

Decision 12-05-005 May 10, 2012

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

Application of Network Communications International Corp. aka 1800Call4Less (U6086C) for a Certificate of Public Convenience and Necessity to Operate as a Provider of Resold Interexchange Service within the State of California.

Application 11-03-028  
(Filed March 29, 2011)

**ORDER DISMISSING APPLICATION 11-03-028**

**Summary**

This decision dismisses the protested application of Network Communications International Corp., aka 1800Call4Less (Applicant), for a certificate of public convenience and necessity (CPCN) authorizing the company to provide resold interexchange services in this state, as requested by Applicant. As a condition of dismissal, we require Applicant, its current officers, directors, and owners of more than 10 percent of shares in Applicant, to disclose this decision, the general nature of the protest filed by the Commission Division of Consumer Protection and Safety (CPSD), and the fact of Applicant's withdrawal of this application after CPSD's protest, in any subsequent applications to this Commission for a CPCN or a registration license.

We decline to impose sanctions against Applicant, as requested by the CPSD, based on Applicant's disclosure of substantive information regarding settlement discussions to the assigned Administrative Law Judge in an e-mail

dated August 15, 2011 in violation of Rule 12.6.<sup>1</sup> Applicant was not represented by counsel in this proceeding, and Applicant's representative does not have a sophisticated knowledge of Commission procedures.

However, we caution Applicant that any future violations of Rules 12.6 or 1.1 or other Rules will be grounds for possible sanctions.

## **Background**

On March 29, 2011, Applicant filed this application for a certificate of public convenience and necessity (CPCN) authorizing the company to provide resold interexchange services in this state. At the time of filing the application, Applicant already held registration authority to provide resold interexchange services in California.<sup>2</sup>

On May 20, 2011, the Commission Division of Consumer Protection and Safety (CPSD) filed a protest to the application on the following grounds:

1. Applicant's Alleged Violation of Rule 1.1<sup>3</sup> by Failing to Disclose Previous Regulatory Sanctions, Settlements, and Consumer Complaints. Although

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<sup>1</sup> All Rule citations are to the Commission Rules of Practice and Procedure, unless otherwise stated.

<sup>2</sup> See Decision 98-11-036, which granted Applicant registration authority to provide resold interexchange services in this state. Applicant continues to hold this registration authority.

<sup>3</sup> Rule 1.1 states:

1.1. (Rule 1.1) Ethics.

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

Applicant verified in this application that "...neither Network Communications International Corp., any affiliate, director, partner,...nor any person acting in such capacity...has been sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with the regulatory statute, rule or order (sic)," CPSD alleged that Applicant entered into settlements with regulatory agencies in three other states based on Applicant's violation of legal and regulatory requirements, as follows:

- a. On October 10, 2005, the Florida Public Service Commission approved a settlement in which Applicant agreed to contribute \$35,000 as a resolution for charging end users a non-subscriber charge on 0+ intrastate calls made from pay telephones in excess of the rate caps provided in Rule 25-24.630 of the Florida Administrative Code;
- b. On May 18, 2005, the Ohio Public Utilities Commission approved a settlement in which Applicant agreed to pay a civil forfeiture of \$12,000 for sending incorrect bills to customers;
- c. On January 6, 2009, the Nebraska Public Service Commission approved a stipulation between Applicant and the Nebraska Telecommunications Infrastructure and Public Safety, in which Applicant paid a fine for failing to file required remittance worksheets or to make remittance payments.

2. Additional Consumer Complaints Against Applicant. CPSD alleged that although Applicant certified in the application that no complaints had been filed against the company, CPSD's research found over 100 consumer reports against Applicants in the Commission Consumer Affairs Bureau (CAB) database and in RipoffReport.com. The CAB database includes 41 consumer complaints against Applicant between 2007 and the date of the filing of this application. According to CPSD's protest, an additional 64 complaints against Applicant from consumers in different states were posted on RipoffReport.com between

April 2007 and January 2011. Most of these complaints relate to billing and cramming issues.

A prehearing conference (PHC) was held on July 7, 2011. Applicant was represented by a non-attorney representative, and CPSD was represented by legal counsel. At the PHC, the parties agreed to discuss the possibility of settlement before proceeding with briefing of the issues in the case. The assigned Administrative Law Judge (ALJ) set a tentative briefing schedule, to be followed if the parties were unable to reach settlement within a specified timeframe.

An exchange of e-mail communications between the parties and the assigned ALJ regarding scheduling and the possible need for an evidentiary hearing occurred in August 2011.

On August 12, 2011, Applicant's representative sent an e-mail to the assigned ALJ, which reported that the parties had made some progress in settlement discussions but still needed to work out some details, and requested an extension of time until August 15, 2011 to provide a status report. Later, on August 12, 2011, CPSD's counsel sent an email to Applicant's representative and the assigned ALJ, which stated that CPSD felt that the parties' positions were too far apart to reach settlement and that mediation would not be successful. CPSD proposed a revised briefing schedule and that Applicant's representative notify CPSD and the assigned ALJ whether Applicant wished to withdraw the application by August 19, 2011.

In response to CPSD's e-mail, on August 15, 2011, the assigned ALJ sent an e-mail to the parties asking if Applicant agreed with CPSD's proposed schedule and whether either party believed that there were disputed facts in the case which would require an evidentiary hearing.

On August 15, 2011, Applicant's representative responded by e-mail to the assigned ALJ's inquiry. This e-mail disclosed certain information regarding the

substance of settlement negotiations. For example, in the e-mail, Applicant's representative stated that her client believed that there were disputed facts, but the parties had not discussed these issues in their negotiations. Applicant's representative further stated that the settlement discussions had primarily concerned a dollar amount for settlement and that when it appeared that the parties could not agree on a dollar amount, Applicant had submitted a proposal to withdraw the application. According to Applicant's representative, settlement negotiations broke down when the parties could not agree on written language regarding the withdrawal of the application and CPSD's conditions for permitting the application to be withdrawn. Applicant's representative concluded the e-mail by stating that she did not believe that the parties could have a productive discussion regarding the facts of the case, and that Applicant was willing to file a motion to withdraw the application within the timeframe suggested by CPSD.

On August 29, 2011, Applicant filed a motion for withdrawal of this application.

On September 6, 2011, CPSD filed a response to Applicant's motion, which stated that although CPSD does not oppose the withdrawal of the application, Applicant and its current directors, officers, or owners of more than 10 percent of outstanding shares should be required to disclose the proceedings in this case and the nature of CPSD's protest in any subsequent applications to this Commission for authorization to provide telecommunications services in this state. CPSD also asked the Commission to impose sanctions in the amount of \$2,000 based on Applicant's alleged violation of Rule 12.6, which provides that settlement discussions are confidential. CPSD argued that Applicant violated Rule 12.6 by disclosing the content of settlement discussions to the assigned ALJ in Applicant's August 15, 2011 e-mail.

On September 21, 2011, Applicant filed a reply to CPSD's response, which requested that the Commission not impose sanctions based on Applicant's August 15, 2011 e-mail to the assigned ALJ, because any violation of Rule 12.6 was inadvertent and Applicant was not represented by counsel in the proceedings.

### **Discussion**

We grant Applicant's request for dismissal of its application to offer interexchange services in this state. However, based on the circumstances of this case, Applicant shall reference this decision and shall disclose the general nature of CPSD's protest and the fact of Applicant's withdrawal of the application after CPSD's protest, in any future applications for authorization to provide telecommunications services in California.<sup>4</sup>

We also decline to impose sanctions, as requested by CPSD, based on the August 15, 2011 e-mail from Applicant's representative, which disclosed the substantive issues discussed in settlement negotiations, to the assigned ALJ. Under Rule 12.6, parties are to keep information discussed during settlement negotiations, confidential, unless otherwise agreed to by both parties.<sup>5</sup> Applicant

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<sup>4</sup> We have imposed the same requirement in other cases in which applicants allegedly violated Rule 1.1 by failing to disclose previous regulatory sanctions or making factual misrepresentations in an application to the Commission for a CPCN or a registration license. For example, *see* D.07-10-023 and D.08-04-021.

<sup>5</sup> Rule 12.6 states in pertinent part:

**12.6. (Rule 12.6) Confidentiality and Inadmissibility.**

No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission.

Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the

did violate Rule 12.6 by including information on the substantive issues discussed in settlement negotiations in her e-mail to the assigned ALJ on August 15, 2011. Applicant's representative should have responded to the assigned ALJ's inquiry by simply stating whether there were disputed facts and whether Applicant wished to request a hearing, without disclosing further information regarding settlement discussions. However, Applicant's representative is not an attorney and does not have a sophisticated understanding of Commission procedures. Therefore, her violation of Rule 12.6 may have been inadvertent. However, Applicant is cautioned that any future violations of Rule 12.6 or Rule 1.1 or other Rules will be grounds for possible sanctions.

#### **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. Comments were filed on April 12, 2012 by CPSD.

In its comments, CPSD urges the Commission to impose sanctions of \$2,000 based on Applicant's representative's violation of Rule 12.6 by disclosing information regarding issues discussed in mediation to the assigned ALJ in an e-mail. CPSD states that Applicant's representative is an experienced regulatory consultant, and should be expected to know and comply with Commission Rules, and that the Commission should impose monetary sanctions to send a message that compliance with Rule 12.6 is important.

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negotiations without the consent of the parties participating in the negotiations... (Emphasis added.)

We agree with CPSD all parties appearing before the Commission are expected to comply with Commission Rules, and that compliance with Rule 12.6 regarding the confidentiality of discussions between the parties in mediation is important to protect the integrity of the Commission's mediation process. However, here, Applicant's representative disclosed only very general information to the assigned ALJ, the disclosure appeared to be inadvertent, and the disclosure did not in any way affect our decision on Applicant's request for dismissal of this application.

Therefore, we believe that in this case, a warning to Applicant and its representative that any future Rule violations may result in the imposition of sanctions is sufficient, and we make no changes to the proposed decision.

### **Categorization and Need for Hearings**

In Resolution ALJ 176-3273 dated May 5, 2011, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. Applicant has requested dismissal of this application. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

### **Assignment of Proceeding**

Catherine J.K. Sandoval is the assigned Commissioner, and Myra J. Prestidge is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Applicant filed this application seeking a CPCN authorizing the company to provide resold interexchange services in California on March 29, 2011.
2. Notice of the filing of the application was posted on the Commission Daily Calendar on April 21, 2011.
3. CPSD filed a protest to the application on May 20, 2011.

4. CPSD's protest alleged that Applicant had violated Rule 1.1 by failing to disclose settlement of regulatory violations in three other states in the application and over 100 consumer complaints against Applicant as listed on the CAB database and RipoffReport.com.

5. After the PHC, Applicant and CPSD engaged in settlement negotiations.

6. On August 15, 2011, Applicant's representative sent an e-mail to the assigned ALJ, which disclosed substantive issues discussed in settlement negotiations with CPSD.

7. CPSD did not agree to Applicant's disclosure of substantive issues discussed during settlement negotiations to the assigned ALJ in Applicant's August 15, 2011 e-mail.

8. Applicant's August 15, 2011 e-mail to the assigned ALJ violated Commission Rule 12.6, which requires the parties to keep information discussed during settlement confidential, unless the parties agree otherwise.

9. On August 29, 2011, Applicant filed a motion requesting dismissal of the application.

10. Dismissal of the application is appropriate.

11. Under the circumstances of this case, it is appropriate and consistent with past Commission decisions to require Applicants, its officers, directors, and owners of more than 10 percent of shares, to disclose this decision, the general nature of CPSD's protest, and the fact that Applicant withdrew this application after CPSD's protest in any subsequent applications to this Commission for a CPCN or a registration license.

12. Applicant's representative violated Rule 12.6 by disclosing substantive issues discussed in settlement negotiations to the assigned ALJ in the August 15, 2011 e-mail.

13. Applicant's representative is not an attorney and appears not to have a sophisticated understanding of Commission procedures.

**Conclusions of Law**

1. Rule 1.1 prohibits any party signing a pleading or brief or offering an appearance in a Commission proceeding from misleading the Commission or its staff by making a false statement of fact or law or by an artifice.

2. Rule 12.6 requires parties to keep issues discussed during settlement negotiations confidential, unless both parties agree otherwise.

3. This application should be dismissed.

4. Based on the circumstances of this case, and consistent with past Commission decisions, it is appropriate to require Applicant, its officers, directors, and owners of more than 10 percent of shares, to reference this decision, the general nature of CPSD's protest, and the fact that Applicant withdrew this application after CPSD's protest, in any future applications to this Commission for a CPCN or a registration license.

5. Based on the unique circumstances of this case, it is appropriate not to impose sanctions on Applicant based on Applicant's representative's violation of Rule 12.6 in the August 15, 2011 e-mail to the assigned ALJ.

6. Future violations of Commission Rules by Applicant will be grounds for possible sanctions.

7. This order should be made effective immediately in order to clear this application from the Commission's list of active proceedings.

**O R D E R**

**IT IS ORDERED** that:

1. Network Communications International Corp. (Applicant), its owners, directors, and owners of more than 10 percent of shares, shall reference this decision, the general nature of the protest filed in this application by the Commission Division of Consumer Protection and Safety (CPSD), and the fact that Applicant withdrew this application after CPSD's protest, in any future applications filed with this Commission for a certificate of public convenience and necessity or for a registration license authorizing the provision of telecommunications services in this state.

2. Application 11-03-028 is dismissed.

3. Application 11-03-028 is closed.

This order is effective today.

Dated May 10, 2012, at Fresno, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners