

Decision 10-02-006 February 4, 2010

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

Utility Consumers' Action Network (UCAN),

Complainant,

vs.

MPower Communications Corp. dba TelePacific  
Communications fka MPower Communications  
aka TelePacific Holding Corp and related entities  
collectively "TelePacific," U 5859-C,

Defendant.

Case 08-08-008  
(Filed August 12, 2008)

**ORDER EXTENDING STATUTORY DEADLINE**

Pub. Util. Code § 1701.2(d) provides that adjudicatory matters such as this complaint case shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the original deadline for resolving the case was August 12, 2009. Through Decision (D.) 09-07-042, that deadline was extended to February 12, 2010.

As we explained in D.09-07-042, the parties agreed at a prehearing conference (PHC) held in December 2008 that it appeared this case could be submitted on a stipulated set of facts. Pursuant to their agreement and with the approval of the Administrative Law Judge (ALJ), the parties submitted a joint fact stipulation on January 15, 2009, opening briefs on January 29, and reply

briefs on February 11, 2009. A scoping memo confirming these procedural arrangements was issued on April 8, 2009.

Although the ALJ had begun work on a Presiding Officer's Decision (POD) by the time D.09-07-042 was issued, the press of other business delayed its completion. Among other things, the ALJ had been required to devote considerable time to Case (C.) 08-02-013, an exceptionally complex and contentious proceeding in which we are also issuing an order today.

Although the POD in this case is now nearly finished, it is not possible to issue it and for the Commission to act upon any ensuing appeal or request for review before the February 12, 2010 deadline. Accordingly, we have decided, pursuant to our powers under Pub. Util. Code § 1701.2(d), that a further order extending the time for resolving this proceeding should be issued, until November 19, 2010.

## **1. Background**

The complaint herein was filed in mid-August 2008. It alleged that defendant MPower Communications Corp. (MPower)<sup>1</sup> had imposed unauthorized direct dialing charges on customers, failed to provide notice that international calls could be placed on the customers' accounts, and billed at unpublished rates that were significantly higher than MPower's published rates.

According to the complaint and briefs that complainant, Utility Consumers' Action Network (UCAN), subsequently filed, the bills for the unauthorized international calls (the circumstances of which are described

---

<sup>1</sup> The answer was filed on behalf of MPower and its corporate parent, U.S. TelePacific Holdings Corp.

below) constitute “cramming” forbidden by Pub. Util. Code § 2890. UCAN also argues that the clause in the service contract on which MPower is relying to hold complainant responsible for these unauthorized calls is unconscionable, and thus unenforceable, under California law. Because of its billings for the unauthorized calls, UCAN also argues that MPower has failed to provide adequate service, as required by Pub. Util. Code § 451, and is also in breach of its obligation to provide customers with sufficient information to permit informed choices, as required by § 2896.

This case arises out of international calls that were placed from a telephone line used for facsimile service by the Edelweiss Flower Salon (Edelweiss) in San Diego, California. Originally a partnership, Edelweiss is now solely owned by Natalja Stepanova. According to the complaint, Edelweiss’s owners originally contracted with MPower for a business telephone package that consisted of a fax line, a DSL line and three POTS lines.<sup>2</sup>

Edelweiss’s troubles with MPower began in September 2006, when Stepanova received a bill for the fax line totaling \$1,043.13 (before taxes, fees and surcharges), most of which was attributable to 17 unauthorized international calls made through expensive satellite facilities. An even larger bill for such calls was issued by MPower for October 2006.

Stepanova declined to pay the bills and instead asked MPower’s customer service representatives to remove the disputed charges. When the charges were not removed, Stepanova hired an attorney. Although the attorney thought he had reached an understanding with MPower that Edelweiss’s service would not

---

<sup>2</sup> POTS stands for “Plain Old Telephone Service.”

be interrupted if it paid the undisputed amounts relating to the fax line, MPower disconnected the service on all of Edelweiss's lines on November 28, 2006, after Stepanova refused MPower's demand that the full amount of the disputed bills be paid immediately. On December 20, 2006, MPower also billed Stepanova approximately \$1,350 in early termination fees as a result of her decision to cancel her contract with MPower.

In their answer to the complaint, MPower and its corporate parent allege that although it cannot be determined with certainty, the international satellite calls that Stepanova says were unauthorized apparently took place as a result of third-party hacking into the modem that served Edelweiss's fax line (a modem that MPower itself had provided). MPower also alleges that its June 2005 contract with Edelweiss expressly requires the customer to secure its equipment against such unauthorized access, but that Stepanova apparently failed to do so. MPower also alleges that the disputed calls were billed at \$14.67 per minute, the lawful rate set forth on its website for Global Mobile Satellite System (GMSS) calls.<sup>3</sup>

MPower argues that neither Pub. Util. Code § 2890 nor General Order (GO) 168 preclude the collection actions it took here, because (1) the charges in dispute are for direct-dialed service, which under § 2890 and GO 168 is "prima facie evidence of authorization," and (2) MPower has verified through its investigation that the charges were authorized under the terms of Edelweiss's

---

<sup>3</sup> According to its answer, MPower's publication of its GMSS rates on the company's website satisfies the applicable rules of the Federal Communications Commission (FCC).

service agreement. MPower also argues that no violation of Pub. Util. Code §§ 451, 2890 or 2896 has been established.

## **2. Discussion**

As the foregoing summary suggests, this case raises some complex legal issues. For example, MPower argues that because this case concerns international calls, any relevant Commission precedents are preempted by federal law, especially two cases decided by the FCC that also concerned unauthorized calls made possible by a business's failure to secure its telecommunications system adequately.<sup>4</sup> UCAN, on the other hand, argues not only that the charges here constitute cramming under § 2890, but also that the clause in the customer service agreement on which MPower relies is unconscionable under *Szetela v. Discover Bank*, 97 Cal.App.4<sup>th</sup> 1094 (2002).

As a result of these clashing theories on what are apparently uncontested facts, the ALJ has been required to conduct a great deal of independent research on hacking, unconscionability, and how federal law would treat such claims. As noted above, although his POD is now nearly complete and is expected to be issued soon, it was not possible to issue it and for the Commission to act upon any ensuing appeal or request for review before the February 12, 2010 deadline for this case.

By extending the deadline for resolving this proceeding until November 19, 2010, there should be sufficient time for the POD to be issued, and

---

<sup>4</sup> The two FCC decisions are *Directel v. AT&T Corp.*, 11 FCC Rcd 7554 (1996) and *Chartways Technologies, Inc. v. AT&T Communications*, 8 FCC Rcd 5601 (1993).

for the Commission to have adequate time to consider and act upon any ensuing appeal or request for review of the POD before the November 19, 2010 deadline.

### **3. Waiver of Comments on Proposed Decision**

Under Rule 14.6(c)(4) of the Rules of Practice and Procedure, the Commission may waive the otherwise applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

### **4. Assignment of Proceeding**

Timothy Alan Simon is the assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this case.

### **Findings of Fact**

1. The complaint in this case was filed on August 12, 2008.
2. Pursuant to an agreement reached at the PHC held on December 3, 2008, the parties submitted a joint fact stipulation on January 15, 2009, followed by opening and reply briefs.
3. Owing to the urgency of other matters being handled by the assigned ALJ, the 12-month deadline for resolving this proceeding was extended until February 12, 2010 by D.09-07-042.
4. An extension of time until November 19, 2010 should allow the ALJ adequate time to issue the POD, give the losing party or any concerned Commissioner time to decide whether to file an appeal of the POD (or request review thereof) pursuant to Rule 14.4 of the Commission's Rules of Practice and Procedure, and allow the Commission adequate time to consider and act upon any such appeal or request for review.

**Conclusions of Law**

1. Because of the press of other business, including C.08-02-013, it will not be possible to resolve this case by the deadline established in D.09-07-042, which is February 12, 2010.

2. The deadline established in D.09-07-042 should be extended for nine months to allow for resolution of this proceeding.

**IT IS ORDERED** that the deadline set forth in Decision 09-07-042 for resolving this proceeding, February 12, 2010, is extended to and including November 19, 2010.

This order is effective today.

Dated February 4, 2010, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
TIMOTHY ALAN SIMON  
NANCY E. RYAN  
Commissioners