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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 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)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING MOTIONS TO DISMISS FILED BY ALTERBER FREEMAN AND RULING THAT NO HEARING IS REQUIRED ON MOTIONS TO ADOPT UNDISPUTED SETTLEMENTS

Background

On February 4, 2010, the Commission opened this Order Instituting Investigation (OII) 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 (collectively, Respondents) to determine whether Respondents violated the laws, rules and regulations of this State regarding the connection of Automatic Dialing-Announcing Devices (ADAD) to Customer-Owned Pay Telephones (COPT).

The Consumer Protection and Safety Division (CPSD) alleged that Respondents connected ADADs to their COPT lines in order to continuously dial toll-free numbers for the purpose of collecting a Federal Communications Commission mandated fee ($.494 per call) for payphone service providers, known as "Dial-Around Compensation" (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. Of the approximately $156,000 generated by Respondents, $103,193.64 (plus any accrued interest) is currently being held in escrow by Respondents' billing aggregator, awaiting the results of this proceeding.

First Motion to Dismiss

On June 16, 2010, Alterber Freeman filed "Respondent's Motion to Dismiss" (the proceeding) in which he argued that the OII was barred by the one-year statute of limitations contained in Section 340 of the California Code of Civil Procedure (CCP). Section (§) 340 sets forth the time for commencing civil actions, and provides, in relevant part:

> Within one year:
>
> (a) An action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation…

Freeman claimed that because the OII is based on allegations that the Respondents violated Public Utilities Code[1] § 2872 between 2002 and 2007, and

[1] Unless otherwise indicated, all future referenced to "section" refer to the California Public Utilities Code.

the penalties are prescribed by § 2876, the proceeding to enforce the penalties had to have been initiated within one year of the last alleged violation, or by December 2008.

The CPSD filed timely opposition to the Motion on the grounds that statutes of limitation contained in the CCP do not apply to administrative actions like this proceeding. CPSD provided Commission decisions and decisions from the courts of appeal in support of its position.

CPSD is correct that the penalties sought in the OII are not barred by a statute of limitations. The Commission has previously rejected the argument that § 340 created a one-year statute of limitations applicable to Commission actions, and instead found that there is no statute of limitations on Commission-initiated investigations.

CPSD accurately cited several courts of appeal cases which state the general principle that statutes of limitations found in the CCP do not apply to administrative actions.[2] CPSD also provided Commission decisions, including *Bidwell Water Company*,[3] where the Commission explicitly rejected a claim that CCP § 340 prevented it from levying a fine, because the statute "does not apply to administrative actions."[4]

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[2] See, *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal. App. 4th 325, citing *Bernd v. Eu* (1979) 100 Cal. App. 3d 511, 515.; *Hartman v. Board of Chiropractic, etc.* (1937) 20 Cal.App.2d 76, 78; *Bold v. Board of Medical Exam*iners (1933) 133 Cal.App.23, 25.

[3] (1999) 85 Cal. P.U.C. 2d 667,671

[4] Followed by the Commission in *Utility Consumers Action Network v. SBC Communications Inc.* (D.09-04-036 at 70).

Furthermore, as CPSD said, the Commission has rejected application of the three-year statute of limitations, contained in Pub. Util. Code § 736, to Commission-initiated enforcement actions. In *In re Hillview Water Co. (Hillview)*,[5] the Commission rejected application of § 736 because the proceeding "was not filed by an aggrieved customer seeking damages from the company, but is an investigatory proceeding instituted by the Commission to determine whether or not the company has violated our rules and/or statutes."[6] The Commission favorably cited the *Hillview* decision in D.07-09-041[7] and reaffirmed the plain language of § 736 is inapplicable to Commission investigations.[8]

Based on the foregoing, the motion is denied.

Second Motion to Dismiss

On July 1, 2010, Freeman filed "Respondents' Motion to Dismiss Complaint of Violation of Public Utilities Code § 734" in which he argued that allegations based on § 734 should be dismissed as inapplicable because (1) Respondents are not "public utilities" since the payphones were not available to the public, (2) the allegations are time-barred by the three-year statute of limitations in § 736 and by the common law doctrine of laches, (3) the DAC was based on legal rates that are not "excessive, unreasonable or discriminatory," and (4) refund of the DAC fees would result in double recovery to the long distance carriers who paid them but have already recouped them from customers.

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[5] D.03-09-072 at 28.

[6] Id.

[7] Application 02-11-017/Investigation 03-01-012 (consolidated).

[8] D.09-07-041 at 20.

CPSD opposed the motion on the grounds that the OII stated valid causes of action and neither Freeman nor any other Respondent filed any rebuttal testimony or disputed the basic underlying facts of the illegal ADAD activity. Instead, CPSD argues, the Commission has full jurisdiction over ADAD operators pursuant to § 2872(a), including ordering "disgorgement of ill-gotten gains,"[9] and payment of penalties pursuant to § 2876.

Freeman has framed the motion based on the mistaken assumption that the Commission asserts Respondents violated § 734. Instead, the allegations are that the Respondents violated §§ 2871-2785.5 by unlawfully connecting and operating the ADADs, and the OII seeks penalties pursuant to § 2876. Section 734 imposes no duties on utilities. It provides the Commission with authority to order reparations where a public utility has charged an "unreasonable, excessive, or discriminatory" rate. CPSD doesn't argue that Respondents are "public utilities" because the Commission has determined that COPT operators are not. However, the Commission has jurisdiction over ADADs and COPT providers,[10] and has adopted consumer safeguards including refund authority.[11] CPSD claims the Commission may look to § 734 for guidance in exercising its authority to order restitution or disgorgement in furtherance of its regulatory power over COPT providers and ADAD operators.

CPSD makes a persuasive argument that § 734 may provide guidance to the Commission in crafting an appropriate remedy for proven violations of

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[9] Opposition to CPSD to Respondents' Motion to Dismiss Regarding Section 734 at 4.

[10] D.85-11-057(1985 Cal. PUC LEXIS 1128).

[11] See, e.g., D.96-06-017; D.94-09-065; D.90-06-018.

§§ 2871-2785.5. Although § 2876 provides that ADAD operators are subject to a maximum $500 fine per violation, other decisions have also authorized refunds for violations. In any event, Freeman fails to establish that § 734 is the basis of the OII allegations, that Respondents are not subject to Commission jurisdiction, or that the OII's allegations lack a basis in law.

Freeman's statute of limitations argument has been discussed above and will not be repeated here. It fails because § 736 is inapplicable to Commission investigations. Freeman's reliance on the doctrine of laches also fails. Laches bars a claim where a party unreasonably delays the assertion of a right in a way that causes substantial prejudice. Freeman refers to *Fountain Valley Regional Hospital and Medical Center v. Bonta*[12] where a hospital sought relief from a superior court decision that approved an assessment by the California Department of Health Services for repayment of alleged Medi-Cal overpayments made a decade earlier upon finding no evidence of unreasonable delay or substantial prejudice in the administrative record. The Court of Appeal found several applicable statutes of limitation and reversed. The Court said the hospital was entitled to rely upon a limitations period borrowed from an "analogous" statute of limitations, and because the Department exceeded that period when it issued its assessments, a presumption arose that the delay in the issuance of those notices was unreasonable, and that the provider had been prejudiced by that delay.

However, Freeman omits that the case was also remanded so that the Department had a chance to rebut the presumptions. Moreover, the facts in this

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[12] 75 Cal.App.4th 316

proceeding are dissimilar. Here, there is no "analogous" statute of limitations applicable to Commission investigations. Furthermore, Respondents didn't articulate a claim or provide evidence of unreasonable delay by CPSD or identify any prejudice suffered. Upon receipt of the complaint from the billing aggregator in 2008, CPSD appears to have promptly initiated its investigation. Absent evidence of "unreasonable delay" or "prejudice" there is no basis for a claim of laches.

Freeman returned to § 734 to contest that, even if the statute applies, the DAC charges the Respondents collected cannot be "excessive, unreasonable, or discriminatory" because the fees are set by federal law. CPSD doesn't challenge the rate of $0.494 in DAC collected per completed call as unreasonable or excessive. Instead, CPSD argues that any DAC charged by Respondents is excessive and unreasonable because it is fraudulent.

The OII will not be dismissed based on the fact that the DAC collected was in the proper amount, assuming the charge was legally made. The issue of whether the DAC fees are excessive or unreasonable is driven by the ultimate finding of fact in the proceeding. If the ADADs were illegally used, then the DAC fees generated by the illegal use would be unreasonable. The Commission will decide this question in its final decision, and if it so concludes, the Commission will determine the appropriate remedies, including whether to look to § 734 as a guideline.

Lastly, Freeman's request to dismiss the OII, based on his opinion that the long distance carriers who paid the billing aggregator have already recovered the funds from their customers, is speculative and begs the question of Respondents' culpability. This issue goes to the remedies if Respondents' liability is established. Respondents have not disputed the underlying charges in the OII

and an attack on the potential remedies for allegedly illegal profit-taking is insufficient reason to dismiss the proceeding.

Motions to Adopt Settlements

On July 14, 2010, CPSD and Respondents TNT Financial Services and Intella II, Inc. filed a Joint Motion for Approval of Settlement Agreement which resolves all issues in the OII with respect to these Respondents. On July 21, 2010, CPSD and Respondent Limo Services, Inc. filed a Joint Motion for Approval of Settlement Agreement and Motion to Substitute Respondent Limo Services, Inc. which resolves all issues in the OII with respect to this Respondent. The accompanying motion would substitute owners Jose and Barbara Quezada as Respondents.

No comments, protests, or opposition of any sort were filed in connection with these motions. Pursuant to Rule 12.3 of the Commission's Rules of Practice and Procedure, if there are no material contested issues of fact, or if the contested issue is one of law, the Commission may decline to set a hearing.

I have determined that these motions provide no material contested issues of fact and no hearing will be held.

IT IS RULED that:

1. Respondent's Motion to Dismiss filed on June 16, 2010 is denied.
2. Respondents' Motion to Dismiss Complaint of Violation of Public Utilities Code Section 734 filed on July 1, 2010 is denied.
3. No evidentiary hearing is required for the Joint Motion for Approval of Settlement Agreement filed on July 14, 2010.

4. No evidentiary hearing is required for the Joint Motion for Approval of Settlement Agreement filed on July 21, 2010.

Dated August 10, 2010, at San Francisco, California.

/s/ MELANIE M. DARLING
Melanie M. Darling
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated August 10, 2010, at San Francisco, California.

/s/ JOYCE TOM
Joyce Tom

N O T I C E

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