



FILED
5-25-16
04:59 PM

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

Application of CereTel Incorporated for Registration as
an Interexchange Carrier Telephone Corporation
Pursuant to the Provisions of Public Utilities Code §
1013.

A.16-04-006
(Filed April 8, 2016)

**REPLY OF CERETEL INCORPORATED TO SAFETY AND
ENFORCEMENT DIVISION'S PROTEST OF
APPLICATION 16-04-006**

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
Thomas J. MacBride, Jr.
Megan Somogyi
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: tmacbride@goodinmacbride.com

Attorneys for CereTel Incorporated

Dated: May 25, 2016

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

Application of CereTel Incorporated for Registration as
an Interexchange Carrier Telephone Corporation
Pursuant to the Provisions of Public Utilities Code §
1013.

A.16-04-006
(Filed April 8, 2016)

**REPLY OF CERETEL INCORPORATED TO SAFETY AND
ENFORCEMENT DIVISION'S PROTEST OF
APPLICATION 16-04-006**

In accordance with Rule 2.6(e) of the Commission's Rules of Practice and Procedure, CereTel Incorporated ("CereTel") submits its reply to the Safety and Enforcement Division's ("SED") protest of Application 16-04-006. The last day to protest A.16-04-006 was May 13, 2016. CereTel's reply to SED's protest was due ten days after the last day to file protests, which was May 23, 2016. Counsel for CereTel obtained a two-day extension from Examiner Amato after counsel's computer servers experienced an emergency shutdown on May 20. The filing deadline was extended to May 25, 2016; this reply is timely filed.

I. INTRODUCTION

CereTel provides international long distance services via prepaid calling cards and an online pinless "portal" product. CereTel cards may also be employed to add funds to (or "top up") prepaid calling accounts with certain wireless carriers.¹ CereTel is strictly a reseller; it has no facilities or infrastructure through which calls can be made. CereTel's calling card products expressly state that they are not to be used to make intrastate calls.² Despite this admonition, CereTel recently learned that its services were used to make a very small number of intrastate

¹ Contrary to SED's assertion at p. 3 of its Protest, CereTel does not provide wireless service on a prepaid or any other basis. As a convenience to the subscriber of wireless carriers (such as T-Mobile or AT&T), that subscriber can purchase a CereTel card and, by following the instructions on the card, add minutes to ("top up") the subscriber's account with the wireless carrier (not CereTel).

² See footnote 45 *infra*, for a discussion of the Commissions standards for determining whether a carrier is holding out intrastate service.

calls in California.³ In response, CereTel promptly filed A.16-04-006 to ensure that any errant intrastate calls are in compliance with California law.

SED's protest of A.16-04-006 is based largely on misunderstandings of law and fact (some of which are quite understandable). As CereTel will demonstrate below, SED's allegations do not warrant any delay in approving A.16-04-006.

II. CERETEL HAS NOT OPERATED IN CALIFORNIA WITHOUT AUTHORITY

CereTel resells international termination services and inbound services, and distributes prepaid international calling cards in California. These services lie within the sole jurisdictional purview of the Federal Communications Commission; the states—let alone the Commission—have no authority to regulate international calling services.⁴

Before the enactment of the Telecommunications Act of 1996 it was well recognized that regulation of interstate and international service is reserved for the federal government.⁵ Decisions of this Commission were consistent with those of the federal courts:

[W]e have held in prior decisions that we have jurisdiction only over intrastate operations consisting of exchange and intrastate toll business. Absent jurisdiction over international calls, the complaint against AT&T and international calls should be dismissed.⁶

Indeed, a decade after the 1996 enactment, it remains the case that:

The world of telecommunications regulation is divided into two hemispheres: interstate and international telecommunications are regulated by the [FCC] pursuant to authority delegated by congress. 47 U.S.C. § 151. Intrastate telecommunications are

³ As set forth at page 8 *infra*, the revenue from the few intrastate calls amounts to approximately 1/20th of one percent (.0005) of CereTel's revenues. In other words, of every \$1,000 in revenue approximately 50 cents is from intrastate calls. As we note at page 4 *infra*, it makes little sense for a customer to employ an international calling card to place an intrastate call.

⁴ *Kaufman v. ACS Systems* (2003) 110 Cal.App.4th 886, 896 (quoting *Foxhall Realty Law Offices, Inc. v. Telecom Prem. Service* (2d Cir. 1998) 156 F.3d 432, 437).

⁵ *Ivy Broadcasting v. AT&T Co.* (2d Cir. 1968) 391 F.2d 486, 490; *AT&T Corp. v. PAB, Inc.* (E.D. Pa. 1996) 935 F.Supp. 584, 590; *LDDS Communications, Inc. v. United Telephone of Florida* (2000) 15 F.C.C. Rcd. 4950, P 2.

⁶ *Siesay v. Gen. Telephone and AT&T*, D.90-12-051. See also *George Sing Louie v. Pacific Telephone & Telegraph Co.*, D.90-05-009, Conclusion of Law No. 3 ("The complaint should be dismissed as to International for lack of jurisdiction.").

regulated at the state level by agencies, like the Iowa Utilities Board (“IUB”), pursuant to authority delegated to them.⁷

The Commission itself has continued to hold that with respect to telecommunications, its jurisdiction is intrastate.⁸ The Commission has also stated that “the 1934 Communications Act generally grants the FCC exclusive jurisdiction over interstate (and international) communications,”⁹ and, in a different proceeding, that “MCI and Verizon engage in many activities beyond our jurisdiction... (b)oth have international operations.”¹⁰ Even in one of its most prominent enforcement cases, the Commission disclaimed any authority over interstate or international calls.¹¹

SED’s protest states that CereTel “began providing prepaid wireless services in the state of California on March 28, 2015.”¹² That assertion is (1) inaccurate and (2) misstates the response to the SED data request on which it is based. More importantly, the qualifier “in California” is jurisdictionally incomplete for purposes of this discussion.

First, CereTel (1) does not provide wireless service on a prepaid or any other basis and (2) made no representation to the contrary in response to the SED data request.

Second, as CereTel stated in response to the SED data request asking when CereTel “started offering prepaid phone cards in California,” CereTel began offering prepaid phone cards in California, on March 28, 2015.¹³ Those cards were only to be employed, however, to originate calls from California to points outside the state. In other words, the cards were to be employed (and essentially were employed) for international calling only and

⁷ *Great Lakes Commun. Corp. v. Iowa Utils. Bd.* (N.D. Iowa 2009) 2009 U.S. Dist. LEXIS 107491, pp. 6–7.

⁸ *Bailey v. Calavaras Telephone Company*, D. 97-07-057, Conclusion of Law No. 6.

⁹ *Order Instituting Rulemaking to Require Interconnected Voice Over Internet Protocol Service Providers to Contribute to the Support of California’s Public Purpose Programs*, R. 11-01-008, p. 39.

¹⁰ *Joint Application of Verizon Communications, Inc. and MCI, Inc. to Transfer Control of MCI’s California Utility Subsidiaries to Verizon*, D.05-11-029, p. 38.

¹¹ See *Communication Telesystems International*, D.97-05-089, p. 61 n. 13 (“In response to concerns raised by Pacific Bell to CTS, we also clarify that this decision does not affect the LECs’ authority to provide billing and collection services for interstate and international calls, but prohibits them from providing such services for intrastate calls.”).

¹² SED Protest, p. 3.

¹³ CereTel Response to SED Data Request, Question 8.

expressly stated that they were not to be used for intrastate calls (calls that originated AND terminated in California).¹⁴

SED may be asserting that CereTel may not offer international or interstate prepaid calling service in California without authority under Section 1001. As the authorities cited earlier show, however, the Commission (consistent with judicial precedent) has acknowledged that it has no jurisdiction over interstate or international calling services. Accordingly, there is no factual or legal basis for SED's allegation that CereTel has improperly provided service in California.¹⁵

Moreover, SED's apparent claim that Public Utilities Code section 885¹⁶ applies to CereTel's sales of international calling cards is also premised on the incorrect assumption that the Commission has jurisdiction over those sales.¹⁷ For two reasons, the Legislature is presumed to have limited the Commission's jurisdiction over the services described in Section 885 to intrastate services.

First, the Legislature is presumed to be aware of all laws in existence at the time new legislation is enacted,¹⁸ is presumed to be aware of previous judicial construction of those laws, and is presumed to have acquiesced to that construction.¹⁹ Therefore, when the Legislature enacted Section 885 in 1998, it was presumptively aware that any regulation authorized by the new statutory provision would be of intrastate calling services whether or not the term "intrastate" appears in the text of the statute. The sale of prepaid calling cards for interstate and international calling does not bring CereTel within the ambit of Section 885.

Second, the absence of language in Section 885 expressly limiting its reach to intrastate calling cards does not extend the Commission's jurisdiction to calls that terminate beyond California's borders. To understand why that is the case the Commission need only consider section 1001 and the jurisprudence construing it.

¹⁴ As a practical matter, it would make no sense for a customer to pay international rates for an intrastate call.

¹⁵ See SED Protest, p. 4.

¹⁶ All further undesignated references are to the Public Utilities Code.

¹⁷ SED Protest, p. 4.

¹⁸ *In re Greg F.* (2012) 55 Cal.4th 393, 407.

¹⁹ *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1018.

Section 1001 is the bedrock statutory requirement for entry into the California telecommunication market.²⁰ It was enacted 65 years ago and was derived from statutes originally enacted decades earlier. Section 1001 does not now nor, to our knowledge, has it ever expressly limited its reach to intrastate telecommunications service. Yet, this Commission has repeatedly held that it has no jurisdiction over interstate and international calls,²¹ a holding consistent with decisions of courts that “[s]tates do not have jurisdiction over interstate calls”²².

Section 885 cannot have any greater jurisdictional reach than Section 1001.²³ The jurisdictional limitations of both statutes are not grounded in the specific text of the statute but in limitations arising out of the Supremacy Clause²⁴ and the constraints of preemption²⁵ that apply to state statutes.²⁶

III. CERETEL HAS NOT VIOLATED SECTIONS 851–854 OF THE PUBLIC UTILITIES CODE

SED alleges that CereTel violated Public Utilities Code sections 851 and 854(a)²⁷ when it acquired physical assets and intellectual property of Angel Americas.²⁸ SED cites CereTel’s response to a data request in which CereTel indicated that it obtained the hard assets and intellectual property of Angel Americas at a public auction.²⁹ SED’s characterization of this purchase as a merger or transfer of utility assets,³⁰ however, is inconsistent with the Public

²⁰ Section 1013, establishing the registration process is simply and alternative procedural process for obtaining Commission authority otherwise required under Section 1001.

²¹ See footnotes 3-10, *supra*, and associated text.

²² *Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 891 (emphasis added).

²³ That the reach of both is coterminous is reflected by the fact that the Legislature provided that an entity already certified under section 1001 need not register under Section 885.

²⁴ U.S. Const. Art. VI, Sec. 2.

²⁵ Cf. *Southern California Edison v. Public Utilities Commission*, 121 Cal.App.4th 1303, 2004.

²⁶ The text of Section 1001 and underlying definitions found in Sections 216–241 textually would authorize the Commission to assert jurisdiction over a host of enterprises that, under federal and state law, plainly lie outside the jurisdiction of the Commission. Examples included interstate or wholesale sales of gas or electricity or intrastate sales of any of the commodities described in those sections by an entity that has not dedicated its property to public utility activity. See, *Richfield Oil Corporation v. Public Utilities Com.* (1961) 55 Cal.2d 187. With respect to Commission jurisdiction, the inquiry does not end with the raw text of the statute.

²⁷ SED does not indicate which transactions it believes fall under which statutory provision, or which transactions it imagines constitute “mergers and transfers of assets” requiring Commission approval. (SED Protest, p. 5.)

²⁸ SED Protest, p. 5.

²⁹ *Ibid.*

³⁰ SED Protest, p. 5.

Utilities Code and the actual facts of the transactions. The principal shortcoming in SED's protest is that it overlooks the fact that Angel Americas was never certified as a public utility.³¹

Section 854 requires that an entity seeking to acquire control of a public utility seek and obtain the prior approval of the Commission.³² Section 851 requires a public utility to seek and obtain the prior approval of the Commission before it sells or encumbers any of its utility assets.³³ Because Angel Americas was not a public utility, no party was required to seek Commission approval to acquire control of Angel Americas. Similarly, because Angel Americas was not a public utility, Angel Americas was not required to seek and obtain the prior approval of the Commission before it sold or encumbered any of its assets.

Moreover, even if Angel Americas were a public utility (which it was not), CereTel could not have violated Section 851 or Section 854. Under section 851, the obligation to seek Commission approval for a sale or encumbrance of utility assets falls on the seller of the assets (Angel Americas) not on the buyer (CereTel). Section 854 requires that the entity seeking to acquire control of a public utility obtain Commission approval, but CereTel did not seek to and never did acquire control of Angel Americas. CereTel only purchased assets (not stock).

The analysis set forth above also applies to SED's claim that CereTel's acquisition of the STi brand in March 2015 falls within the scope of Sections 851 and 854(a).³⁴ As CereTel indicated in its response to SED's data request asking for a list of CereTel's trade names, STi is a trade name.³⁵ A trade name is a name, style, or symbol used to identify a business³⁶—a brand. SED's claim that CereTel's "acquisition" of the STi trade name is somehow the acquisition of another utility or utility property within the meaning of the Public Utilities Code is incompatible with the law and facts governing this case.³⁷ (Again, even if the STi brand were an "asset," it was not subject to Sections 851 or 854 for the reasons set forth at pp. 5–6 *supra*.)

CereTel could not possibly have violated Sections 851 or 854 because there is no configuration of the facts under which either statute applies.

³¹ Cf. SED Protest, pp. 6–7 (describing the jettisoned Commission application process and ultimate dissolution of Angel Americas).

³² *Gale v. Teel* (1977) 81 CPUC 817; *Lake Alpine Water Co.*, D.13-03-007, pp. 7–8.

³³ *Lake Alpine Water Co.*, D.13-03-007, pp. 4–5.

³⁴ SED Protest, p. 5.

³⁵ Data Request #1 Response, Question 10.

³⁶ See, e.g., Black's Law Dictionary (Seventh Ed. 1999).

³⁷ SED Protest, p. 5.

IV. CERETEL DID NOT FAIL TO DISCLOSE FICTITIOUS BUSINESS NAMES

SED's claim that CereTel failed to disclose fictitious business names in violation of Rule 1.1 is an extension of SED's mischaracterization of the STi trade name.³⁸ The form application for registration filed by CereTel asks for the applicant's DBA ("doing business as") entities.³⁹ As CereTel indicated on its application and in its subsequent response to SED's data request, CereTel does not operate under any DBAs. The four trade names CereTel provided to SED—which SED calls "trade names"⁴⁰—are not DBAs. These trade names are brands, not business entities. Were SED's view correct, Juicy Fruit would be considered a fictitious name of the Wrigley company, not just a brand of chewing gum; and the Pinto would be a DBA of the Ford Motor Company, not simply a car. CereTel does business as CereTel.

Because it has no DBAs, CereTel did not fail to disclose fictitious business names in violation of Rule 1.1.

V. CERETEL DID NOT FAIL TO DISCLOSE EXECUTIVES' ASSOCIATION WITH PREVIOUSLY INVESTIGATED COMPANY

CereTel truthfully represented in A.16-04-006 that none of its officers or directors were found to have violated any statute, law, or rule pertaining to public utilities, and that none of its officers or directors had been investigated by the FCC or other regulatory agency for failure to comply with any law, rule, or order.⁴¹ SED's attempt to prove the contrary relies on the fact that a few CereTel employees were formerly employed by Angel Americas, whose application for a registration license SED protested. As a preliminary matter, a protest to an application by a division of the Commission staff does not constitute an investigation by a regulatory agency for violations of law. A formal Order Instituting Investigation issued by the full Commission is the "investigation" contemplated by Question 9 of the Commission's Application for Registration License form. Additionally, Angel Americas was never an affiliate of CereTel.⁴² CereTel merely purchased Angel Americas' assets at a bankruptcy sale and later hired some of its employees. CereTel answered Question 9 truthfully.

³⁸ SED Protest, pp. 5–6.

³⁹ A.16-04-006, p. 1.

⁴⁰ SED Protest, pp. 5–6.

⁴¹ *Id.* at p. 6.

⁴² See, e.g., Affiliate Transaction Rule I.A (defining "affiliate").

Not only was there no formal investigation of Angel Americas, but no formal (or even informal) finding was made that any CereTel officer or director violated any statute, law, or rule pertaining to public utilities or other regulated industry.⁴³ No formal findings were even made regarding Angel Americas; as SED states, Angel Americas' application died on the vine with no findings or resolution of any aspect of the application or SED's protest.⁴⁴ But even if formal findings of wrongdoing were made, SED has not identified any officer or director of CereTel or one of its affiliates who falls within the ambit of Questions 9 and 10 of the Application. CereTel's Chief Operating Officer ("COO") at the time A.16-04-006 was filed was formerly the Senior Vice President of Sales and Marketing for Angel Americas. She is no longer employed by CereTel. Despite her title of Senior Vice President, she was never an officer or director of Angel Americas—she was a manager. CereTel's Pricing, Business Development, and Sales Operation Director, who is cited by SED as another CereTel officer formerly employed by Angel Americas, is a manager; he exercises no control over CereTel beyond his own department. CereTel's answers to Questions 9 and 10 were not improper and did not violate Rule 1.1.

VI. REQUIRED REPORTS AND USER FEES

CereTel does not offer intrastate calling services and its international calling cards explicitly state that the product is not to be used for in-state calls. It had no intention of offering intrastate telecommunications services and certainly did not "hold out" such services as the Commission has construed that term in its regulation of intrastate telecommunications.⁴⁵ When CereTel discovered that approximately \$15,000 of intrastate calls had nevertheless been made using its international products, CereTel filed A.16-04-006. Because it never intended to provide intrastate service subject to Commission regulation, and because it was not aware until very

⁴³ *Ibid.*

⁴⁴ *Id.* at pp. 6–7. Proceeding A.13-11-010 is still technically open, but, with the exception of several notices of reassignment to a new Administrative Law Judge, no action has been taken and no pleadings have been filed in the docket since January 2014. Angel Americas' subsequent dissolution makes it impossible for A.13-11-010 to be approved.

⁴⁵ See, *Competition in the Provision of Telecommunications Transmission Services*, D.84-06-113 (15 CPUC 2d 426, 465-466). The Commission determined that whether carriers had (1) unlawfully offered unauthorized intrastate service or (2) lawfully carried some intrastate calls as only "incidental use," turned on whether carriers "manifested an intention to provide uncertified services." The Commission concluded that the carriers had not manifested such an intent. The Commission noted that the carriers' tariffs had advised their subscribers that the carriers were not offering intrastate service. Perhaps most significantly for purposes of this proceeding, the Commission found that the carriers were not required to block intrastate calls to avoid a finding of "holding out" intrastate calling.

recently that its products had been improperly used to make intrastate calls, CereTel had no reason or opportunity to file the reports and remit the user fees required of Commission-regulated telecommunications providers.⁴⁶ Now that it is aware of the small amount of intrastate service it unwittingly provided, CereTel is happy to remit the appropriate user fee and provide the Commission with the required reports, if any. The \$15,000 in California calls amounts to 0.0005% of CereTel's revenues; CereTel therefore expects to remit the \$100 minimum fee, as 0.18% of \$15,000 is \$27.⁴⁷

CereTel's failure to file the reports and remit the fees required of regulated intrastate telecommunications utilities was the result of an honest and reasonable mistake. CereTel immediately filed its application with the Commission when the intrastate traffic was discovered, and is willing to remedy that mistake now. Under these circumstances, penalties are not warranted.⁴⁸

VII. STANDARDS FOR PRE-PAID CALLING CARDS AND SERVICES

SED does not indicate that it believes that CereTel is violating Business & Professions Code § 17538.9. Accordingly, it would be inappropriate to delay a process developed for expeditious market entry based on SED's promise to "further investigate."⁴⁹

If, at some point in the future, SED believes CereTel or some other already-certified California utility is violating the provision of Bus. & Prof. Code § 17538.9, it may urge the Commission to initiate a quasi-judicial enforcement action.

Delaying the instant matter is particularly inappropriate since it was largely initiated to (1) provide a vehicle for payment of the very small fees due the Commission (about \$27/quarter) and (2) render moot any question of whether CereTel is required to seek Commission authority notwithstanding the fact that its intrastate traffic is miniscule.

The application should simply be granted.

VIII. CONCLUSION

SED does not show any violation of the Commission's rules or any legal deficiency in CereTel's actions or application. SED's claims regarding Sections 851–854,

⁴⁶ SED Protest, p. 7.

⁴⁷ D.10-09-017, p. 3.

⁴⁸ SED Protest, pp. 7–8.

⁴⁹ *Id* at p. 8

fictitious business names, and the prior corporate relationships of its employees are incorrect as shown above. CereTel has acted reasonably and in good faith. No penalties are warranted and no enforcement action is appropriate. The Commission should grant A.16-04-006 without delay.

Respectfully submitted May 25, 2016 at San Francisco, California.

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
Thomas J. MacBride, Jr.
Megan Somogyi
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: tmacbride@goodinmacbride.com

By /s/ Thomas J. MacBride, Jr.

Thomas J. MacBride, Jr.

Attorneys for CereTel Incorporated