

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-215
Administrative Law Judge Division
May 15, 2008

RESOLUTION

RESOLUTION ALJ-215. Dismissing, without prejudice, CPSD Third-Party Verification Citation Forfeiture No. 116 Case #07-02-4445, Time Warner Cable Information Services.

In this Resolution, the Commission considers the appeal by Time Warner Cable Information Services (Respondent) of Third-Party Verification Citation Forfeiture No.116 issued by the Consumer Protection and Safety Division (CPSD) pursuant to Resolution UEB-001 (August 24, 2006).¹ The Citation Forfeiture alleges that Respondent failed to comply with Public Utilities Code Section 2889.5.²

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.³ 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.⁴ 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.

¹ 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.

² All section references herein are to the Public Utilities Code unless otherwise indicated.

³ Section 2889.3(a)(3).

⁴ *Id.*

Specifically, Section 2889.5(a)(3) and 47 C.F.R. § 64.1120 require 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;
- 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 telecommunications carrier violate any of the TPV requirements described above, Resolution UEB-001 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.⁵

Comments on Draft Resolution

The draft resolution of the Administrative Law Division in this matter was mailed in accordance with Section 311 of the Public Utilities Code and Rule 14.2(c) of the Commission's Rules of Practice and Procedure. Comments were submitted on May 5, 2008, and reply comments were submitted on May 12, 2008 by Respondent and CPSD.

⁵ Section 2889.5(f).

We make no changes to the proposed resolution based on the comments and reply comments of either party. CPSD alleges that the proposed resolution commits legal error by declining to assess a penalty against Respondent, noting that both parties agree that a “slam” occurred and reiterating its view that there is no jurisdictional bar. CPSD’s comments largely reiterate arguments made in its briefs but go on to contend that the result of D.06-06-010, which closed the prior VoIP investigation, is that the Commission left in place a partial regulation of VoIP. We think CPSD misconstrues D.06-06-010, which we interpret to be a determination, at the time that decision issued, that the Commission’s regulatory role had yet to be resolved. D.06-06-010 has not been modified. Even CPSD agrees that this citation procedure is not the place for litigating disputes about Commission jurisdiction over an entire industry sector.

Respondent asks us to revise the proposed resolution to add a conclusion of law referencing an FCC decision subsequent to D.06-06-010. We decline to do so here. As we have counseled CPSD, this citation procedure is an inappropriate forum for attempting to secure modification of D.06-06-010 – whether a party’s ultimate objective is to see VoIP regulated or to see it exempted from regulation. Respondent also asks that we dismiss the citation with prejudice, arguing that Section 1708 requires that result. We decline to make this change. Section 1708 simply requires notice and opportunity to be heard before the Commission may alter a prior decision. Other law, such as statutes of limitation, may prevent the issuance of some other proceeding based on the facts here, or the reissuance of a citation, but Section 1708 creates no absolute bar.

Findings of Fact

1. On September 10, 2007, CPSD issued Citation Forfeiture No. 116 to Respondent in Case ID #07-02-4445 (filed March 20, 2007) for failure to provide to the Commission a TPV or other acceptable evidence showing that a change in provider has been made.
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.
3. Under Resolution UEB-001, respondents have the right to a hearing on appeal before an ALJ.
4. On November 19, 2007, CPSD sent an email to the assigned ALJ, with a copy to Respondent, stating that the parties agreed that the facts underlying this case are not in dispute and that they proposed to forego hearings and instead prepare briefs on the legal issues underlying the dispute. By email on the same date, the ALJ granted the parties’ request for a schedule deviation and authorized submission of briefs on the schedule proposed by the parties, as follows: on December 18, 2007, CPSD’s response

to Respondent's appeal; on January 18, 2008, Respondent's reply to CPSD's response. By email on January 25, 2008, the ALJ advised the parties that the case would be submitted without further proceedings, effective that date.

5. The evidentiary record in this case consists of the parties' joint Statement of Facts, comprising paragraphs numbered 1 through 8. The Statement of Facts, submitted as an attachment to CPSD's response, is Attachment A to this resolution. The Statement of Facts establishes that:

- (a) The customer complained that her local and long distance phone service with AT&T was switched to Respondent's Cable Digital Phone service in mid-January 2007. The customer alleged that she had not authorized the switch and Respondent has been unable to locate a TPV tape or other evidence of authorization.
- (b) The customer alleged that she contacted the FCC after the slam occurred but was told that the FCC does not "handle any situation like this in the state of California" and that she should contact the CPUC. (Statement of Facts, Paragraph 5.)
- (c) Respondent has restored the customer's service to AT&T and issued her a refund and specified credits.

6. Based on the established facts, CPSD requests that the citation be upheld.

7. The appeal and reply contend that regardless of the established facts, the Commission lacks jurisdiction to apply Section 2889.5 or Resolution UEB-001 to Respondent's Cable Digital Phone service, because it is a form of VoIP service.

8. The response and reply establish that Respondent is a facilities-based VoIP provider and that the Cable Digital Phone service Respondent provided in mid-January 2007 constitutes "fixed" VoIP rather than "nomadic" VoIP.

9. The response concurs that the Commission lacks jurisdiction to apply Section 2889.5 or Resolution UEB-001 to nomadic VoIP, but contends the Commission is not preempted from applying these consumer protection laws to the provision of fixed VoIP.

10. Resolution of this case turns on legal and policy issues (e.g., whether the Commission has jurisdiction over fixed VoIP, and if it does, whether the Commission should exercise that jurisdiction).

Conclusions of Law

1. The Commission opened I.04-02-007 in February 2004 to examine, among other things, whether VoIP providers should be subject to consumer protection rules such as those governing slamming.

2. In June 2006 D.06-06-010 closed I.04-02-007, concluding it was premature for the Commission to “assess what our regulatory role over VoIP will be and to address the issues raised in this investigation” until the Federal Communications Commission acted to clarify the extent of federal jurisdiction. (D.06-06-010 at 3.)

3. The Commission has not modified D.06-06-010 to date. Section 1708 requires notice and opportunity to be heard before the Commission may modify a prior decision. A petition for modification is an appropriate vehicle for consideration of such a change.

4. The citation forfeiture program authorized by Resolution UEB-001 follows models previously established for transportation and utility safety regulation. Like those programs, this one has been designed to provide inexpensive and efficient “traffic ticket” type enforcement of compliance by individual providers with clearly defined regulatory rules. The program was not designed to litigate complex issues of law or policy applicable to an entire industry sector.

5. This citation should be dismissed without prejudice.

6. For purposes of *ex parte* communications, this matter is designated as adjudicatory under Rule 8.1 of the Commission’s Rules of Practice and Procedure; therefore, *ex parte* communications are prohibited.

IT IS ORDERED that:

1. Pursuant to Section 2889.5 and Resolution UEB-001, CPSD TPV Citation Forfeiture No. 116 Case #07-02-4445 served on Time Warner Cable Information Services is dismissed without prejudice.

2. The appeal process for this citation is closed.

3. 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 _____, 2008, the following Commissioners voting favorably thereon:

PAUL CLANON
Executive Director