

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 1, 2005

TO: PARTIES OF RECORD IN INVESTIGATION 04-03-016
DECISION 05-02-001, Mailed February 1, 2005

On December 30, 2004, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 8.2 of the Commission's Rules of Practice and Procedures provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

/s/ ANGELA K. MINKIN

Angela K. Minkin, Chief
Administrative Law Judge

ANG:sid

Attachment

Decision 05-02-001 February 1, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations and practices of Miko Telephone Communications, Inc. and its sole owner and President Margaret Currie, to determine whether it has violated the laws, rules and regulations governing: 1) payment of surcharges to the Commission, 2) authorized operation in California, 3) providing accurate information to the Commission and 4) the manner in which California consumers are switched from one long distance carrier to another.

Investigation 04-03-016
(Filed March 16, 2004)

Travis Foss, Attorney at Law, Legal Division, for
Consumers Protection and Services Division.
James W. Howard, Consumer Protection & Safety
Division, Sacramento.

PRESIDING OFFICER'S DECISION

I. Summary

This decision finds that respondents Miko Telephone Communications, Inc. (Miko) and its sole owner and President Margaret Currie violated Public Utilities Code Sections 405, 702, 1013(a), and 2229.5(a), as well as Commission

rules and regulations.¹ The uncontested evidence demonstrates that Miko conducted operations in California without operating authority, failed to pay the Commission's telecommunications fees and surcharges, made a material misrepresentation in response to a data request from the Commission's Telecommunications Division, and engaged in a pattern of slamming, i.e., violated regulations governing how telephone subscribers are switched from one interexchange carrier to another.

Therefore, we (1) permanently revoke respondents' operating authority to provide telephone service in California, (2) find that Miko owes the Commission \$27,383 for 2002 and \$54,019 for 2003 in uncollected fees and surcharges, (3) fine respondents \$20,035 pursuant to Section 405, and (4) fine respondents \$25,000, pursuant to Sections 2107 and 2108 and the guidelines set forth in Decision (D.) 98-12-075.

In addition, we direct the Telecommunications Division to notify all local exchange carriers (LECs) and billing agents to cease all business with respondents unless respondents have obtained new operating authority and to check the Telecommunications Division's publicly accessible database to ensure that companies with which the LECs do business in fact have valid operating authority.

¹ All subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to rules refer to the Commission's Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

II. Procedural Background

The Commission served this Order Instituting Investigation (OII) on respondents on March 24, 2004. On April 8, 2004, the assigned Administrative Law Judge (ALJ) issued a ruling setting a prehearing conference (PHC) for Tuesday, May 11, 2004 and directing the filing of PHC statements on May 6, 2004.

On April 16, 2004, a response to the Commission's OII was filed on behalf of Miko by the Helein Law Group, LLP. The response states that the law firm is no longer retained as Miko's counsel, but was asked as a professional courtesy to (1) inform the Commission of Miko's dissolution, and (2) request that its authorization and carrier code be canceled. The response further states that Miko is insolvent, is no longer in business, and will not resume business now or at any time in the future. The respondents did not file a PHC statement and did not appear at the PHC or at evidentiary hearing held on July 19, 2004.

The Consumer Protection and Safety Division (CPSD) timely filed a PHC statement, appeared at the PHC, timely served supplemental testimony, sponsored a witness at the evidentiary hearing, and submitted an opening brief on July 21, 2004, at which time the case was submitted.

III. Evidentiary Record

A. Evidence of Violations

CPSD's investigative reports (Exhibits 1 and 2) document Miko's history as a telecommunications company in California, its interactions with Commission staff, and the specifics of the claimed violations. Briefly, on September 18, 2001, the Commission issued D.01-09-038 granting Miko a certificate of public convenience and necessity (CPCN) to operate as a switchless reseller of intraLATA and interLATA service within California. Miko is based in

Birmingham, Alabama, and is solely owned and operated by its President, Margaret Currie. Miko did business in California in 2002 and 2003, but is no longer conducting business in California.

During Miko's California operations from May 2002 to about August 2003, it used billing agent ILD Communications (ILD) to submit billings through the local exchange carriers (LECs). According to information obtained from ILD, Miko billed consumers \$844,575 in 2002, and \$2.75 million in 2003. According to ILD, and Commission staff, Miko has not submitted any of the fees and surcharges mandated by law. These fees are required by Attachment A to D.01-09-038, and include Universal Lifeline, High Cost Fund A and B, California Teleconnect Fund, etc.

When Miko first obtained a CPCN, it failed to notify the Commission within 12 months that it had begun operations by filing a tariff with the Commission (as required by D.01-09-038). Therefore, on March 12, 2003, the Telecommunications Division administratively revoked Miko's CPCN. Miko, which had already begun operations, continued to operate without a valid CPCN after March 12. Miko re-applied for a CPCN in April 2003, and received a new CPCN on September 4, 2003.

On March 3, 2003, the Telecommunications Division issued a data request to all interexchange carriers for certain specific information, including when carriers (such as Miko) began operations. Margaret Currie responded that Miko began operations in California in January 2003. However, ILD reported billing activity for Miko in 2002, and SBC Communications, Inc. reported about 27,000 Primary Interexchange Carrier (PIC) changes for Miko in 2002.

During 2002, the Commission's Consumer Affairs Branch (CAB) received 11 slamming complaints against Miko, rising to 176 slamming

complaints in 2003. In addition, SBC reports 1,702 PIC disputes against Miko in 2002, rising to 2,869 in 2003. In 2002, of the \$844,575 billed to consumers, \$166,736 was refunded to consumers, or approximately 20% of all billings for that year. In 2003, of the \$2,750,127 billed to consumers, \$826,493 was refunded to consumers, or approximately 30% of all billings for that year.

B. CPSD's Recommended Sanctions and Fines

Based on the evidence introduced in this case, CPSD recommends that the Commission:

- permanently revoke respondents' operating authority;
- find that Miko owes the Commission \$27,383 for 2002 and \$54,019 for 2003 in uncollected fees and surcharges, based on the amount of revenues reported by Miko's billing agent; and
- find that Miko has violated the statutes and rules set forth in Ordering Paragraph 1a-f of the OII, and pursuant to Public Utilities Code Section 2107, impose \$10,000 in nominal penalties for those violations.

IV. Discussion

A. Operating Authority

The OII suspended respondents' operating authority for failure to pay the Commission mandated fees and surcharges. The evidence of illegal conduct and slamming of hundreds of customers warrants permanent revocation of respondents' operating authority and we do so here. Although Miko, after we issued the OII, requested its operating authority be canceled and stated it does not intend to resume business in the future, we also address the possibility of future operations in the event Miko changes its plans. If Miko or Margaret

Currie make any future applications for a CPCN, they must address the violations found here, indicate whether they have complied with this decision by fully paying the fines and sanctions imposed herein, and otherwise offer evidence of rehabilitation and fitness; such an application must specifically reference this decision.

In response to the ALJ's questions at the hearing, CPSD's witness stated that, to his knowledge, the Commission does not have written guidelines or procedures for notifying interested parties of when an interexchange carrier's operating authority is revoked. In its brief, CPSD recommends that the Telecommunications Division be immediately notified of the final decision in this case and directed to:

- (1) not grant a future CPCN to respondents unless they have paid the fines and complied with the sanctions in this case;
- (2) notify CPSD staff if and when a future application is filed so that CPSD can review the application and protest if necessary;
- (3) immediately inform all LECs and billing agents that the respondents operating authority has been revoked and remind them to regularly check Telecommunications Division's publicly accessible carrier database to ensure that companies with which they do business have valid operating authority.

We find that the above recommendations are reasonable and will assist in protecting California consumers from further illegal operations by respondents or other unlicensed companies. We therefore adopt them.

B. Uncollected Fees and Surcharges

The evidence substantiates the amount of fees and surcharges owed to the Commission. We therefore order the respondents to pay \$27,383 for 2002 and \$54,019 for 2003.

C. Penalties

The evidence presented by CPSD is clear and convincing and sustains the allegations in the OII that respondents violated:

- Section 405 by failing, refusing, or neglecting to pay surcharges and fees required by D.01-09-038 (Appendix A);
- Section 702 by failing to pay surcharges and fees required by a Commission decision, and by violating a Commission directive by continuing to operate without valid operating authority;
- Section 1013(a) by operating without a certificate of public convenience and necessity;
- Rule 1 by providing false information to the Commission that Miko did not begin operations in California until January of 2003, when in fact Miko began operating in California in May of 2002; and
- Section 2889.5(a) by failing to establish whether the subscriber intends to make any change to the subscriber's telephone service and to explain any charges associated with that change, i.e., (slamming).

There are three statutes that address penalties for the above violations. First, Section 405 provides for a penalty not to exceed 25% of unpaid regulatory fees for failure to submit to the Commission regulatory fees for a period of 30 days or more. For violations that do not carry specific sanctions, Section 2107

provides for a penalty of not less than \$500 nor more than \$20,000 per violation. Lastly, Section 2108 can be used in conjunction with Section 2107 to allow the Commission to treat each day's continuance of a violation as a separate and distinct offense.

Under the penalty provisions of Sections 405, 2107 and 2108, CPSD recommends the Commission assess a nominal monetary penalty of \$10,000 based on the amount of financial harm to consumers and the State of California, the fact that Miko is insolvent, and the fact that in CPSD's investigation it was unable to identify any tangible assets owned by either Miko or Margaret Currie. CPSD states it does not object to a higher penalty amount if the Commission deems it necessary and that respondents should be on notice that in any case where a party fails to abide with a Commission decision, the Commission has the discretion, pursuant to Section 2104, to pursue recovery of fine amounts imposed by the Commission.

We consider first the penalty provision of Section 405. This statute provides its own level of penalties for nonpayment of regulatory fees and surcharges and respondents have flagrantly violated it. Therefore, we assess a penalty of \$20,350 under Section 405.

Next, we consider penalties under Section 2107 and 2108. For violations under these statutes, as the Commission has stated before, "The primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations. Fines should, therefore, be set at a level within the range permitted by Section 2107 that is sufficient to achieve the objective of deterrence without being excessive in light of the offending utility's financial resources." (See D.01-08-058, mimeo. at 80 and D.04-09-062, mimeo. at 62.)

In determining the amount of a fine, we look to the criteria we established in D.98-12-075, Appendix A. (84 CPUC2d at 188-190.) That decision stated that the purpose of a fine is to effectively deter further violations by the perpetrator or others and sets the following criteria for consideration:

The severity of the economic or physical harm;

The utility's conduct to prevent, detect, disclose, and rectify the violation;

The utility's financial resources;

The public interest involved;

The totality of the circumstances; and

Commission precedents.

In his testimony, CPSD's witness states that he reviewed 41 of the 216 written complaints received by the Commission's Consumer Affairs Branch. All, or at least most, of these complaints included a response from Miko's Regulatory Affairs Department indicating that Miko had what it considered a valid Third-Party Verification record, but despite this Miko would issue a credit to the customer in order to satisfy the customer and resolve the dispute at hand. CPSD testified that while it did not contact any of these customers to verify that Miko had, in fact, issued a credit, it assumed from Miko's response that the customers had received appropriate restitution. Based on this evidence, we cannot make a finding that customers are owed any further restitution.

In looking at Commission precedents, D.98-12-075 directs that we address previous decisions that involve reasonably comparable factual circumstances and explain any substantial differences in outcome. Most penalty cases for telecommunications companies are not comparable as they involve companies much larger than Miko, with substantial resources and an evidentiary record of having engaged in more numerous violations.

A case that is somewhat comparable is D.03-01-079. In this decision, the Commission, after issuing an OII and holding evidentiary hearings, revoked Titan Telecommunications, Inc.'s (Titan) operating authority as an interexchange carrier and fined Titan \$35,000. The Commission did so after finding that Titan and Christopher Bucci, its sole shareholder and president, violated Rule 1 by misleading the Commission in Titan's 1999 application for a CPCN. In D.03-01-079, the Commission made a specific finding that it was reasonable to assess a relatively low fine in light of Titan's limited ability to pay a fine.

Under the criteria established in D.98-12-075, we find that the economic harm to customers is at least equal to the regulatory harm that we have fined respondents \$20,350 for under Section 405. Recognizing (1) CPSD's testimony that customers had received appropriate restitution, (2) Miko having re-applied and obtained operating authority from the Commission, and (3) Miko's current insolvency and the lack of identifiable assets for either respondent, we should assess a relatively low fine. Therefore, we find that a penalty of \$25,000 for violations under Sections 2107 and 2108 is reasonable and we adopt it. The \$45,350 in fines we levy against Miko is in a comparable range to the fine established in Titan.

The respondents shall pay penalties of \$45,350 to the State of California's General Fund within 45 days after the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive Director within five days of payment.

V. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and ALJ Christine M. Walwyn is the Presiding Officer in this proceeding.

Findings of Fact

1. On September 18, 2001, the Commission issued D.01-09-038 granting Miko a CPCN to operate as an interexchange carrier within California. Miko began operations in California by May 2002.

2. Miko failed to notify the Commission, within 12 months of being granted its authority, that it had begun operations. Miko's CPCN was revoked on March 12, 2003, due to this failure.

3. On April 23, 2003, Miko filed another application for authority and was granted a CPCN on September 4, 2003.

4. From March 12, 2003 to September 4, 2003, Miko operated without a CPCN.

5. The records of Miko's billing agent show that Miko conducted business as an interexchange carrier in California from approximately May 2002 to August 2003 and that Miko billed California consumers \$844,575 in 2002 and \$2,750,127 in 2003. The fees and surcharges owed to the Commission from these billings are \$27,383 for 2002 and \$54,019 for 2003. Miko failed to pay any of the fees and surcharges owed to the Commission.

6. Respondent Margaret Currie provided false information to the Commission's Telecommunications Division in response to a March 3, 2003 data request when she stated that Miko did not begin operations in California until January 2003, when in fact Miko began operating in California in May 2002.

7. During 2002, the Commission's Consumer Affairs Branch received 11 slamming complaints against Miko, rising to 176 slamming complaints in 2003. In addition, SBC Communications Inc. reports 1,702 PIC disputes against Miko in 2002, rising to 2,869 in 2003.

8. In 2002, of the \$844,575 Miko billed to consumers, \$166,736 was refunded to consumers. In 2003, of the \$2,750,127 Miko billed to consumers, \$826,493 was refunded to customers. The number of complaints and disputes, the volume of refunds, and the failure of Miko to contest the charges of the OII, demonstrate that Miko has engaged in extensive slamming substantially as charged in the OII.

9. On April 16, 2004, a response to the Commission's OII was filed by Miko's counsel of record requesting that Miko's authorization and carrier code be canceled because Miko is insolvent, no longer in business, and will not resume business now or at any time in the future.

Conclusions of Law

1. Respondents violated Section 405 by failing to pay surcharges and fees required by D.01-09-038.

2. Respondents violated Section 702 by failing to pay surcharges and fees required by a Commission decision, and by violating a Commission order by continuing to operate without valid operating authority.

3. Respondents should pay to the Commission \$81,402 in surcharges and fees, and pursuant to Section 405 should pay a related penalty of \$20,035 to the State of California General Fund.

4. Respondents violated Section 1013(a) by operating without a certificate of public convenience and necessity.

5. Respondents violated Section 2889.5(a) by failing on numerous occasions to establish whether a subscriber intends to make any change to the subscriber's telephone service and to explain any charges associated with that change.

6. Respondents violated Rule 1 of the Commission's Rules of Practice and Procedure by providing false information to the Commission.

7. Section 2107 requires the Commission to order a monetary penalty when a public utility violates or fails to comply with any statute or Commission decision, or requirement where a penalty has not otherwise been provided.

8. Based on the criteria established in D.98-12-075, a penalty of \$25,000 is reasonable for violations under Sections 2107 and 2108 and should be adopted. Respondents' CPCN should be permanently revoked.

9. Should Miko or Margaret Currie make any future applications for a CPCN, they should address the allegations made in this case and indicate whether they have complied with this decision by fully paying the fines and sanctions imposed herein.

10. This order should be effective immediately.

11. Telecommunications Division should timely notify all local exchange carriers and billing agents when an interexchange carrier's operating authority has been revoked and remind the local exchange carriers and billing agents to regularly check Telecommunications Division's publicly accessible carrier database to ensure that companies with which they do business have valid operating authority.

O R D E R

IT IS ORDERED that:

1. The Certificate of Public Convenience and Necessity (CPCN) issued to Miko Telephone Communications, Inc. (Miko) and in effect when this investigation began is permanently revoked.

2. Neither Miko nor its President Margaret Currie shall be granted a future CPCN unless they have paid all surcharges, fees, and penalties assessed here and have complied with all sanctions.

3. Telecommunications Division shall immediately inform all local exchange carriers and billing agents that Miko's operating authority has been revoked and remind them to regularly check Telecommunications Division's publicly accessible carrier database to ensure that companies with which the local exchange carriers and billing agents do business have valid operating authority.

4. Respondents shall immediately pay to the Commission \$81,402 in overdue surcharges and fees.

5. Respondents shall pay penalties of \$45,350 to the State of California's General Fund within 45 days after the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive Director within five days of payment.

6. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.