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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298

October 2, 2007

Agenda ID #7039

TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-208

This draft resolution regarding Peak Communications, Inc.'s appeal of Third-Party Verification Citation Forfeiture No. 102 issued by the Consumer Protection and Safety Division pursuant to Resolution UEB-001 will be on the agenda at the November 1, 2007 Commission meeting. The Commission may then vote on this draft resolution, or it may postpone a vote.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Opening comments shall be served no later than October 22, 2007 and reply comments shall be served no later than October 26, 2007. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on Administrative Law Judge DeAngelis at [rmd@cpuc.ca.gov](mailto:rmd@cpuc.ca.gov), and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN  
Angela K. Minkin, Chief  
Administrative Law Judge

ANG:h12

Attachment

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

Resolution ALJ #208  
Administrative Law Judge Division  
November 1, 2007

**R E S O L U T I O N**

RESOLUTION ALJ-208 Affirming CPSD Third-Party Verification Citation  
Forfeiture No. 102 Case #07-02-3102 Peak Communications, Inc.

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In this Resolution, the Commission considers the appeal by Peak Communications, Inc. (Respondent) of Third-Party Verification Citation Forfeiture No. 102 issued by the Consumer Protection and Safety Division (CPSD) pursuant to Resolution UEB-001. The Citation Forfeiture alleges that Respondent failed to comply with Public Utilities Code Section 2889.5.<sup>1</sup>

Section 2889.5 sets forth the procedure that telecommunication carriers must follow to obtain authorization and verification from the customer before implementing a change to a residential consumer's presubscribed carrier.<sup>2</sup> Specifically, for the sales of residential services, the customer's decision to change his or her presubscribed carrier must be confirmed by an independent third-party verification (TPV) company.<sup>3</sup> Section 2889.5 complements existing federal law set forth in Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and 47 C.F.R. § 64.1120.

Specifically, Section 2889.5(a)(3) requires a telecommunications carrier to verify each of the below in connection with obtaining verification of a change in a residential customer's preferred local or long-distance carrier:

- i. identity of the customer;

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

<sup>2</sup> Section 2889.3(a)(3).

<sup>3</sup> Id.

- ii. confirmation that the person on the call is authorized to make the carrier change;
- iii. confirmation that the person on the call wants to make the carrier change;
- iv. names of the carriers affected by the change (not including the name of the displaced carrier);
- v. telephone numbers to be switched; and
- vi. types of service involved.

Section 2889.5(a)(7) requires a telecommunications carrier to provide to the Commission, upon request, a TPV tape or other acceptable evidence (e.g., a letter of agency) showing that a change in the telecommunications service provider has been made in compliance with Section 2889.5.

Should a telecommunication carrier violate any of the TPV requirements described above, Resolution UEB-001<sup>4</sup> (August 24, 2006) authorizes the Director of CPSD, or designated staff under the Director's supervision, to serve a citation on the carrier and, consistent with Section 2107, levy a fine on the carrier in the amount of \$1000.00.

Resolution UEB-001 does not specifically address the issue of customer credits in the event of an unauthorized switch of a customer's preferred local or long-distance carrier. However, under Section 2889.5, a carrier found in violation of the TPV requirements must also credit the customer for any amounts paid in excess of the amount that the customer would have been obligated to pay had the customer's service not been changed.<sup>5</sup>

### Findings of Fact

1. On June 4, 2007, CPSD issued Citation Forfeiture No. 102 to Respondent in Case ID #07-02-3102 (filed March 19, 2007) for failure to confirm that "the person on the call wants to make a carrier change."

2. In accordance with the procedure set forth in Resolution UEB-001, Respondent properly served notice of the appeal of this citation on the Director of CPSD within 45 days of the date of the citation.

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<sup>4</sup> Resolution UEB-001 was issued pursuant to Decision 06-03-013, *Market Rules to Empower Telecommunications Consumers and to Prevent Market Fraud*. At Table A of this decision, the Commission ordered CPSD to investigate the feasibility and effectiveness of a citation forfeiture program for violations of the anti-slamming statutes.

<sup>5</sup> Section 2889.5(f).

3. Under Resolution UEB-001, respondents have the right to a hearing on appeal before an Administrative Law Judge.

4. On August 30, 2007, Respondent waived its right to a hearing and agreed to an expedited review process. The expedited review process included positions statements from both Respondent and CPSD served via electronic mail on each other and the Administrative Law Judge. This process, which provided Respondent with a more cost efficient means to pursue appeal, is available in all appeals and may be further refined in the future. The Administrative Law Judge approved the use of this expedited procedure in this case on August 29, 2007.

5. The evidentiary record in this case consists of the position statement of Respondent, the position statement of CPSD, and a copy of the TPV tape.

6. The Administrative Law Judge reviewed these position statements and listened to a copy of the TPV tape.

7. CPSD submitted its position statement on August 30, 2007, stating that Respondent failed to confirm that the customer wanted to switch carriers. According to CPSD, Respondent did not provide such confirmation because the customer was unable to hear the TVP question seeking to confirm the customer's intent. In addition, CPSD offered an argument in favor of finding Respondent in violation of a second separate TPV requirement. However, because the citation does not include this alleged second violation, this matter is not properly before us and we make no determination on this matter. CPSD also submitted a copy of the TPV tape. Accordingly, CPSD requests that the citation be upheld.

8. In support of dismissing the citation, the Respondent submitted its position statement on August 30, 2007, stating that Respondent acted in accordance with the requirement to obtain confirmation that the customer wanted to make the carrier change. Respondent claims that it obtained this confirmation through the following verbal exchange:

TVP: "Thank you and the telephone number to be switched to Peak Communications long distance services is (xxx) xxx-xxxx, is that correct?"

Customer: "Right."

9. We find that the above-quoted exchange fails to confirm the customer's intent to switch carriers. We do not, however, base our decision on the rationale provided by CPSD because it is unclear from listening to the TVP tape whether the customer heard the first question or not. Therefore, we reviewed the portion of the TVP tape cited above by Respondent in support of this confirmation. We find that, while we could infer the customer's intent to switch carriers from the above-quoted exchange, we cannot confirm it. The

purpose of the TPV rules is for the carrier to establish with certainty the customer's decision to switch. It is not sufficient if we must guess or assume the customer's intent to switch from the customer's answer to a question that indirectly might establish the intent to switch carriers.

### Conclusions of Law

1. Based on the evidentiary record, we find that Respondent failed to confirm that the customer wanted to switch carriers. As such, Citation Forfeiture No. 102 is upheld.

2. Respondent must submit full payment of the citation fine or make arrangements for installment payments with CPSD within 30 days. Payment must be made payable to the Commission and submitted to the Director of CPSD for remittance to the State's general fund. If timely payment is not received, CPSD is authorized under Resolution UEB-001 to, among other things, revoke Respondent's authority to operate and order the companies providing billing and collection services to Respondent to cease immediately.

3. Respondent has already credited the customer any excess charge, as defined by Section 2889.5.

4. In compliance with Section 311(g), the draft resolution on this appeal was served October 2, 2007 on CPSD and Respondent in accordance with Section 7(j) of Resolution UEB-001.

5. If the Respondent is unsatisfied with the resolution of this appeal, Respondent may file an application for rehearing of this resolution under Section 1731 and pursue further appeal rights under Section 1756.

6. For purposes of ex part communications, this matter is designated as adjudicatory under Rule 8.1 of the Commission's Rules of Practice and Procedure.

### **IT IS ORDERED** that:

1. Pursuant to Section 2889.5 and Resolution UEB-001, CPSD TPV Citation Forfeiture No. 102 served on Peak Communications, Inc. is upheld.

2. Respondent is ordered to pay the fine noted in the Citation Forfeiture within 15 days. Payment must be made payable to the Commission and delivered to the Director of CPSD.

3. In this case, Respondent has already credited the customer any excess charge, as defined by Section 2889.5. Therefore, no proof of this credit to the Director of CPSD is required.

4. The appeal process for this citation is closed.

5. This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, 2007, the following Commissioners voting favorably thereon:

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PAUL CLANON  
Executive Director

**ATTACHMENT**

**SERVICE LIST FOR RESOLUTION ALJ-208**

Travis Foss  
Legal Division  
CPUC  
505 Van Ness Avenue  
San Francisco, CA 94102  
[ttf@cpuc.ca.gov](mailto:ttf@cpuc.ca.gov)

Richard Clark  
Director  
Consumer Protection & Safety Division  
CPUC  
505 Van Ness Avenue  
San Francisco, CA 94102  
[rwc@cpuc.ca.gov](mailto:rwc@cpuc.ca.gov)

John Clark  
Goodin, MacBride  
505 Sansome Street, 9<sup>th</sup> Fl.  
San Francisco, CA 94111  
[jclark@goodinmacbride.com](mailto:jclark@goodinmacbride.com)

**(END OF ATTACHMENT)**