. A penalty of \$16,000 is appropriate for operating without authority in California for a period of 32 calendar months.

5. Vodafone US Ops' motion to file under seal its Exhibits C and D and material filed on November 21, 2014 in response to an ALJ Ruling should be granted for three years.

**O R D E R****IT IS ORDERED** that:

1. The Application of Vodafone US Operations, Inc. for a certificate of public convenience and necessity is denied as moot because the company is no longer operating in California and has been dissolved.

2. Vodafone US Operations, Inc. is liable for a penalty under Pub. Util. Code §§ 2107 and 2108 in the amount of \$16,000 for operating without authority for 32 calendar months.

3. Vodafone US Operations, Inc. must pay a fine of \$16,000 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, CA 94102, within 30 days of the effective date of this order.

Write on the face of the check or money order "For deposit to the General Fund per Decision       ."

4. The Administrative Law Judge's ruling dated October 29, 2014, is affirmed.

5. The motion for reconsideration of the October 29, 2014 ruling is denied.

6. Vodafone US Operations Inc.'s (Vodafone US Ops) Motions to File Exhibits C and D of its application and material filed November 21, 2014 are granted for a period of three years after the effective date of this order. During this period, this information shall not be publicly disclosed except on further Commission order or Administrative Law Judge ruling. If Vodafone US Ops believes that it is necessary for this information remain under seal for longer than three years, Vodafone US Ops may file a new motion showing good cause for extending this order by no later than 30 days before expiration of this order.

7. All outstanding motions not previously ruled on are hereby denied.

This order is effective today.

Dated \_\_\_\_\_, at Sacramento, California.