

Decision 18-11-028 November 29, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GOGO TECHNOLOGIES, INC. (dba GoGoGrandparent) for order declaring Applicant to be a non-regulated entity; to stay enforcement action pending resolution.

Application 18-06-011

DECISION GRANTING MOTION TO DISMISS

Summary

The Commission’s Consumer Protection and Enforcement Division’s motion to dismiss the Application of GoGo Technologies, Inc. for an Order declaring Applicant to be a non-regulated entity is granted. This proceeding is closed.

1. Background

On June 18, 2018, GoGo Technologies, Inc. (GoGo or Applicant) submitted an Application for order declaring Applicant to be a non-regulated entity and to stay enforcement action pending resolution. In its application, Applicant seeks an order from the Commission stating that GoGo is a non-regulated entity and is therefore exempt from Commission authority.

Through GoGo’s various filings, Applicant describes the events leading up to and following the filing of the application, as follows:

- On March 9, 2018, GoGo received a cease and desist order from the Commission’s Consumer Protection and Enforcement Division (CPED) notifying GoGo that it must cease operations for

alleged violations of Public Utilities (Pub. Util.) Code §§ 5315, 5371, 5411, and 5414.5.

- On May 18, 2018, Applicant requested that CPED staff reconsider its cease and desist determination.
- On May 25, 2018, CPED denied GoGo's request for reconsideration. In its denial, CPED stated that GoGo must submit a Transportation Network Carrier (TNC) permit application by June 15, 2018 and that "[c]ontinued operation and failure to submit an application to TEB [Transportation Enforcement Branch] by June 15, 2018 will be deemed a willful violation of Public Utilities Code § 5371 which may result in a citation, fines and/or discontinuance of telephone service."
- On June 14, 2018, CPED granted Applicant a one-month extension to comply with the cease and desist order and/or file the TNC permit application.
- On June 18, 2018, Applicant filed the present application, A.18-06-011.
- On July 3, 2018, CPED denied Applicant any further extensions.
- On July 5, 2018, Applicant filed a motion for stay of enforcement of the cease and desist order pending resolution of its application.
- On July 13, 2018, CPED filed a motion for party status, which was granted on July 20, 2018.
- On July 16, 2018, CPED filed a response to Applicant's motion for stay of enforcement of cease and desist order.
- On July 23, 2018, CPED filed a protest to the application. On that date, CPED also filed a motion to dismiss the application.

In its motion to dismiss, CPED asserts that GoGo's application is procedurally improper because the Applicant has not exhausted the process set forth by the Commission.¹ CPED states that under its current practice, when it learns of a potential violation, CPED first issues a cease and desist letter, notifying the entity that it cannot operate without a permit. After issuing the letter, CPED and the entity may engage in discussions as appropriate. If the entity continues to operate without a permit or fails to submit a TNC application, CPED may issue a citation. Once the citation issues, the party may appeal the citation under rules established by Resolutions ALJ-187 and ALJ-299.²

On August 1, 2018, Applicant filed a response to CPED's motion to dismiss. In its response, GoGo identified reasons why it should not be subject to the citation appeals process and instead continue with the application at hand. GoGo generally asserts that: (1) the application is more efficient than the citation appeals process because Applicant may "at the end of the day be in the same position we will be in now" with more resources expended; (2) the application involves substantive statutory interpretation that make it inappropriate for a citation appeals process; and (3) the case should "not be relegated to the Citation Appeal Process where public input and visibility is limited."³

To the Commission's knowledge, Applicant has not received a citation from CPED for violation of the cease and desist letter.

¹ CPED's Motion to Dismiss at 5.

² *Id.* at 6.

³ *See, generally*, GoGo's Response to Motion to Dismiss.

2. Discussion

The Commission's standard for reviewing a motion to dismiss is "[b]y assuming that the facts as alleged in the application are true for the purposes of deciding whether to grant a motion to dismiss, we assume that the applicant will be able to prove everything the applicant alleged in its application..." However, "[w]e do not accept as true the ultimate facts, or conclusions, that Applicant alleges, for instance, that granting the [application] would be in the public interest."⁴

Before we apply the standard, however, a preliminary issue is whether the application is properly before the Commission. In its motion to dismiss, CPED states that the application is premature and procedurally improper because GoGo has not exhausted the citation appeals process. CPED cites Resolutions (Res.) ALJ-187⁵ and ALJ-299, which govern the citation appeals process. Res. ALJ-187, in pertinent part, gives the respondent 20 days from receipt of a citation to either pay a fine or serve a Notice of Appeal. After serving a Notice of Appeal, an Administrative Law Judge (ALJ) is assigned and a hearing is set within ten days.⁶ Res. ALJ-299 provides additional guidance on citation appeals, including requiring a draft decision resolving the citation within 60 days of filing the appeal.⁷

⁴ *Application of Western Gas Resources-California, Inc. for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services*, D.99-11-023, 1999 Cal. PUC LEXIS 856, 10-11 (Cal. PUC 1999).

⁵ Resolution ALJ-187 adopted procedures for citation appeals related to Charter Party Carriers.

⁶ Res. ALJ-187 at Para. 4.

⁷ Res. ALJ-299 at Para. 11.

The Commission's citation appeals process differs from the application process in several respects. Of relevance here, the citation appeals process is an expedited proceeding (*e.g.*, hearings are set within ten days, decisions are issued in 60 days). By contrast, for applications, there is no statutory deadline to set a hearing date and decisions for ratesetting applications may be issued up to 18 months after filing. (Pub. Util. Code § 1701.) Discovery is also expedited for citation appeals (*e.g.*, exchanged three days before a hearing) whereas for applications, discovery rules are discretionary and typically subject to agreement among the parties. For both citation appeals and applications, a party may apply for rehearing after a decision issues.⁸

GoGo argues that the substantive issues raised in its application, including questions of statutory interpretation, make it inappropriate for a citation appeals proceeding. We disagree with this statement given that, just as with applications, citation appeals receive a hearing before an ALJ subject to due process protections. If GoGo receives a citation and chooses to appeal, it may raise substantive arguments, for example, to dispute the issuance of the citation.

GoGo next argues against the citation appeals process because "public input and visibility is limited." We also disagree with this assertion. Citation appeals are not confidential proceedings and therefore, the public is not precluded from participation. Further, draft decisions resolving the citation are subject to public comment under Pub. Util. Code § 311.⁹

Lastly, GoGo states that the expense and time involved in appealing a citation is reason to continue with the present application. We disagree with this

⁸ Res. ALJ-299 at Para. 14.

⁹ Res. ALJ-299 at Para. 12.

assertion given that, as described above, the citation appeals process is an expedited forum intended to resolve citations without the need for a protracted, resource-intensive proceeding.

After considering the parties' filings, the Commission is unpersuaded by GoGo's arguments opposing the motion to dismiss. The Commission also notes the policy considerations for dismissing this application. In establishing procedures specifically for citation appeals, the Commission intends to give parties reasonably certain guidelines as to how proceedings will function. Following these set procedures not only ensures that parties receive reliable, consistent guidance in Commission proceedings, but also ensures that the Commission is appropriately allocating its limited resources and not creating ad hoc processes on a case-by-case basis.

For these reasons, the Commission concludes that GoGo's application is procedurally improper and that dismissing the application is appropriate. In the event that GoGo receives a citation from CPED and chooses to appeal, it shall proceed through the citation appeals process. Because we conclude that GoGo's application is not properly before the Commission, the Commission does not consider, nor does it reach any conclusions about, the merits of the substantive arguments raised by Applicant, as well as CPED.

3. Conclusion

The Commission concludes that CPED's motion to dismiss the application is granted. GoGo's application is dismissed.

4. Categorization and Need for Hearing

In Resolution ALJ 1763410, issued on July 12, 2018, the Commission preliminarily categorized this application as ratesetting and preliminarily determined that hearings were necessary. Given the Commission's decision to

grant the motion to dismiss the application as improperly before the Commission, hearings are not necessary.

5. Comments on Proposed Decision

The proposed decision of ALJ Chiv 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. Comments were filed by CPED on November 14, 2018. No reply comments were filed. No changes were made to the proposed decision.

6. Assignment of Proceeding

Liane Randolph is the assigned Commissioner and Debbie Chiv is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On June 18, 2018, GoGo filed its Application for order declaring applicant to be a non-regulated entity.
2. On July 23, 2018, CPED filed a motion to dismiss the application.
3. CPED's motion to dismiss argues, among other things, that GoGo's application is procedurally improper and premature because GoGo has not exhausted the citation appeals process set forth by the Commission.
4. On August 1, 2018, GoGo filed a response to the motion to dismiss.
5. In response to the motion to dismiss, GoGo argues, among other things, that the application is more efficient than the citation appeals process, that the application involves substantive interpretation not appropriate for a citation appeals hearing, and that citation appeals proceedings involve limited public visibility.

Conclusions of Law

1. GoGo's application is procedurally improper and a premature challenge of CPED's cease and desist order.
2. CPED's motion to dismiss the application should be granted.

O R D E R

IT IS ORDERED that:

1. Consumer Protection and Enforcement Division's motion to dismiss GoGo Technologies, Inc.'s application for order declaring applicant to be a non-regulated entity is granted.
2. GoGo Technologies, Inc.'s application is dismissed.
3. All pending motions not previously ruled upon are hereby denied.
4. Application 18-06-011 is closed.

This order is effective today.

Dated November 29, 2018, at San Francisco, California.

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners