BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation On The Commission's Own Motion Into The Operations, Practices, And Conduct Of Contractors Strategies Group, Inc., Intella II, Inc., A&M Communications, TNT Financial Services, Limo Services, Inc., Calnev Communications, Inc., 1st Capital Source Funding & Financial Services, Inc., And Their Owners To Determine Whether Respondents Violated The Laws, Rules, And Regulations Of This State Regarding The Connection Of Automatic Dialing-Announcing Devices To Customer-Owned Pay Telephones.	Investigation 10-02-004 (Filed February 4, 2010)

OPPOSITION OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO RESPONDENTS' MOTION TO DISMISS REGARDING SECTION 734

I. INTRODUCTION

On July 1, 2010, Mr. Alterber Freeman on behalf of Respondents[1] filed a Motion to Dismiss based on Public Utilities Code Section 734[2] (Motion). The Consumer Protection and Safety Division (CPSD) opposes Mr. Freeman's Motion to Dismiss because the Motion seeks a relief that cannot be granted. The Motion inartfully requests to "dismiss the allegations of a violation of Public Utilities Code Section 734" (Motion, p.1); however, no such allegations were made.

[1] Four of the named Respondents are companies owned wholly or in part by Mr. Alterber Freeman; Contractors Strategies Group, Inc., A&M Communications, CALNEV Communications, Inc., and 1st Capital Source Funding & Financial Services, Inc. CPSD has been negotiating separately with the other three Respondents, and believes that Mr. Freeman does not represent them.

[2] Section 734 authorizes the Commission to order public utilities to pay reparations. All statutory

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Section 734 does not impose an actionable duty on the utility. As such, a public utility cannot be said to have "violated" Section 734. Instead, Mr. Freeman appears to request that the entire case be dismissed, but he does not rebut[3] the alleged violations of Section 2871 *et seq.* that are the substance of the case.

Generally, any valid cause of action overcomes a *demurrer* (i.e., a motion to dimiss). (See *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 C.4th 992, 998.) The Commission's OII describes how Respondents used automatic dialing-announcing devices (ADADs) to place thousands of automated calls for the sole purpose of collecting dial-around compensation (DAC), which would violate Public Utilities Code Sections 2871 *et. seq*. which regulates the use of ADADs. The Commission has thus stated a valid cause of action in the OII and the proceeding cannot be dismissed.

Essentially, Mr. Freeman requests to strike references to Section 734 in the OII which relate to refunds. However, apart from that section the Commission has full jurisdiction and authority over ADAD operators as well as COPT operators. Section 2872(a) provides: "The connection of automatic dialing-announcing devices to a telephone line is subject to this article and to the *jurisdiction, control, and regulation* of the commission." (Emphasis added.)

Under Section 701 the Commission is empowered to do "all things, whether specifically in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." Thus, the Commission is fully empowered to do all things necessary to exercise its authority under the main provisions of the Public Utility Code *or in addition thereto*, such as the connection of ADAD devices to telephone lines, which includes making a

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references herein are to the Public Utilities Code.

[3] Respondents filed no rebuttal testimony disputing the underlying facts of the case; in fact, they filed none at all. At the prehearing conference on May 5, 2010, Mr. Freeman indicated that he did not dispute the substance of the allegations. (PHC Transcript, p.9:17-24.)

determination as to what to do with the illegally obtained funds kept in an escrow account, or funds illegally obtained by Mr. Freeman that have not yet been disgorged.

II. BACKGROUND

Respondents in this case are alleged to have connected automatic dialing-announcing devices (ADADs) to their customer-owned pay telephone (COPT) lines in order to continuously dial toll-free numbers for the purpose of collecting a Federal Communications Commission (FCC) mandated fee ($.494 per call) for payphone service providers, known as "Dial-Around Compensation" (DAC). Based on its investigation and report, CPSD Staff alleges that Respondents unlawfully used ADADs to place thousands of fraudulent calls for the sole purpose of collecting DAC, without any effort to comply with Public Utilities Code Sections 2871 *et. seq*. which regulates the use of ADADs.

From 2002 to 2007, Respondents are alleged to have generated hundreds of thousands of dollars in DAC. In 2007, Respondents' billing aggregator G-Five, LLC, (G-Five) became suspicious of the high volume of toll-free calls placed from Respondents' COPT lines, and began holding the DAC in an escrow account. In early 2008 G-Five notified the Commission, which prompted CPSD's investigation. Of the approximately $156,000 generated by Respondents, $103,193.64 (plus any accrued interest) is currently being held in escrow by G-Five, awaiting the results of this investigation.

III. MOTION TO DISMISS

Respondents' Motion to Dismiss regarding Section 734 requests that this case be dismissed based on several grounds; first, that Section 734 does not apply to Respondents because "the payphone lines were not available to any portion of the public" (Motion to Dismiss, p.3.); second, that allegations of illegal calls from 2002-2005 are time-barred by Section 736 and by the doctrine of laches (Motion to Dismiss, p.4); third, because the dial-around compensation (DAC) rates charged

by Respondents were not excessive (Motion to Dismiss, p.5); and fourth, that the carriers who paid DAC have already recouped the money (Motion to Dismiss, p.5). CPSD will address the arguments in the order in which they appear in Mr. Freeman's Motion.

IV. DISCUSSION

CPSD opposes the Motion to Dismiss regarding Section 734 because the OII states valid causes of action under Section 2871 *et seq*. Generally, any valid cause of action overcomes a *demurrer* (i.e., a motion to dimiss). (See *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 C.4th 992, 998.) The Motion to Dismiss is especially inappropriate in this instance because Mr. Freeman filed no rebuttal testimony and thus has no grounds upon which to base any disagreement with CPSD's facts that conclusively demonstrate that violations of the ADAD laws occurred.

Essentially, Mr. Freeman requests that references to Section 734 be stricken (although his request is improperly phrased, as discussed above). (See Code of Civil Procedure Section 436.) However, the Commission has full "jurisdiction, control, and regulation" over ADAD operators pursuant to Section 2872(a), and thus is fully empowered to do whatever is necessary to fulfill its statutory obligations, including ordering the disgorgement of ill-gotten gains by Respondents and the payment of penalties pursuant to Section 2876.

A. Section 734 Does Not Apply to Non-Public Utilities

Mr. Freeman argues that Section 734 does not apply to these Respondents because "the payphone lines at issue were not available to any portion of the public." (Motion, p.3.) While Section 734 does not apply to these Respondents, it is not for the reasons stated in Mr. Freeman's Motion. Respondents, as operators of customer-owned pay telephones (COPTs), are not public utilities because the Commission has determined that COPT operators are not. (*See* OII, p.12.)

However, this does not mean that the Commission has no authority to look to Section 734 to make a determination as to the disgorgement of fraudulently obtained funds. The Commission has authority to order reparations and determine the disposition of the funds held in escrow, pursuant to both its jurisdiction over COPT providers and ADAD operators.

As noted in the OII, although COPTs are not public utilities, "a certain degree of regulation of the rates and terms of service offered by all COPT operators is required to meet the public's proper expectations of consistency in pay telephone services." (OII, p.12.) While not specifically referring to Section 734, the Commission has in the past exercised its jurisdiction over COPT providers to issue refunds[4].

In D.90-06-018[5], the Commission adopted consumer safeguards applicable to all pay telephones. In subsequent decisions the Commission required that all pay telephones offer customers coin-free, cost-free access to 911 (emergency), 411 (directory assistance), 611 (repair) services, to the pay telephone provider's facilities for service, trouble, complaints, **refunds** and general assistance, and to the LEC's operator for 0- dialing. (D.94-09-065; 1994 Cal. PUC LEXIS 681,*120.) Pay telephones were also required to provide 950-prefix calling, 800 calling, 10XXX direct dialing to IECs, and access to all coin and noncoin calling, including intraLATA toll and interLATA calling. (*Id*.)

In addition to its authority over COPT providers, the Commission also has full regulatory jurisdiction and control over ADAD operators. Section 2872(a) provides that the connection of ADADs to telephone lines is subject to the

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[4] For example, in D.96-06-017 the Commission considered whether the COPT provider was in violation of Pacific Bell's tariffs because it did not prominently display a placard as to how to obtain refunds. The Complainant demanded $1 in refunds. The Commission ultimately dismissed the case because the Complainant had already received his refund among other reasons, but the Commission implicitly accepted that it has jurisdiction to order a refund.

[5] 36 CPUC2d 446.

provisions of 2872 *et seq*., and also under the "jurisdiction, control, and regulation" of the Commission. Section 2872(a) states:

> The connection of automatic dialing-announcing devices to a telephone line is subject to this article **and** to the jurisdiction, control, and regulation of the commission. (Emphasis added.)

Section 701 empowers the Commission to do all things necessary in the exercise of its jurisdiction over regulated entities. The Legislature has given the Commission the powers enunciated in "this article" (i.e., Section 2871 *et seq*.), and also provided that the Commission has jurisdiction and control over ADADs. Thus, the Commission may look to Section 734 for guidance as to restitution even if not strictly applicable, or, if the Commission deems it necessary to order disgorgement of illegally obtained funds, it has the authority from its power over COPT providers and ADAD operators to do so. The OII places Respondents on notice that they may be subject to refunds, and cites to Section 734 as a possible grounds for such an order, but this does not preclude the Commission from exercising its jurisdiction over COPT providers and ADAD operators under separate and distinct authority.

The Motion to Dismiss allegations of a violation of Section 734 should be denied for these reasons.

B. Commission-Initiated Investigations Have No Statute of Limitations

Mr. Freeman next argues that the Commission is time-barred from considering allegations from 2002-2005. (Motion, p.4.) This is Mr. Freeman's second attempt to make this argument – the first Motion to Dismiss (filed June 16, 2010) improperly cited to Code of Civil Procedure Section 340. Now, Mr. Freeman tries again to argue that the case is time-barred, for two "new" reasons. First, Mr. Freeman argues that Section 736 creates a three-year statute of limitations; second, Mr. Freeman argues that the doctrine of laches applies.

1. Section 736 Does not apply to Commission-initiated cases

The argument that Section 736 does not apply to Commission-initiated enforcement actions (such as this one) was addressed at pages 5 – 6 of CPSD's Opposition to Mr. Freeman's first Motion to Dismiss filed on June 16, 2010 and will not be repeated here. Section 736 only applies to utility customers who file complaints against the utility, and does not apply to Commission-initiated enforcement actions. (D.07-09-041, p.22.)

2. Laches Does Not Apply

Mr. Freeman is also incorrect that the common law doctrine of laches applies. The common law doctrine of laches bars a claim where a party unreasonably delays the assertion of a right in a way that causes substantial prejudice. (*See* D.02-09-025.)

Mr. Freeman's claim of laches is unsubstantiated by any claim of unreasonable delay by CPSD or substantial prejudice on his part. Upon receipt of Mr. Berg's complaint in 2008, CPSD first learned of Respondents' possible violations and promptly began its investigation. Mr. Freeman does not explain how there was any "delay," or how this perceived "delay" was unreasonable. Mr. Freeman also has not shown that he has been substantially prejudiced by the perceived "delay".

Mr. Freeman attempts to boot-strap his claim of laches by "borrowing" from an "analogous" statute of limitations. (Motion, p.4.) Apparently, the analogous statute is Section 736, which the Commission has clearly stated does not apply to Commission-initiated enforcement actions such as this one. It would undermine the Commission's decision not to impose a statute of limitations on Commission-initiated enforcement actions if Mr. Freeman was permitted to boot-strap Section 736 into this proceeding using laches.

Without any applicable statute of limitations, we must conclude that there is none. The doctrine of laches would only apply if Respondent could demonstrate

unreasonable delay on the part of CPSD and substantial prejudice caused to Mr. Freeman because of it, which he has not done.

C. The DAC Rates Charged by Respondents Are "Excessive or Unreasonable" Because the Charges Themselves Are Illegal

Mr. Freeman argues that Section 734 does not apply because Section 734 applies to excessive or unreasonable rates, and Respondents' DAC rates were set by the FCC and not by Respondents. (Motion, p.5.) This argument lacks any merit, however, because the DAC charges were completely fraudulent.

Payphone service providers collect a fee of $.494 from the carriers for each call successfully placed to a toll-free number from their payphone. This compensation is known as dial-around compensation (DAC) and is required by the Federal Communications Commission (FCC). DAC is a flat charge for every call connected, without regard to the duration of the call, to the business or entity that leases the toll-free number.

CPSD alleges that Respondents illegally obtained DAC by connecting ADADs to their payphone lines and sequentially calling toll-free numbers without following the requirements of Section 2871 *et seq*.

CPSD does not challenge the rate of $.494 in DAC collected per completed call as excessive or unreasonable. Instead, CPSD believes that any DAC charged by Respondents is excessive and unreasonable because it is fraudulent. The OII preliminarily determined that Respondents had no legitimate business purpose for connecting the ADADs to their COPT lines, other than to collect DAC. (OII, p.15-16.) Respondents offered no evidence to demonstrate otherwise.

D. Whether Carriers Have Already "Recouped" DAC from Their Customers is Not a Reason to Dismiss This Case

Mr. Freeman claims that reparations in this case would go to carriers, who have already recouped the DAC charges from their customers. (Motion, p.5.) Essentially, Mr. Freeman argues that this case should be dismissed because

carriers have already been compensated. However, as discussed above issues such as penalties under Section 2876 remain, and thus this case cannot be dismissed.

Should the Commission find that the DAC was illegally obtained, CPSD trusts that the Commission will make a proper determination as to how to disburse the disgorged funds and will not allow double-recovery to the carriers. CPSD's recommendations in its Staff Report and testimony are designed to ensure equity and fairness, and would not allow the kind of double-recovery alleged by Mr. Freeman.

In any event, fears of double-recovery are not a reason to dismiss this case.

V. CONCLUSION

The Motion to Dismiss must be denied because it is inartfully worded, in that the requested relief to "dismiss the allegations of a violation of Public Utilities Code Section 734" cannot be granted because no such allegations were made. If this Motion was instead a motion to strike references to Section 734 and preclude the Commission from ordering the disgorgement of illegally-obtained funds, it would also fail. The Commission may look to Section 734 for guidance as to restitution even if not strictly applicable, or if the Commission deems it necessary to order restitution it may do so on other grounds. The OII places Respondents on notice that they may be subject to refunds, and cites to Section 734 as a possible grounds for such an order, but this does not preclude the Commission from exercising its jurisdiction over COPT providers and ADAD operators under separate and distinct authority described herein.

Respectfully submitted,

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July 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **OPPOSITION OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO RESPONDENTS' MOTION TO DISMISS REGARDING SECTION 734** to the official service list in **I. 10-02-004** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on **July 14, 2010** at San Francisco, California.

/s/ Imelda Eusebio
Imelda Eusebio

N O T I C E

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