Decision 12-11-003 November 8, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Cytel, Inc. for Registration as an Interexchange Carrier Telephone Corporation pursuant to the provisions of Public Utilities Code Section 1013.	Application 12-04-002 (Filed April 4, 2012)

DECISION DISMISSING THIS PROCEEDING WITHOUT PREJUDICE

1. Introduction

This decision grants the motion of the Consumer Protection and Safety Division to dismiss the application of Cytel, Inc. to register under Pub. Util. Code § 1013 to provide resold interexchange service as a switchless reseller. The dismissal is without prejudice.

2. Background

On April 4, 2012, Cytel, Inc. (Cytel) filed an application to register under Pub. Util. Code § 1013 to provide resold interexchange service as a switchless reseller in California.

On May 9, 2012, Consumer Protection and Safety Division (CPSD) filed a protest requesting that the Commission conduct further review of the Cytel application because CPSD alleges Cytel has violated Rule 1.1 of the Commission's Rules of Practice and Procedure[1] and because CPSD has concerns about Cytel's fitness to operate as a utility. In its application, Cytel's President,

[1] All references to Rules are to the Commission's Rules of Practice and Procedure.

Carmen Asorey, declared under penalty of perjury that none of Cytel's officers had ever held an officer position with a company that had been found liable for fraud or violation of a law regulating public utilities.[2] CPSD asserts that, contrary to Ms. Asorey's sworn statement, there are at least five separate incidents of investigations or sanctions related to companies in which Ms. Asorey held an officer role. CPSD asserts that failure to disclose these incidents is a violation of Rule 1.1. In addition, CPSD alleges that Cytel's President has a history of working for or with companies that have been the subject of slamming allegations and other complaints.

Cytel did not reply to CPSD's protest.

On June 19, 2012, the assigned Administrative Law Judge (ALJ) issued a ruling, the Administrative Law Judge's Ruling Setting a Prehearing Conference and Requiring the Parties to Meet and Confer and to File a Joint Prehearing Conference Statement (June 19 Ruling). On June 28, 2012, the parties served their Joint Prehearing Conference Statement (Joint PHC Statement) as required by the June 19 Ruling. The undisputed material facts in the Joint PHC Statement

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[2] The relevant portion of the verified statement reads as follows:

> Neither applicant…any of its officers…or owners…or anyone acting in a management capacity for applicant:…(b) been personally found liable or held one of these positions with a company that has been found liable, for fraud, dishonesty, failure to disclose or misrepresentations to consumers or others;…(f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of…any other statute, regulation or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (g) been found to have violated any statute, law or rule pertaining to public utilities or other regulated industries; or (h) entered into any settlement agreements or made any voluntary payments or agreed to any other monetary forfeitures in resolution of any action by any regulatory body, agency or attorney general.

include five instances of investigations or sanctions against either Cytel or a company in which Ms. Asorey held an officer level position that should have been disclosed in Cytel's application.

On July 2, 2012, Cytel failed to appear at the prehearing conference (PHC) scheduled in the June 19 Ruling.

When Cytel failed to appear at the PHC, the assigned ALJ attempted to contact Cytel by telephone from the hearing room. The phone number listed on the service list for Cytel was answered by voicemail. The assigned ALJ also attempted to contact Charles Helein of Helein Law Group. Although, Mr. Helein is not on the service list, he is listed as the attorney for Cytel on the Joint PHC Statement. Mr. Helein's telephone number was also answered by voicemail. The assigned ALJ left messages at both telephone numbers.

On July 3, 2012, Mr. Helein left a voicemail for the assigned ALJ stating that he had been unable to attend the July 2 PHC because of a major power outage in McLean, Virginia. The power outage was the result of a severe storm on June 29, 2012 that left portions of Virginia without power for days.

On July 11, 2012, the ALJ issued a second ruling, Administrative Law Judge's Ruling Setting a Prehearing Conference (July 11 Ruling). The July 11 Ruling was served on the service list,[3] and the ALJ notified Mr. Helein of the date of the PHC via e-mail on July 5, 2012. The time, date, and location of the PHC were posted to the Commission's online calendar in advance of the PHC.

[3] As of the date this decision was published for comment, Mr. Helein has not requested to be added to the service list either as the representative of Cytel or on an information only basis.

On July 27, 2012, Cytel failed to appear at the PHC scheduled in the July 11 Ruling.

When Cytel failed to appear at the PHC, the assigned ALJ again attempted to contact Cytel by telephone from the hearing room. The phone number listed on the service list for Cytel was answered by voicemail. The ALJ also attempted to contact Mr. Helein at the number listed on the Joint PHC Statement. Mr. Helein's telephone number was also answered by voicemail. The ALJ left messages at both telephone numbers.

At the July 27 PHC, CPSD moved to dismiss the application. On July 30, 2012, the ALJ issued a ruling, the Administrative Law Judge's Ruling Requiring Applicant To Show Cause Why Application Should Not Be Dismissed, requiring Cytel to file a responsive brief no later than August 6, 2012. The brief also constituted a reply to CPSD's motion to dismiss.

Prior to August 6, 2012, however, Janet Tripi, Regulatory Consultant for Cytel, contacted the ALJ and requested an extension. In support of this request, Ms. Tripi cited the fact that she had been unable to reach Cytel's Attorney, Charles Helein, and that his e-mail indicated he was out of the office until August 14, 2012. Based on this representation, the ALJ extended the deadline to August 16, 2012.

On August 15, 2012, Cytel filed its Brief in Response to Administrative Law Judge's Ruling Requiring Applicant to Show Cause Why Application Should Not Be Dismissed. In its brief, Cytel stated that the certification of false information in the application was the result of Cytel's outside compliance advisor (not an attorney) failing to understand the certification statement. In addition, the brief stated that Mr. Helein was unaware of the PHC set for July 27.

CPSD filed a Reply to Cytel's brief, asserting that not only had Cytel violated Rule 1.1 by filing an application with false information, but that in addition Cytel and its counsel further violated Rule 1.1 when Cytel failed to appear at either PHC and when Cytel asserted that Cytel counsel was unaware of the July 27, 2012 PHC.

On August 29, 2012, Cytel served a letter on the service list stating that it was withdrawing its application and asserting that CPSD's Reply was prejudicial.

3. Discussion

Pursuant to Pub. Util. Code § 1013(d), the Commission has adopted rules to verify the financial viability of any company applying for registration as an interexchange service reseller and to verify that the officers of the applicant have no prior history of committing fraud on the public.

CPSD is charged with ensuring the protection and safety of California consumers. CPSD is also charged with investigating potential telephone corporations to ensure the financial viability of the corporation and to ensure no prior history of fraud. Pub. Util. Code § 309.7(b) provides that CPSD shall exercise all powers of investigation granted to the Commission.

A number of factors call into question Cytel's fitness to provide service in California, including the facts that (1) there are five separate instances of investigations or sanctions against Cytel or an associated company, (2) Cytel filed an application containing false information, and (3) Cytel failed to attend two separate PHCs. As described in Section 2 above, Cytel has offered a limited explanation for facts (2) and (3).

Both parties have indicated that they do not want this proceeding to continue. CPSD has made a motion to dismiss. Cytel has requested its application be withdrawn.

Because both parties request that the proceeding be terminated, the Commission can dismiss this application without making a finding on the merits of the allegations above.

Prior to dismissing a proceeding, the Commission must consider how the public interest is implicated. Here, because both parties request that the proceeding be closed at this time, the public interest would not be served by keeping this proceeding open. However, while we draw no conclusions as to the allegations of CPSD, it is in the public interest that the information developed in this proceeding be disclosed in any future application made at this Commission by Cytel, its officers or its affiliates.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

5. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Jeanne McKinney is the assigned ALJ in this proceeding.

Findings of Fact

1. Pursuant to Pub. Util. Code § 1013(d), the Commission has adopted rules to verify the financial viability of any company applying for registration as an interexchange service reseller and to verify that the officers of the applicant have no prior history of committing fraud on the public.

2. Pub. Util. Code § 309.7(b) provides that CPSD shall exercise all powers of investigation granted to the Commission.

3. CPSD has filed a motion to dismiss this proceeding.

4. Cytel has requested to withdraw its application.

5. This Commission has authority to dismiss a proceeding where there is no public interest served by keeping the proceeding open.

Conclusions of Law

1. The public interest is not served by keeping this proceeding open.

2. It is in the public interest for the Commission to be reminded of this proceeding in any future applications made by Cytel, its affiliates or its principals.

3. This proceeding should be dismissed without prejudice.

4. Any future applications or other filings by Cytel, its affiliates or its officers should include disclosure of the circumstances of this proceeding and its dismissal.

5. This decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Application 12-04-002 is dismissed without prejudice.

2. Future applications and filings by Cytel, Inc., its affiliates, or its officers shall disclose the circumstances of this proceeding and its dismissal.

3. Application 12-04-002 is closed.

This order is effective today.

Dated November 8, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners