
PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 17, 2023

TO PARTIES OF RECORD IN CASE 20-08-003; DECISION 23-10-030:

On September 13, 2023, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 15.5(a) of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission if no appeal or request for review has been filed within 30 days of the mailing of the Presiding Officer's Decision.

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/ MICHELLE COOKE

Michelle Cooke

Acting Chief Administrative Law Judge

MLC:jnf

Attachment

Decision 23-10-030 October 17, 2023

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Telecom Group, LLC (U5807C),	
Complainant,	
vs.	
Bandwidth.com CLEC, LLC	
(U7038C),	
Defendant.	

Case 20-08-003

John L. Clark, for Utility Telecom Group, LLC (UTG),
Complainant.

Margaret L. Tobias, for Bandwidth.com CLEC, LLC,
Defendant.

PRESIDING OFFICER'S DECISION DISMISSING COMPLAINT

Summary

Utility Telecom Group, LLC (UTG) filed the instant Complaint on August 4, 2020, against Bandwidth.com CLEC, LLC (Bandwidth) requesting that the Commission direct Bandwidth to port specific telephone numbers and asking the Commission to impose penalties in relation to Bandwidth's refusal to port those numbers. In separate federal litigation, the ownership of the phone numbers has since been resolved. UTG initially stated that it still wished to pursue penalties against Bandwidth, but subsequently filed a Motion to Dismiss

without prejudice, stating that it no longer wished to prosecute the case. Bandwidth supports the dismissal of this proceeding, but stated that the complaint should be dismissed with prejudice. After review of the statutes governing voluntary motions to dismiss, the motion is granted and the complaint is dismissed with prejudice.

This proceeding is closed.

1. Background

In 2018, Utility Telecom Group, LLC (UTG or Complainant), a competitive local exchange carrier (CLEC) and interchange carrier based in Stockton, California that provides retail and wholesale voice and data telecommunications, and a certain unnamed limited liability company (the Customer) entered into an agreement for provision of telecommunications service. The Customer then switched service providers to Numberbarn, LLC, a Voice-Over Internet Protocol provider (NumberBarn), before deciding to switch back four specific telephone numbers to UTG.¹ Bandwidth.com CLEC, LLC (Bandwidth or Defendant), a competitive local exchange carrier and interexchange carrier, provides numbering resources to NumberBarn.² Consequently, UTG submitted a port-in request for those four phone numbers to Bandwidth. However, Bandwidth refused to port the numbers because of a subpoena issued to Bandwidth on June 12, 2020, by third-party Jonathan Finestone (Finestone), in separate federal litigation related to the same phone numbers.³ The subpoena directed

¹ The Complaint identifies the phone numbers as 213-888-8888, 310-788-8888, 213-888-8000, and 949-277-7777. *See* Complaint, at 3.

² Answer, at 4.

³ *Id.* at 1.

Bandwidth not to transfer or otherwise dispose of the numbers. The separate federal litigation was filed on January 30, 2020 by Finestone against UTG.

1.1. Procedural Background

On August 4, 2020, UTG filed a formal complaint (Complaint) with the Commission alleging that Bandwidth violated California Public Utilities Code § 451 and Federal Communications Commission (FCC) Rules 52.34 and 52.35 by refusing to port the disputed telephone numbers upon request. UTG further alleged that Defendant's refusal violates the Commission's General Order (GO) 168, which provides that "Consumers have the right to change voice service providers within the same local area and keep the same phone number in accordance with the rules set forth by FCC regulations regarding Local Number Portability." UTG sought immediate release and porting of the phone numbers at issue, and the imposition of fines and sanctions on Bandwidth for the alleged failure to timely port the phone numbers.

UTG submitted a Motion for an Interim Order on August 5, 2020, requesting that the Commission require Bandwidth to transfer the telephone numbers in dispute, to which Bandwidth submitted a response on September 17, 2020. UTG filed a reply to the response on September 21, 2020.

In its Amended Answer to the Complaint, filed October 29, 2020, Bandwidth argued that it did not violate any rules regarding the porting of telephone numbers. Bandwidth also asserted that UTG had never filed a valid porting request and that its refusal to port the numbers is in compliance with a federal court subpoena from Finestone requesting that it preserve the disputed telephone numbers. Subsequently, an Administrative Law Judge (ALJ) ruling on November 4, 2020 directed both parties to provide all relevant documents related

to UTG's request for the number in question. On November 9, 2020, UTG filed a Motion for Clarification for the use of these documents.

A prehearing conference was held on November 5, 2020, to address the issues of law and fact, discuss the scope of the proceeding, determine the need for hearing, and set the schedule for resolving the matter and address the Motion for immediate porting. On November 12, 2020, Finestone filed a Motion to Enter Appearance with the intention of offering information related to the phone numbers, which UTG opposed in its response. On November 30, 2020, Bandwidth filed a Motion to Dismiss the Complaint.

On December 7, 2020, the Assigned Commissioner's Scoping Memo and Ruling (Scoping Ruling) in this proceeding was issued, laying out the scope and schedule. The Scoping Ruling laid out the following issues for consideration:

1. Is the ongoing federal litigation concerning the phone numbers in dispute grounds for the Commission to stay or dismiss this proceeding?
2. Is there a specific and applicable law, rule or precedent which prevents Bandwidth from porting the phone numbers in dispute due to the existence of an outstanding federal subpoena issued by a third party concerning the phone numbers in dispute?
3. Did UTG submit a valid porting request to Bandwidth for the phone numbers in dispute, such that Bandwidth was obligated to port the numbers?
4. Should the Commission order either UTG or Bandwidth to take any actions with regards to the federal litigation in order to resolve this dispute?
5. Should Bandwidth be subject to sanctions and or fines with regards to its refusal to port the phone numbers in dispute, and if so, what amount?

The Scoping Ruling also granted Finestone's Motion for Appearance, and Bandwidth's Motion for Clarification, stating that the porting documents would only be used after appropriate process had been followed. The Scoping Ruling also denied UTG's outstanding Motion for Interim Order for immediate porting of the numbers.

Bandwidth's Motion to Dismiss the Complaint was denied by ALJ Ruling on January 6, 2021. On January 13, 2021, Opening Testimony was served by UTG. Reply Testimony was served on May 13, 2021, by Bandwidth and Finestone. On May 27, 2021, Rebuttal Testimony was served by UTG. On June 3, 2021, an ALJ Ruling pausing the proceeding schedule was issued, at the request of the parties, as they had begun mediation discussions in the ongoing separate federal litigation.

A number of joint status updates followed, informing the Commission that mediation discussions were still in progress in the federal litigation. On January 4, 2023, Finestone submitted a Motion to Dismiss. In the Motion to Dismiss, Finestone stated that the Federal Court had approved an agreement between UTG's customer and Finestone on December 9, 2022, in which UTG's customer had given up all rights to the four telephone numbers in dispute in this proceeding, and therefore Finestone requested that the instant Complaint be dismissed, as all issues had been mooted. UTG filed a response to Finestone's Motion to Dismiss on January 19, 2023, agreeing that the Motion to Dismiss should be granted in part as to the injunctive relief sought, but stating that UTG's Complaint was not moot on the whole as it still sought to pursue the question of whether sanctions should be placed on Bandwidth for its refusal to port the telephone numbers, as stated in Scoping Ruling Issue 5. Bandwidth filed a Motion for Acceptance of Late-filed Response, which was granted in a March 1,

2023 ALJ ruling. Bandwidth's response supported Finestone's Motion to Dismiss, stating that UTG had not filed a valid porting request and that Bandwidth had at all times acted lawfully.

On February 13, 2023, Finestone filed a Motion for Official Notice of an agreement approved by the Federal Court on January 25, 2023, between UTG and Finestone in which UTG agreed to withdraw its request to transfer the four telephone numbers and recognized that it had no claim to them. All parties agreed that Finestone and UTG resolved in the Federal Court case the matter of current ownership of the disputed phone numbers. An ALJ ruling on April 13, 2023, granted in part Finestone's Motion to Dismiss with respect to the injunctive relief sought, and denying the motion in part because UTG wished to pursue the imposition of penalties. The ruling directed the parties to hold a Meet and Confer and file the results by April 28, 2023.

UTG filed the Meet and Confer Statement on April 28, 2023, stating that the parties had stipulated to the admission of all evidence, but that Bandwidth sought additional time to file a motion. Bandwidth subsequently on May 4, 2023, filed a Motion to modify the proceeding scope to consider the imposition of penalties on UTG as well. On May 17, 2023, Bandwidth filed a Response to Bandwidth's Motion to Modify the Scope, stating that any scope modification was unwarranted at this time.

UTG on May 17, 2023 filed a Motion to Dismiss without prejudice (Motion to Dismiss), as it no longer sought to expend further resources in pursuing the Complaint. Bandwidth filed a response on June 1, 2023, agreeing with the Motion to Dismiss, but contending that the Complaint be dismissed with prejudice.

2. Review and Grant of the Motion to Dismiss

UTG's Motion to Dismiss states there are no longer any factual disputes in this proceeding, and that the Complainant now recognizes that Finestone is the true current owner of the four specific phone numbers UTG requested to port from Bandwidth.⁴ UTG states that its request for injunctive relief has been mooted, and that although it still believes that sanctions should be imposed upon UTG for alleged violations of telephone porting rules, that it no longer wishes to pursue these sanctions as it "wishes to devote its efforts and resources to endeavors other than independently policing number portability obligations as a private attorney general."⁵

Bandwidth states that the Complaint itself was unreasonable and improper, and caused all parties to expend resources evaluating unnecessary litigation, and should therefore be dismissed with prejudice.⁶ After considering the relevant authorities and precedents, the Motion is reviewed and granted in part, and the Complaint is dismissed with prejudice.

2.1. Standard for Review of a Motion to Dismiss

UTG requests that the Complaint be dismissed without prejudice. In evaluating a voluntary Motion to Dismiss, the presumption under California Code of Civil Procedure (CCP) is that once a trial has commenced, any dismissal requested by the plaintiff should be granted with prejudice unless all parties agree to a dismissal without prejudice, or if there is a showing of good cause.⁷

⁴ Motion (May 17, 2023), p. 1.

⁵ UTG Motion to Dismiss, May 17, 2023, at 1-2.

⁶ Response to Motion to Dismiss, June 1, 2023, at 2-5.

⁷ Cal. Code of Civ. Proc. § 581(e).

Additionally, CCP Section 581(d) states that actions may be dismissed by the court “when upon the trial and before the final submission of the case, the plaintiff abandons it.” Witkin California Procedure notes that voluntary dismissal under Section 581(d) “must be predicated upon a clear, unequivocal and express intent to abandon an action...demonstrated to the court by way of a motion to dismiss, stipulation of the parties or some other form of express intent on the record.”⁸

2.2. Substantive Review of Whether to Dismiss With Prejudice

Both the Complainant and Defendant in this proceeding agree that the case should be dismissed, and only argue over whether the Complaint should be dismissed with or without prejudice. The Motion to Dismiss filed by UTG asserts that the injunctive relief sought has become moot because of the resolution of true ownership of the phone numbers in favor of Finestone.⁹ However, UTG continues to maintain that there was cause for the Commission to impose fines or other sanctions based on Bandwidth’s “long, continuing violation of its regulatory obligations and ensuing individual harm and harm to the Commission’s regulatory process.”¹⁰ Since these issues have yet to be resolved, UTG believes a dismissal without prejudice is warranted.

Bandwidth states that it at all times followed the required telephone number porting rules, and that the case was frivolous. Bandwidth states that

⁸ Witkin California Procedure, 6 Witkin Cal.Proc. PWT Section 359, *citing* Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co., 10 Cal App. 3d 206 (1970).

⁹ Motion (May 17, 2023), p. 1.

¹⁰ Motion (May 17, 2023), pp. 1-2.

UTG knew of the outstanding federal litigation and sought to evade it by filing this action at the Commission.

Under CCP Section 581(e), any requested voluntary dismissal is with prejudice, unless all parties agree to a dismissal without prejudice. Bandwidth disputes the dismissal without prejudice, and therefore any voluntary dismissal at this time can only be granted with prejudice. The default to dismissal with prejudice is to prevent abuse by plaintiffs which could lead to wasteful proceedings and continuous litigation.¹¹ Here, given the long nature of this proceeding so far and extensive record already built, policy favors dismissal with prejudice to avoid unnecessary waste of Commission and party resources.

Additionally, under CCP Section 581(d), separately from the Motion to Dismiss and any authority under CCP Section 581(e), the court may, after the commencement of a trial, dismiss a complaint where the plaintiff has abandoned it. Such dismissal must be predicated upon a clear, unequivocal, and express intent to abandon. Here, UTG has stated that it no longer wishes to pursue this case due to an unwillingness to act as a “private attorney general.”¹² As UTG has put on the record a specific reason for being unwilling to proceed with this case, unrelated to whether the dismissal is granted with or without prejudice, CCP Section 581(d) may be invoked as a separate authority for dismissing this case with prejudice.

¹¹ Kyle v. Carmon, 71 Cap. App. 4th 901, 909 (1999).

¹² Motion to Dismiss, at 2.

2.3. Conclusion

UTG's Motion to Dismiss is granted. Due to the ample progression of this proceeding, as well as the fact that UTG has stated it no longer wishes to continue to litigate the Complaint, the dismissal is with prejudice.

3. Need for Hearings and Outstanding Motions

The categorization of this proceeding is adjudicatory. There is no need for evidentiary hearing; parties agree that the Complaint should be dismissed. Therefore, the Complaint is dismissed and the evidentiary determination is changed to state that no evidentiary hearings are necessary. Any outstanding motions not addressed in this decision are denied.

4. Proceeding Record

The proceeding record closed on June 1, 2023 after the filing of Bandwidth's Response to the Motion to Dismiss.

5. Assignment of Proceeding

Commissioner Karen Douglas is the assigned Commissioner, and Garrett Toy is the assigned Administrative Law Judge and Presiding Officer in this proceeding.

Findings of Fact

1. Parties in this proceeding have settled ownership of the phone numbers in dispute in separate federal litigation.
2. The ownership of the telephone numbers is no longer in dispute.
3. Briefings, rulings, and testimony have been filed and submitted in this proceeding.
4. On May 17, 2023, UTG filed a Motion to Dismiss the Complaint without prejudice.
5. UTG stated it does not wish to further prosecute this Complaint, which would require it to act like a "private attorney general."

6. Bandwidth states that the Motion to Dismiss should be granted, but with prejudice.

Conclusions of Law

1. CCP Section 581(e) states that after a trial has commenced, voluntary dismissals are presumed to be with prejudice, unless agreed to by all parties.

2. CCP Section 581(d) states that when a plaintiff abandons a cause of action, it may be dismissed by the court with prejudice.

3. It is reasonable to dismiss this Complaint with prejudice, where the Complainant UTG has stated a desire to abandon the Complaint and has had an opportunity to fully litigate the issues, but still wishes to dismiss the Complaint.

4. Because there are no disputed issues of material fact, no evidentiary hearings are necessary.

5. We should change our preliminary and Scoping Memo determination regarding hearings to no hearings are necessary.

6. As a matter of law, UTG's Motion to Dismiss should be granted.

7. The Complaint should be dismissed with prejudice.

8. The proceeding record is closed.

9. Any outstanding motions should be denied.

O R D E R

IT IS ORDERED that:

1. Utility Telecom Group, LLC's Motion to Dismiss its own Complaint is granted, in part.

2. Any outstanding motions are denied.

3. The complaint is dismissed with prejudice.

4. Case 20-08-003 is closed.

This order is effective today.

Dated October 17, 2023, at San Francisco, California.