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Date of Issuance
March 2, 2015

Decision 15-02-040 February 26, 2015

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion into the operations, practices, and conduct of Telseven, LLC, Calling 10 LLC dba California Calling 10 (U7015C), and Patrick Hines, an individual, to determine whether Telseven, Calling 10, and Patrick Hines have violated the laws, rules and regulations of this State in the provision of directory assistance services to California consumers.	Investigation 10-12-010 (Filed December 16, 2010)

ORDER DENYING REHEARING OF DECISION (D.)14-08-033

I. INTRODUCTION

In this decision, we deny rehearing of Decision (D.)14-08-033 (or "Decision").[1] In D.14-08-033, we held that Telseven, LLC and Calling 10 LLC dba California Calling 10 ("corporate respondents") placed unauthorized charges on California subscribers' telephone bills, a practice generally referred to as "cramming." We ordered the corporate respondents and individual respondent Patrick Hines to pay reparations to the subscribers as well as a fine, and prohibited all California local exchange carriers from providing billing and collection services to any entity in which respondent Patrick Hines has an ownership or management interest.

[1] All citations to Commission decisions after 2000 are to the official pdf versions available on the Commission's website at http://docs.ca.gov/DecisionsSearchForm.aspx, unless otherwise specified.

We have reviewed each and every allegation raised in Patrick Hines' application for rehearing, and we are of the opinion that the application for rehearing fails to demonstrate any legal error. Accordingly, rehearing of D.14-08-033 is denied.[2]

II. FACTUAL BACKGROUND

In D.14-08-033, we concluded that all charges placed on California subscribers' telephone bills by Telseven, LLC ("Telseven") and Calling 10 LLC dba California Calling 10 ("Calling 10") were not authorized by those subscribers and ordered the corporate respondents and Patrick Hines ("Hines"), an individual, to pay reparations to each subscriber. We further ordered that the corporate respondents and Hines pay a fine of $19,760,000 to the General Fund of the State of California, allocated one-half to the corporate respondents and one-half to Hines. Finally, we prohibited all California local exchange carriers from providing billing and collection services to any entity in which Hines has an ownership or management interest of 10 % or more.

Hines filed a timely rehearing application of the Decision. The rehearing application alleges that the Decision is unlawful and erroneous because the Commission lacks jurisdiction; the corporate respondents acted lawfully; Hines is not liable for the corporate respondents' actions; and the penalty is excessive, overbroad/baseless, and barred by the statute of limitations and the doctrine of laches. The Commission's Safety and Enforcement Division ("SED")[3] filed a response opposing the rehearing application.

III. DISCUSSION

In his rehearing application, Hines contends that the Commission erred in ordering him to pay the reparations and fine on the grounds that (1) the Commission lacks subject matter jurisdiction over the matter; (2) the Commission lacks personal jurisdiction over Hines; (3) the corporate respondents' price disclosures were sufficient notice to consumers; (4) the Commission misapplied the theory of alter ego liability to

[2] By this decision we also deny Patrick Hines' September 23, 2014 motion for a stay of D.14-08-033 as moot with the disposition of his application for rehearing.

[3] SED was formerly known as the Consumer Protection and Safety Division.

hold Hines liable for the corporate respondents' actions; (5) the fine is barred by the doctrine of laches; (6) the fine is excessive under the California Constitution; (7) part of the fine's amount is time-barred; and (8) the prohibition on local exchange carriers' provision of billing and collection services to Hines-owned or managed entities is overbroad and/or baseless. We find that the final argument does nothing more than disagree with the Commission's reasoning and thus fails to assert legal error. As described below, none of the remaining allegations demonstrates legal error.

A. The Commission Has Subject Matter Jurisdiction

Hines contends that the Commission lacks jurisdiction over this matter because the corporate respondents offered only interstate telecommunications service. On the contrary, the Commission is statutorily empowered to institute this proceeding and, pursuant to Public Utilities Code sections 2889.9 and 2890,[4] order remedies for illegal conduct, including cramming.

The Decision sets forth this authority, and there is no reason to repeat that discussion here. (See D.14-08-033 at pp. 30-33.) The charges at issue – which related to an alleged directory assistance service, not "calls" -- appeared on the telephone bills of California customers, and that is what gives the Commission jurisdiction.[5] Indeed, the corporate respondents and Hines stated that the charges for their services appeared on telephone bills in California and – by asserting that their disclosures complied with

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[4] Subsequent section references are to the Public Utilities Code, unless otherwise specified.

[5] We have repeatedly taken action with regard to what appears on California telephone customer bills. See, e.g., *Investigation into Operations, Practices, and Conduct of Qwest Communications Corp. and LCI Int'l Telecommunications Corp.,* Opinion Finding Violations and Imposing Sanctions [D.02-10-059] (Oct. 24, 2002) 2002 Cal. PUC LEXIS 654 (investigating the manner in which California consumers are switched from one long distance carrier to another and billed for long distance telephone services and finding that Qwest failed to supervise its sales agents; agents switched thousands of customers long distance without permission; and agents placed unauthorized charges on telephone bills); *Investigation of USP&C to Determine Whether It Has Violated Public Utilities Code Section 2889.9,* Opinion and Order to Show Cause [D.01-04-036] (Apr. 19, 2001) 2001 Cal. PUC LEXIS 297 (holding billing information aggregator and agent liable for unauthorized charges placed on California bills by Missouri entity).

section 2890 – in effect recognized that section 2890 applies to them. (Respondents' Jan. 31, 2011 Response to Order Instituting Investigation and Denial of All Assertions of Possible Violation of California Law of Telseven, LLC, Calling 10, LLC dba California Calling 10, and Patrick Hines, an Individual, at 11 & 16-17.)

Hines also asserts that the Federal Communications Commission ("FCC") found that consumers using directory assistance service had their calls transmitted to Nevada and, because Telseven did not offer service in Nevada, all calls using this equal access number were interstate calls. We find that the FCC's cramming action under the Communications Act of 1934 against Telseven and Hines does not foreclose this Commission from pursuing a violation of state law. The FCC's Notice of Apparent Liability does not state that it is preempting this Commission's jurisdiction. Rather, the FCC specifically refers to our investigation in this proceeding and then repeatedly cites to the record evidence in this proceeding, as well as our December 2010 Order Instituting Rulemaking ("OII"), to support its own findings. (See *In re Telseven LLC, Calling 10 LLC, and Patrick Hines aka P. Brian Hines*, Notice of Apparent Liability For Forfeiture (2012) 27 FCC Rcd 15558 ¶ 19 & n.4, 6, 33, 74, 83, 103, 105.)

B. The Commission Has Personal Jurisdiction over Hines

According to Hines, we incorrectly relied on his appearance and testimony at hearings to establish the Commission's personal jurisdiction over him. The California courts' decisions on what constitutes an appearance, however, support the Commission's assertion of jurisdiction.

"It has long been the rule in California that 'a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action.'" (*Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 419.) If the defendant, either personally or through an attorney, is physically present at a trial and participates, that participation amounts to a general appearance. (2 Witkin California Procedure (5th ed. 2010) Jurisdiction, § 213.) A general appearance "must be express or arise by implication from the defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other

than one contesting the jurisdiction only." (*RCA Corp. v. Superior Court* (1975) 47 Cal.App.3d 1007, 1009 (parties' written but unfiled stipulation extending petitioner's time for appearing in action constituted a general appearance); see also *Creed v. Schultz* (1983) 148 Cal.App.3d 733, 740 (plaintiff made a general appearance in the action because she used the court's processes to initiate discovery by serving a deposition notice on defendant).)

Hines submitted to our jurisdiction by appearing here to testify, rather than filing a motion to dismiss for lack of personal jurisdiction. (D.14-08-033 at p. 20.) Moreover, Hines sought to benefit himself through his testimony by arguing, among other things, that he had insufficient financial means to pay restitution to California consumers. (*Ibid.*) Thus, Hines made a general appearance, and the Commission has personal jurisdiction over Hines.

C. The Record Supports a Finding that the Charges Were Unauthorized

Hines contends once again that the corporate respondents made price disclosures to consumers sufficient to allow them to decide to utilize the directory service with a live agent. In doing so, Hines simply re-argues the same position he took in the proceeding. We rejected his argument and concluded, based on the record, that the recorded notice was insufficient and the charges were unauthorized. (D.14-08-033 at pp. 8-12.)

D. The Record Supports a Finding that Hines Was the Alter Ego of the Corporate Respondents

It is Hines' position that the Commission misapplied the doctrine of alter ego liability and that "the Commission [must] demonstrate a far greater set of facts and circumstances in order to pierce the corporate veil and find personal liability" on the part of Hines for the actions of the corporate respondents. Application for Rehearing at p. 14. Hines asserts that it is typical for one person to be in the position of manager for several small companies, and that the corporate respondents kept separate books, records, and bank accounts. Yet we addressed the prongs of the alter ego test and correctly concluded,

based on record evidence, that we could and should hold Hines personally responsible for the corporate respondents' violation of the Public Utilities Code.

The Decision explained when the alter ego doctrine applies and the highly fact-specific set of factors courts look at when deciding whether to "pierce the corporate veil." (D.14-08-033 at pp. 25-28.) We then laid out the relevant facts (many of which are undisputed) including: Hines owned all the corporate respondents and other entities involved in the scheme (D.14-08-033 at pp. 24 & 27-28);[6] the corporate respondents had a common address (D.14-08-033 at p. 28);[7] Hines changed these entities at his sole discretion (D.14-08-033 at p. 27); Hines managed both corporate respondents (see Application for Rehearing at p. 14 and exhibits identified therein); Hines directed corporate respondents, controlled all aspects of the scheme, and testified on their behalf as the sole witness (D.14-08-033 at p. 27); different versions of Hines' signature appeared on documents of entities in corporate chain, which Hines maintained should be disregarded for tax and business purposes (D.14-08-033 at pp. 24 & 28); Calling 10's thin capitalization (D.14-08-033 at p. 38); and Hines' failure to identify any business associate, partner, or shareholder other than himself who might have been responsible for the corporate respondents' unauthorized charges or the scheme which resulted in them (D.14-08-033 at p. 21).[8] Finally, with regard to Hines' continued reliance on our 2005 decision in the *Clear World* case,[9] we have distinguished that case on its facts. (D.14-08-033 at pp. 24-26.)

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[6] See SED Investigation Report on Cramming and Related Allegations Regarding Telseven LLC, Calling 10 LLC, and Other Entities Controlled and/or Utilized by Patrick Hines and His Agents (Exhibit 3) ("Staff Report") at pp. 2-8.

[7] Citing to Exhibit 3, Staff Report at pp. 2-5 & 8.

[8] In addition, the corporate respondents declared bankruptcy after hearings. D.14-08-033 at pp. 24 & 37.

[9] *Investigation on the Commission's Own Motion into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation*, Opinion Resolving Investigation [D.05-06-033] (June 16, 2005) 2005 Cal. PUC LEXIS 221.

E. The Equitable Doctrine of Laches is Inapplicable

Hines asserts that because the Commission "delayed" issuing the OII, the imposition of penalties constitutes a due process violation and is barred by the doctrine of laches. According to Hines, the corporate respondents "cooperated" with SED staff's inquiries regarding respondents' services in 2006; SED "delayed in an 'on-again, off again' investigation"; and, but for the "delay," the corporate respondents "could have altered their disclosures to satisfy Staff some four years before the OII was issued in 2010." Application for Rehearing at pp. 26-30. These assertions, however, are not supported by the record, and the defense of laches does not apply.

Pursuant to the doctrine of laches, a party's claim is barred where the party unreasonably delays the assertion of a right in a way that causes substantial prejudice; a respondent must show that the prosecuting party unduly delayed seeking equitable relief, to the respondent's detriment. Laches is an equitable doctrine, and the party invoking laches must "come with clean hands." (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 9; see *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* (1945) 324 U.S. 806, 814 (unclean hands "closes the doors of a court of equity to the one tainted with inequitableness or bad faith relative to the matter in which he seeks relief").) Moreover, laches is not a defense when its application would conflict with an important policy adopted for the public benefit. (See *San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 392 (laches did not bar city's claim that building sprinkler system violated fire prevention regulation and constituted public nuisance); *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal. App. 4th 249, 263 (county's nuisance abatement order against water skiing club that built structure in violation of land use restrictions not barred by laches, even though county took 35 years to issue order).)

Here, because section 2890 provides consumer protections to telephone subscribers and thus promotes an important public policy, we do not see how laches could apply to thwart our enforcement of section 2890. Even if laches were a defense, Hines points to no evidence that the Commission or Commission staff acquiesced in his and the corporate respondents' wrongful acts. Hines is also unable to demonstrate that

the Commission unduly delayed its investigation. Rather, the record shows the opposite. The evidence presented by SED sets out Commission staff's unsuccessful efforts to obtain documents from the corporate respondents and SED's resulting inability to fully investigate the issues. (See Exhibit 3, Staff Report at pp. 46-49 ("the lack of detailed complaint information from the Respondents and their billing aggregators . . . prevented staff from fully investigating the reported consumer complaints against Respondents").) Finally, even if Hines could show undue delay, there is no evidence that Hines was prejudiced, whether by lost evidence or faulty memories (as Hines himself was the only witness for himself and the corporate respondents).

F. The Record Supports the Imposition of the Fine

Hines asserts that the fine is not supported by the record and is "excessive," "unreasonable," and/or "oppressive" under the California Constitution. Yet, as set forth in the Decision, we carefully examined the evidence of wrongdoing in this matter and ordered a fine within the parameters set forth in the Public Utilities Code. (D.14-08-033 at pp. 17-20.)

In addition, we note that our imposition of the fine follows the guidelines set forth in D.98-12-075, in which we laid out the following factors: the severity of the offense, the utility's conduct, the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent. Whether or not restitution may be available in another case, as Hines argues, is not relevant to our levy of a fine. Pursuant to section 734, the purpose of reparations is "to return funds to the victim which were unlawfully collected by the public utility." In contrast, and as we set forth in
D.98-12-075, the purpose of a fine "is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others." (*Re: Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, Final Opinion Adopting Enforcement Rules [D.98-12-075] (1998) 84 Cal.P.U.C.2d 155, 188.) As we further stated, "reparations are not fines and conceptually should not be included in setting the amount of a fine." (*Ibid.)*

G. The Penalty is Not Barred by any Statute of Limitations

Finally, Hines appears to make a number of different statute-of-limitations arguments: that the Decision lacks findings or conclusions regarding a continuing violation under section 2108; that section 735 sets out a two-year statute of limitations which must limit the penalty to that two-year period; and that the one-year statute of limitations in Code of Civil Procedure ("C.C.P.") section 340 applies. We find, however, that the penalty complies with section 2108, and neither section 735 nor C.C.P section 340 applies here.

Section 2108 states that every Public Utilities Code violation is a separate and distinct offense and "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense." Once again, the Decision lays out our reasoning in this regard. (D.14-08-033 at pp. 17-20.)

Pursuant to section 735, all complaints for damages resulting from any violation must be filed at the Commission or any court of competent jurisdiction within two years from the time the cause of action accrues. This section applies to refunds/reparations, not to penalties to be assessed.

C.C.P. section 340 provides for a one year statute of limitation for actions by an individual or state for a statutory penalty or forfeiture. However, as we have recognized previously, civil statutes of limitations such as C.C.P. section 340 do not apply to administrative proceedings, but to the commencement of civil actions. (See *UCAN v. SBC Communications* [D.08-08-017 at pp. 46-47 (slip op.)] (Aug. 21, 2008) 2008 Cal. PUC LEXIS 302 at **70-73, affd [D.09-04-036 at pp. 68-69 (slip op.)] (April 16, 2009) 2009 Cal. PUC LEXIS 212 at **136-140 (and cases cited therein); see also 3 Witkin, California Procedure (5th ed. 2010) Actions, § 430.) Thus, we do not find any legal error in our computation of the penalty.

IV. CONCLUSION

For the reasons stated above, we deny Patrick Hines' application for rehearing of D.14-08-033 and deny Patrick Hines' motion for a stay of D.14-08-033.

Therefore, **IT IS ORDERED** that:

1. Rehearing of D.14-08-033 is denied.

2. Patrick Hines' motion for a stay of D.14-08-033, filed September 23, 2014, is denied.

3. Investigation (I.)10-12-010 is hereby closed.

This order is effective today.

Dated February 26, 2015, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE RANDOLPH
Commissioners