PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 15, 2002

TO: PARTIES OF RECORD IN INVESTIGATION 01-03-021

This proceeding was filed on March 15, 2001, and is assigned to Commissioner Geoffrey Brown and Administrative Law Judge (ALJ) Janice Grau. This is the decision of the Presiding Officer, ALJ Grau.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ CAROL A. BROWN
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:hkr

Attachment

ALJ/JLG-POD/hkr

PRESIDING OFFICER'S DECISION (Mailed 8/15/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own Motion and Order to Show Cause into the operations, practices and conduct of Titan Telecommunications, Inc. (U-6224), and Christopher Bucci, its President and owner, Respondents.	Investigation 01-03-021 (Filed March 15, 2001)

J. Geoffrey Barry, Attorney at Law, for Titan Telecommunications, Inc. and Christopher Bucci, respondents.
Carol Dumond, Attorney at Law, for Consumer Services Division.

OPINION REVOKING TITAN TELECOMMUNICATIONS, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BUT FINDING RESPONDENTS NOT LIABLE FOR RESTITUTION ORDERED IN DECISION 00-04-012

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OPINION REVOKING TITAN TELECOMMUNICATIONS, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BUT FINDING RESPONDENTS NOT LIABLE FOR RESTITUTION ORDERED IN DECISION 00-04-012

Summary

We revoke Titan Telecommunications, Inc.'s (Titan) certificate of public convenience and necessity (CPCN) and fine Titan $17,500 after finding that Titan and Christopher Bucci (Respondents) violated Rule 1 of the Rules of Practice and Procedure by misleading the Commission in Titan's application for a CPCN filed with the Commission on July 19, 1999. Respondents failed to disclose in that application pending investigations concerning consumer misrepresentation that resulted from slamming allegations against Bucci's prior company, ACI Communications Inc. (ACI).

We find that Respondents are not liable for the restitution ordered in Decision (D.) 00-04-012 after determining that the alter ego doctrine cannot be applied to Bucci and Titan so as to hold them liable for ACI's misconduct. To hold Bucci personally liable for the restitution ordered by the Commission against ACI when Bucci was not named a respondent in that proceeding, would violate his due process rights. Titan similarly did not participate in the ACI investigation and cannot be held liable.

Background

We issued this Order Instituting Investigation (OII) to determine whether Titan and its sole shareholder and president, Christopher Bucci, have 1) violated Rule 1 by including false and/or misleading information on Titan's application (Application (A.) 99-07-029) for a CPCN; and 2) used money wrongfully obtained through slamming ACI customers in establishing Titan. We further issued this OII to determine whether respondent Bucci is an alter ego of either or both ACI

and Titan. The Commission's Consumer Services Division (CSD) investigated the statements in Titan's application and alleged that Bucci knowingly made false statements in order to avoid Commission inquiry into his behavior as the Chief Executive Officer of ACI. The OII set hearings for two phases to permit CSD to present evidence on the alter ego issue after CSD had completed its discovery.

We granted ACI a CPCN to operate as a reseller of long distance services in D.97-05-013. San Diego Superior Court appointed a receiver for ACI on February 26, 1999. On June 24, 1999, we opened an investigation into the operations, practices, and conduct of ACI and Larry Cornwell, in his capacity as receiver for ACI, to determine whether ACI had violated Pub. Util. Code § 2889.5 by switching subscribers' long distance provider without the subscribers' authorization. We revoked ACI's CPCN and ordered ACI to pay $200,000 restitution in D.00-04-012, issued April 6, 2000. As noted in that decision, ACI's receiver and CSD stipulated that ACI had switched subscribers' long distance service provider without the subscribers' authorization.

Titan filed its application with the Commission on July 19, 1999, pursuant to the Commission's registration process. We granted that application in D.99-08-049, issued on August 23, 1999, and authorized Titan to operate as a switchless reseller of interLATA and intraLATA services.

In the first phase of this OII, the Commission held an evidentiary hearing on January 8, 2002. Opening and reply briefs were filed on February 15 and March 8, 2002, respectively. Pursuant to an administrative law judge's ruling, CSD filed a supplemental brief on March 28, 2002, and Respondents filed a supplemental reply brief on April 30, 2002. With the filing of supplemental briefs, Phase I was submitted.

In Phase II, the Commission held evidentiary hearings on April 24 and 25, 2002. Opening and reply briefs were filed on June 6 and 27, 2002, respectively.[1] With the filing of reply briefs, Phase II was submitted.

CSD's Support for Rule 1 Allegations

In this OII, CSD has the burden of proving that Respondents violated Rule 1 by a preponderance of the evidence. (See *CTS*, D.97-05-089, 72 CPUC2d 621, 642.) CSD asserts that Respondents violated Rule 1 in filing their application and are unfit to operate in California, because they made false and/or misleading statements in responses to Questions 7[2] and 8[3] on the CPCN application. Rule 1 provides:

> Any person who signs a pleading or brief, enters an appearance 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

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[1] CSD requested and was granted an extension until June 10, 2002 to file its Phase II opening brief.

[2] Question 7 of the application asks the applicant to answer "true" or "not true" to the following statement: No affiliate, officer, director, general partner, or person owning more than 10% of applicant, or anyone acting in such a capacity whether or not formally appointed, held one of these positions with an IEC that filed for bankruptcy or has been found either criminally or civilly liable by a court of appropriate jurisdiction for a violation of § 17000 et seq. of the California Business and Professions Code or for any actions which involved misrepresentations to consumers, and to the best of applicant's knowledge, is not currently under investigation for similar violations.

[3] Question 8 of the application asks the applicant to answer "true" or "not true" to the following statement: To the best of applicant's knowledge, neither applicant, any affiliate, officer, director, partner, nor owner of more than 10% of applicant, or any person acting in such a capacity whether or not formally appointed, has been sanctioned by the Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule or order.

> Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

CSD's investigation focused on proceedings in other states involving Bucci's prior company, ACI. CSD's investigation determined that prior to the filing of Titan's application, the Texas Public Utilities Commission issued a notice of intent to assess an administrative penalty against ACI for slamming (June 23, 1998), the Michigan Public Service Commission filed a complaint against ACI (April 30, 1999), the New Jersey Division of Consumer Affairs-Office of Consumer Protection served a subpoena duces tecum ordering ACI to appear and produce documents (July 22, 1998), the Idaho Attorney General notified Bucci that it had commenced an investigation of ACI's business practices (March 30, 1999), and the Attorney General of Arizona filed a complaint in court alleging ACI committed consumer fraud (September 3, 1998).

CSD alleges Bucci attempted to evade service of this Commission's process for ACI matters. CSD investigator Richard Molzner spoke with respondent Bucci on July 13, 1999, and informed him that the Commission had issued a slamming investigation of ACI. Prior to the call, the Commission mailed a copy of the OII and investigative report to ACI but it had been returned as undeliverable and no forwarding order. Bucci told Molzner that ACI was no longer in business and he did not want to receive any papers. Molzner mailed the OII and report to Bucci at his home address, but they were returned unopened.

Respondents' Reply to Rule 1 Allegations

Respondents contend their actions were reasonable in completing the application and that they are fit to operate. Respondents further contend that the application form is ambiguous and that Respondents did not intentionally

answer any questions incorrectly. They also assert that CSD has not shown any of Respondents' actions were intentional.

Respondents note that ACI had not filed for bankruptcy or been found criminally or civilly liable by any court for any action. Respondents further state that Bucci and ACI had not been sanctioned by anyone when Titan's application was filed.

The record does not reflect that the Texas and Michigan commissions and the states of New Jersey and Idaho personally served Bucci with any papers. Bucci does not recall a conversation with Molzner concerning the Commission's investigation into whether ACI switched subscribers' long distance service provider without the subscribers' authorization.

Respondents contend that the fact that Martha Coleman, a regulatory consultant, signed the application on July 9, 1999, increases CSD's burden to prove that Bucci intentionally caused Questions 7 and 8 to be marked "true" when he knew the answers to be 'not true,' a burden CSD has failed to meet. Respondents further contend that CSD produced no evidence that Titan has had any consumer complaints or administrative actions since Titan was authorized to operate in California.

Legal Standard for Finding a Rule 1 Violation

Our objective in adopting the registration process was to allow applicants that have no history of questionable behavior and that present noncontroversial applications to rely on an expedited and inexpensive means of securing telecommunications operating authority. If applicants do not meet these standards, they need to use the more extensive application process. (*Rulemaking to Establish a Simplified Registration Process for Non-Dominant Telecommunications Firms*, D.97-06-017, 73 CPUC2d, 288, 293.)

Here, the issue is whether Respondents misled us by failing to disclose that ACI had filed for bankruptcy, was under investigation for or had been found liable for or guilty of consumer fraud, or had been sanctioned by a regulatory agency when Respondents answered Questions 7 and 8 of the CPCN application. If Bucci had actual or constructive (implied) notice of judgments or verdicts finding consumer misrepresentation, pending investigations alleging similar violations, or regulatory sanctions, Respondents were required to respond "not true" to Questions 7 and 8. Bucci had constructive knowledge of any action of which ACI was aware; similarly Titan had constructive knowledge of any action of which Bucci was aware. Where the record does not substantiate that Bucci or ACI had actual knowledge of any court or regulatory action, we cannot conclude Respondents had actual or constructive knowledge of the proceedings subject to disclosure on Titan's application.

A finding that Respondents have misled us does not require a finding of intent. (*Rulemaking into Competition for Local Exchange Service*, D.01-08-019, 2001 Cal. PUC LEXIS 653 *14.) Respondents' intent is one factor in assessing a penalty if a violation is found.

Respondents and CSD agree that the regulatory consultant who signed Titan's application was Titan's agent. The act of an agent of a public utility is imputed to the public utility. (Pub. Util. Code § 2109.)

Respondents Violated Rule 1 in Answering Question 7

Question 7 of the CPCN application asks the applicant to state that no officer, director, general partner, or owner of applicant had acted in that capacity with an interexchange carrier that 1) filed for bankruptcy; 2) had a judgment or verdict involving a violation of Bus. & Prof. Code § 17000 et seq. or consumer

misrepresentation; or 3) is under investigation for similar violations. Respondents answered "true" in response to Question 7.

ACI Was Under Investigation for Consumer Misrepresentation Within the Meaning of Question 7

Question 7 asks whether a court has found an interexchange carrier with which the applicant held a similar position criminally or civilly liable for consumer violations or whether the interexchange carrier currently is under investigation for similar violations but does not include an applicant's compliance with regulatory authorities. (73 CPUC2d *supra* at 292.) CSD and Respondents disagree whether there was any investigation into consumer misrepresentation by ACI, but the record reflects that ACI was under investigation for consumer misrepresentation by other than regulatory authorities at the time the application was filed.

CSD alleges that the Arizona Attorney General had a pending action alleging consumer fraud, but Respondents state the Arizona Attorney General had dismissed their complaint against ACI at that time. The Arizona Attorney General's 1998 complaint against ACI alleging consumer fraud is discussed in Bucci's Motion for Summary Judgment in the related 2000 complaint filed after the 1998 complaint was dismissed. The motion states that a Judgment of Dismissal was filed in the 1998 action on February 4, 2000, and that the 2000 complaint is identical to the 1998 complaint brought under the Arizona Consumer Fraud Act and alleges that ACI and Bucci engaged in deception, deceptive acts and practices, fraud, false pretenses, false promises and concealment, suppression and omission of material facts with the intent that others rely upon such concealment, suppression, or omissions.

The record does not support Respondents' claim that the complaint had been dismissed in 1998. Instead, the record points to dismissal occurring in 2000

after the Attorney General failed to actively pursue the investigation. Even that dismissal does not show that the investigation had concluded, since the Attorney General immediately filed an identical complaint.

The Arizona Attorney General's pending complaint alleging consumer fraud is the type of information Question 7 attempts to elicit. In this instance, we find that Respondents misled the Commission in responding "true" to Question 7 at a time when ACI was under investigation in Arizona for consumer fraud.

On July 22, 1998, prior to the filing of the CPCN application, the New Jersey Division of Consumer Affairs-Office of Consumer Protection served a subpoena on ACI to appear by August 6, 1998, and produce documents related to ACI's customer solicitation process, customer complaints, evidence of agreement to switch to ACI for specific customers, etc., under the authority granted by the New Jersey Consumer Fraud Act. On June 15, 1999, the New Jersey Attorney General's office sent ACI a letter noting that ACI had failed to produce the documents and demanding that ACI comply by July 6, 1999. In this instance, we find that Respondents misled the Commission in responding "true" to Question 7 while New Jersey was investigating ACI for consumer fraud.

On March 30, 1999, the Idaho Attorney General notified Bucci that it had commenced an investigation to determine whether ACI had violated Idaho's Consumer Protection Act, Consumer Protections Rules, Telephone Solicitations Act, and Telephone Solicitation Rules. Idaho's Consumer Protection rules prohibit sellers from

> Making any claim or representation concerning goods or services which directly, or by implication, has the capacity, tendency, or effect of deceiving or misleading a consumer acting reasonably under the circumstances. An omission of a material or relevant fact shall be treated with the same effect as a false, misleading, or deceptive claim or representation, when such omission, on the

> basis of what has been stated or implied, would have the capacity, tendency, or effect of deceiving or misleading a consumer acting reasonably under the circumstances.

However, the Idaho Attorney General's office doubted that this notification ever caught up with Bucci due to Bucci's numerous changes of address. In this instance, we find that Respondents did not mislead the Commission by responding "true" to Question 7, because Bucci did not have notice that ACI was under investigation in Idaho for consumer fraud. Absent actual or constructive notice that Idaho was investigating ACI, Bucci could not have answered "not true."

ACI Had Not Filed for Bankruptcy Within the Meaning of Question 7

We determine that in this instance, Respondents did not mislead the Commission in responding "true" to Question 7, because in fact ACI had not filed for bankruptcy at the time Titan's CPCN application was filed. Although a receiver had been appointed for ACI, a receivership is not the same as a bankruptcy. Bankruptcy is defined as the administration of an insolvent debtor's property by the court for the benefit of the debtor's creditors. A receivership is the state of being in the hands of a receiver, one appointed by the court to administer, conserve, rehabilitate, or liquidate the assets of an insolvent corporation for the protection or relief of creditors. (Merriam-Webster's Dictionary of Law, http://www.findlaw.com.) Although both processes concern insolvent entities, those processes are distinct.

We originally included in Question 7 whether the entity had gone out of business. After comments from parties to that proceeding, we deleted that portion of the question, because we did not want to include a voluntary departure from the market. Although involuntary departure from the market

commonly occurs through bankruptcy or CPCN revocation, this proceeding illustrates that receivership is another involuntary departure from the market, one that we did not consider in designing Question 7.

Respondents Did Not Violate Rule 1 in Answering Question 8

Question 8 asks the applicant to state that neither applicant nor an officer, director or owner of applicant has been sanctioned by a state regulatory agency for failure to comply with that agency's rules or orders. Respondents answered "true" in response to Question 8.

We ask this question to determine an applicant's regulatory compliance history since it would be relevant and highly probative of the applicant's prospective compliance with California authorities. (73 CPUC2d, *supra*, at 292.) A sanction is a punitive or coercive measure or action that results from failure to comply with a law, rule, or order. (Merriam-Webster's Dictionary of Law.)

At the time the Titan application was filed (July 1999), the Michigan Public Service Commission had fined ACI for its failure to comply with the Commission's procedures for changing telecommunications service providers. The Michigan Commission had issued a show cause order on February 26, 1999 that required ACI to respond within 21 days. Because ACI did not respond to the order and Michigan staff found that contact phone numbers had been changed and then disconnected, the Michigan Commission concluded in an order issued April 30, 1999, that ACI was out of business and had violated the show cause order and the Commission's procedures for changing telecommunications service providers. The Michigan Commission fined ACI $940,000 and prohibited ACI's directors, officers, principals, and agents from

engaging in the telecommunications business in Michigan until the fine was paid.[4]

The record establishes that the Michigan Commission sanctioned ACI but not Bucci. Respondents did not mislead the Commission in responding "true" to Question 8 in this instance, because the Michigan Commission had not sanctioned Bucci and it is not clear that either ACI or Bucci received the show cause order.

In Texas, the Office of Consumer Protection (OCP) of the Public Utility Commission sent a letter on June 23, 1998 that constituted a notice of intent to assess an administrative penalty on ACI for switching long distance services without proper verification. If the violations were not cured within 30 days, the OCP would recommend a fine of $120,000. A signed receipt indicated the notice was received on June 29, 1998. On April 27, 1999, ACI's receiver and the OCP entered into a settlement agreement in which ACI agreed to pay the fine but did not admit wrongdoing. The settlement agreement states:

> The parties expressly acknowledge and agree that remedial actions on the part of ACI do not constitute and shall not be deemed as constituting, any admission by ACI of wrongdoing, violation of the PUC's Substantive Rules or Texas statutes or liability for any administrative penalties in the circumstances referenced in Paragraph (1) [violations of PUC Substantive Rules § 26.106] above.

Because the settlement agreement expressly excludes admission that ACI failed to comply with the Texas Commission's regulations, that Commission did not "sanction" ACI. That Commission also did not sanction Bucci. In this

[4] Titan registered as an intrastate provider of telecommunications services in Michigan. On December 20, 2000, the Michigan Commission revoked Titan's registration.

instance, we find that Respondents did not mislead the Commission in responding "true" to Question 8.

Respondent Is Unfit to Conduct Business in California

CSD alleges that Titan is unfit to operate, because Titan failed to answer all statements on the application truthfully, failed to adequately maintain records, and failed to respond to CSD's data requests. Respondents note that there is no disagreement that Titan updated its contact person information and filed its annual report. Respondents also note that there is some uncertainty as to the exact requirements for tariff filings and whether the tariffs submitted with the application were sufficient. Finally, Respondents note that CSD acknowledged that Titan had responded to all outstanding data requests. CSD counters that these omissions were only resolved when they were pointed out to Titan and that late compliance is irrelevant to disproving the violations. Titan states that technical violations that have been corrected do not, in and of themselves, substantiate that Titan is unfit to operate.

We concur that technical violations alone are insufficient to find Respondents unfit to conduct business in California. However, CSD's investigation demonstrates that allegations of consumer violations and failure to comply with state commission regulations were pervasive when Bucci operated ACI. Although we do not find that Respondents violated Rule 1 for failing to disclose all the pending investigations and actual sanctions which had occurred at the time the application was filed, that failure occurred because ACI lacked a correct address or phone number for service of process. An interexchange carrier with numerous investigations for questionable business practices that also became insolvent is the type of business that prompted us in the registration process to question the previous experience of current applicants.

The record does reflect that Respondents operated Titan's DSL and long distance services in California for less than a year without engendering consumer complaints. Titan currently is not providing telecommunications services in California and ceased providing services at some point during the last six months in 2000, because it lost most of its customers to attrition and its wholesale DSL provider went bankrupt. The pattern of failing to provide an agent for service of process has persisted. In addition, Respondents have failed to timely comply with regulatory requirements. Although Respondents corrected their failure to comply with those requirements in advance of these hearings, including providing a correct agent for service of process, it is unclear whether Respondents would continue to comply absent the existence of a proceeding where Respondents' activities are monitored. There is ample evidence to show that Bucci's prior experience with ACI and Titan's technical violations render Respondents unfit to resell interLATA services in California.

CSD's Support for Alter Ego Allegations

CSD alleges Bucci was an alter ego of ACI and is an alter ego of Titan, and should therefore be held jointly and severally liable with them for violations of pertinent statutes and regulations. CSD asserts that Bucci, as the sole shareholder of ACI, took unauthorized loans from ACI, failed to hold regular board meetings, to obtain board authority to issue stock, and to maintain corporate records under General Order 28-A, and used the same attorney as ACI. CSD alleges Bucci, as Chief Executive Officer (CEO) and owner of the vast majority of shares in Titan, repeated much of the same behavior he had exhibited as ACI's CEO and sole shareholder.

CSD's investigation indicates that ACI lent Bucci $420,945. (Declaration of James Martinec in Support of Ex Parte Application for Appointment of Receiver

or Alternatively for Temporary Restraining Order, p. 2.) An attachment to that declaration, ACI's September 30, 1998 balance sheet, lists shareholder loans as approximately $344,000.

Respondents' Reply to Alter Ego Allegations

Respondents contend that cash transfers from ACI to Bucci were lawful and proper for "Subchapter S" corporations such as ACI and that there was no commingling of funds or assets. Respondents offered the opinion of one of ACI's accountants, James Jamieson, that the payments to Bucci were permissible for "Subchapter S" corporations.

Respondents assert that CSD failed to prove its assertions of any failure to keep appropriate records. Respondents also contend that ACI's records were surrendered to the corporation's receiver according to the terms of the workout agreement between Bucci and MCI WorldCom Network Services, Inc. (MCI). Respondents further contend that MCI backed out of the workout agreement. Finally, Respondents note that Bucci was not a party to the Commission's action against ACI and contend that ACI's receiver essentially allowed a default judgment to the Commission's action against ACI in which it was assumed 100% of ACI's remaining 10,000 customers had been obtained by slamming.

Legal Standard Governing Application of the Alter Ego Doctrine to Bucci and ACI

We have noted that when a corporation is lawfully operated, the general rule is that only the corporate entity itself, and not its shareholders, officers, or other persons (legal or natural), bear liability for the consequences of the corporation's actions. (*See Investigation on the Commission's own Motion into the Operations, Practices, and Conduct of Coral Communications, Inc.*, D.01-04-035, 2001 Cal. PUC LEXIS 289 *88.) By contrast, under the alter ego doctrine:

> the corporate veil may be "pierced," i.e., individuals or other corporations acting on behalf of the corporation may be held liable for its debts and misdeeds. The doctrine requires that there be such a unity of interest and ownership between the corporation and the individuals or other corporation that the separate entities cease to exist, and that an inequitable result would follow if the doctrine were not applied. [Citations omitted] (*Id.* at **88-89.)

CSD and Respondents agree that the legal standard for finding an individual to be the alter ego of a corporation is stated in *Watson* v. *Commonwealth Ins. Co.* (1936) 8 Cal.2d 61, 68; 63 P.2d 295, 298:

> The two requirements are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice. On the second score it is sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results.

It is well established that application of the alter ego doctrine is a question of fact and that determining its application depends heavily upon the facts of the individual case. (*Alexander* v. *Abbey of the Chimes* (1980) 104 Cal. App. 3d 39, 46; 163 Cal.Rptr. 377, 381.) Courts have considered an array of factors in analyzing alter ego problems, including some CSD suggests apply here: commingling of funds and other assets, the unauthorized diversion of corporate funds or assets to other than corporate uses, the treatment by an individual of the assets of the corporation as his own, the failure to obtain authority to issue stock or to subscribe to or issue the same, the failure to maintain minutes or adequate corporate records, sole ownership of all of the stock in a corporation by one individual or the members of a family, the employment of the same attorney, and the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors. (*Associated Vendors, Inc.* v. *Oakland*

Meat Co., Inc. (1962) 210 Cal. App. 2d 825, 838-840; 26 Cal.Rptr. 806, 814-815, citations omitted.) These factors have been the subject of hearings and a considerable amount of conflicting evidence has been adduced as to whether they characterized the relationship between Bucci and ACI. However, resolution of these factual disputes does not determine the outcome of this matter. Instead, the controlling factor here is the application of another legal doctrine, due process of law, as established in the United States Constitution.

Respondents assert that finding Bucci liable for the award against ACI would constitute a denial of due process of law. The alter ego doctrine is subject to standards of due process arising under the 14th Amendment to the United States Constitution. This limitation was recognized by the California Supreme Court in *Motores de Mexicali, S. A.* v. *Superior Court* (1958) 51 Cal. 2d 172, 331 P.2d 1.

Motores de Mexicali was an attempt to recover on a judgment against a corporation whose commercial drafts had been dishonored. The corporation was insolvent and the judgment creditor sought to recover from the individual shareholders who had operated it. Those shareholders, like Bucci and Titan in this proceeding, had never been named or served in the action against the corporation. The judgment creditor—relying on two decisions cited by the parties to this proceeding, *Mirabito* v. *San Francisco Dairy Co.* (1935), 1 Cal.2d 400, 35 P.2d 513 and *Thomson* v. *L. C. Roney & Co.* (1952) 112 Cal.App.2d 420, 246 P.2d 1017—argued that it was permissible to retroactively amend the judgment to name non-parties as debtors. The Supreme Court distinguished those cases on the grounds that each case involved adding parties, who had controlled or participated in the suits leading to the judgments. It then noted:

> [A]n amendment to the judgment here to include [the individual principals] would constitute a denial of due process of law. (U.S.

> Const., 14th Amend.) That constitutional provision guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses. [Citations omitted.] To summarily add [the principals] to the judgment heretofore running only against [their corporation], without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate this constitutional safeguard. Nor is this difficulty overcome by the suggestion that [the principals] should have intervened in the action brought solely against [their corporation] if they desired to assert any personal defenses against the drafts. They were under no duty to appear and defend personally in that action, since no claim had been made against them personally. (51 Cal. 2d at 176; 331 P.2d at 3.)

Bucci and Titan are entitled to due process and the opportunity to respond to the allegations that ACI operated unlawfully. Bucci was neither a named respondent nor a party to the proceeding in which the Commission ordered ACI to make restitution to ratepayers. There is no evidence that Bucci had any control over ACI's participation in the Commission's proceeding against ACI. By the time that proceeding commenced, ACI was in receivership, and the evidence is that the receiver hired counsel to represent ACI and controlled ACI's defense. Further, the receiver stipulated to the violations that resulted in the Commission order to make restitution. Under the circumstances, to hold Bucci personally liable for that restitution would violate his due process rights.

This conclusion also exonerates Titan from any liability, for it was not a party to the Commission's earlier proceeding either. The logic of CSD's argument strengthens this conclusion. Titan and ACI are alleged to be alter egos of Bucci. CSD invokes the alter ego doctrine to make Bucci personally liable for the restitution award against ACI, and then attempts to reach Titan's assets to satisfy the award on the grounds that it too is Bucci's alter ego. Since personal

liability cannot constitutionally be fastened on Bucci, the relationship between Bucci and Titan is irrelevant to this proceeding.

Because we determine that the alter ego doctrine cannot be applied to Bucci and Titan so as to hold them liable for ACI misconduct, we find they are not liable for the restitution ordered in D.00-04-012.

Remedies and Fines

We must determine whether Respondents' authority granted under D.99-08-049 should be suspended or revoked. We also must determine whether Respondents should be fined as provided in Pub. Util. Code §§ 2107 and 2108 for violating Rule 1.

CSD's Proposals and Respondents' Response

CSD recommends that Respondents' operating authority be held invalid and revoked and that Respondents be fined for intentionally omitting and misstating information on the CPCN application. CSD does not propose a specific fine but states it could justify a fine of $1250 per violation per day. CSD proposes that the fine be assessed for a period of 634 days, the difference between the date Respondents filed the CPCN application and the date this investigation was filed, and be set at the statutory minimum fine per day, $500.

Respondents state that they should not be fined, and that Titan's operating authority should not be revoked. They note that Titan has suspended its operations and that they have provided CSD with sufficient financial statements to show that Titan has a current net worth of less than $5,000. Titan has no ability to pay any fines or penalties. Titan notes that the potential fine proposed by CSD is far higher than that imposed by the Commission on Sprint Spectrum L.P. dba Sprint PCS, a much larger company, for violating Rule 1.

Revocation

The severity of the violations of our rules and regulations is a criterion we use in determining whether we should revoke the operating authority of a utility. As discussed above, we have concluded that Respondents violated Rule 1 and are unfit to resell long distance services in California. The numerous investigations into allegations of slamming by ACI in California and other states and the failure to comply with our application process are sufficiently serious to warrant revoking Titan's operating authority.

We have considered Respondents' showing that Titan operated in California between six months and a year without consumer complaints and remains fit to conduct telecommunications services in California. However, Titan is the second telecommunications business of Bucci's that has ceased to provide service to customers in this state. To acquire and lose a DSL and long distance customer base in less than a year, mostly through attrition, does not persuade us to continue operating authority that was obtained by misleading the Commission. Titan was not eligible to use the registration application. Although we did not contemplate a specific remedy for improperly using the registration process, revoking that authority and permitting the opportunity to reapply is consistent with the process we envisioned.

We revoke Titan's operating authority, because Respondents violated Rule 1 in obtaining that authority, because the authority obtained is invalid, and because Respondents are unfit to resell long distance services. Although we revoke Titan's operating authority obtained through the registration process, we do not preclude Titan from reapplying for authority through the formal application process in which we can consider any conditions on Titan's operating authority. We also will require Bucci to apply by formal application for

authority for any telecommunications carrier in which Bucci is an officer, director, partner, or owner.

Legal Standard for Imposition of Remedies and Fines

In D.98-12-075, we established standards for the imposition of fines. We consider two general factors: (1) severity of the offense, and (2) the conduct of the utility. In addition, we consider the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent. (*See Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, D.01-08-019, 2001 Cal. PUC LEXIS 653 *18.) A fine might be a penalty of not less than $500, nor more than $20,000, for each offense, with every day of a continuing offense a separate and distinct offense. (Pub. Util. Code §§ 2107, 2108.)

Severity of the Offense

The size of the fine should be proportionate to the severity of the offense. To determine severity, we consider three factors: (1) physical harm; (2) economic harm; and (3) harm to the regulatory process. Respondents' violation of Rule 1 resulted in no physical harm. Regarding economic harm, we consider costs imposed upon the victims of the violation and unlawful benefits gained by the public utility; we use the greater of these two amounts in setting a fine. Here there are no costs imposed on the victims. The record does not reflect that Respondents directly benefited from their conduct, because we have not established a benefit from receiving authority through an expedited process rather than applying for authority through the more extensive application process. The record does not conclusively establish that we would have declined to grant Titan a certificate. Instead, Respondents' conduct harmed the regulatory process by failing to disclose ongoing consumer misrepresentation investigations

on the CPCN application. We must ensure that the simplified application process serves its intended purpose, to permit those with a clean slate to obtain expedited authority while requiring those with prior conduct that might be of concern to use the more detailed and lengthier application process. We accord a high level of severity to any violation that harms or undermines the regulatory process (2001 Cal. PUC LEXIS, *supra*, at **23-24), and find this violation constitutes a grave offense.

Conduct of the Utility

In D.98-12-075, we held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, we consider the following factors: (1) the utility's actions to prevent a violation; (2) the utility's actions to detect a violation; and (3) the utility's actions to disclose and rectify a violation.

We expect utilities to take reasonable steps to ensure compliance with applicable laws and regulations. The record reflects that Bucci delegated the completion of the application and did not monitor its accuracy, conduct that could, and in this instance did, facilitate a violation. The application attaches Bucci's resume in which he states that he built ACI into a $14 million company from nothing by 1998. However, Bucci failed to note that ACI was in receivership, an event that had occurred when the application was filed. Both the omissions in the resume and the application indicate, at a minimum, that Bucci failed to take reasonable steps to ensure that Titan's application was completed in conformance with our requirements.

CSD and Respondents dispute whether there was intent to mislead the Commission. Absent actual notice of all pending investigations, CSD's allegation that Bucci intentionally misled the Commission remains speculative,

especially because the receiver represented ACI in many of those matters. Although the record does not prove intent to mislead the Commission with respect to ongoing investigations and regulatory sanctions, Respondents should not avoid responsibility for the truthfulness of their representations to the Commission. We expect utilities to diligently monitor their activities, and we consider deliberate wrongdoing an aggravating factor. Although the record does not establish deliberate wrongdoing, it does establish carelessness inconsistent with the diligence we expect.

We expect utilities to promptly bring violations to our attention. The record does not conclusively demonstrate that Bucci was aware of the failure to accurately complete the application in advance of this investigation. However, Michigan's revocation of Titan's operating authority because Bucci failed to pay the fine assessed against ACI should have prompted Bucci to review the status of Titan's operating authority in other jurisdictions. Instead, at that time Titan had ceased providing telecommunications services in California. Based on the conduct criteria, Respondents' ongoing carelessness weighs in favor of more than a minimum penalty.

Totality of the Circumstances and Financial Resources of the Utility

In D.98-12-075, we held that the size of the fine should reflect the financial resources of the utility and should consider two factors, the need for deterrence and any adjustment to achieve deterrence without becoming excessive. We also held that a fine should be tailored to the unique facts of each case.

The penalty for failing to disclose information requested on the CPCN application should be tailored to the resulting harm and should be sufficient to ensure that applicants fully disclose information requested.

Respondents' offense involves regulatory harm that Bucci at no time acted to avoid. As a result, CSD conducted an extensive investigation into ACI's actions, an outcome that would have been avoidable had Bucci monitored the regulatory consequences of ACI's customer operations. Although CSD did not propose a specific fine, CSD indicated a range of acceptable fines, from $500 to $1250 per offense. CSD also provided the number of hours Molzner spent on this investigation, a total of 957 hours at an hourly rate of $23.88 for a total of $22,853. This investment of resources is a fair measure of the regulatory harm involved and suggests an appropriate amount for the fine.

Titan obtained operating authority through our expedited registration process, authority it should have requested through the lengthier application route. As a result, the duration of the offense extends, at a minimum, from the date Titan filed its application until the date it received its CPCN, a total of 35 days, because that was the timeframe when Respondents could have corrected the registration application. CSD proposes that the violation extend until the date this investigation was filed, a total of 634 days. However, once we granted Titan its operating authority, there would be little reason for Titan to review its application for accuracy.

Respondents failed to disclose two matters that Question 7 requested and that would have prompted a "not true" response. CSD proposes that a false answer to one question be considered one offense and we will adopt that proposal and find there was one offense.

CSD does not contest Respondents' claim that Titan has limited ability to pay a fine, so we are constrained in setting the fine higher than the minimum amount per day per offense, $500 for 35 days. We fine Titan $17,500. This amount shall be payable to the State of California General Fund. Although that amount is less than the actual investigation cost, it is sufficient to deter

future violations. We require that this amount be paid before Respondents seek future operating authority.

Precedent

Finally, D.98-12-075 requires that we address previous decisions that involve reasonably comparable factual circumstances and explain any substantial differences in outcome. In D.01-08-019, we reviewed precedent for Rule 1 violations. In that decision, we adopted a standard of $10,000 per offense after noting that we had fined one utility $10,000 plus parties' expenses of $38,495 and proposed to fine another utility $78,500 for Rule 1 violations. Although the fine assessed here is less, it is reasonable to do so in light of Titan's limited ability to pay a fine.

Findings of Fact

1. Titan filed its application for CPCN with the Commission on July 19, 1999, pursuant to the Commission's registration process. The Commission granted that application in D.99-08-049 issued on August 23, 1999, and authorized Titan to operate as a switchless reseller of interLATA and intraLATA services.

2. Question 7 of the CPCN application asks the applicant to respond "true" or "not true" to the statement that no officer, director, general partner, or owner of applicant had acted in that capacity with an interexchange carrier that 1) filed for bankruptcy; 2) had a judgment or verdict involving a violation of Bus. & Prof. Code § 17000 et seq. or consumer misrepresentation; or 3) is under investigation for similar violations.

3. Respondents answered "true" in response to Question 7.

4. The Arizona Attorney General's 1998 complaint against ACI was brought under the Arizona Consumer Fraud Act and alleged that ACI and Bucci had violated that act.

5. On July 22, 1998, the New Jersey Division of Consumer Affairs-Office of Consumer Protection served a subpoena on ACI to appear by August 6, 1998, and produce documents related to ACI's customer solicitation process, customer complaints, evidence of agreement to switch to ACI for specific customers, etc. under the authority granted by the New Jersey Consumer Fraud Act.

6. Prior to the filing of Titan's application, the Texas Public Utilities Commission issued a notice of intent to assess an administrative penalty against ACI for slamming (June 23, 1998), the Michigan Public Service Commission filed a complaint against ACI (April 30, 1999), and the Idaho Attorney General notified Bucci that it had commenced an investigation of ACI's business practices (March 30, 1999).

7. On June 24, 1999, the Commission opened an investigation into the operations, practices, and conduct of ACI and Larry Cornwell, in his capacity as receiver for ACI, to determine whether ACI had violated Pub. Util. Code § 2889.5 by switching subscribers' long distance provider without the subscribers' authorization.

8. CSD's attempts to mail the ACI OII and investigative report to Bucci were unsuccessful; they were returned unopened.

9. The Commission revoked ACI's CPCN and ordered ACI to pay $200,000 restitution in D.00-04-012, issued on April 6, 2000.

10. The $17,500 fine is established by assessing a fine of $500 per day for one offense, for a total of 35 days, the time from filing of Titan's registration application and issuance of the decision granting that application.

Conclusions of Law

1. Rule 1 of the Commission's Rules of Practice and Procedure provides that any person who transacts business with the Commission agrees never to mislead

the Commission or its staff by an artifice or false statement of fact or law. Titan and Bucci misled the Commission by answering "true" to Question 7 when ACI was under investigation in Arizona and New Jersey for consumer fraud.

2. It is reasonable to revoke Titan's operating authority, because Titan was not eligible to use the registration process and had numerous technical violations of Commission rules, and because Bucci's prior experience with ACI resulted in numerous investigations and sanctions for slamming.

3. Bucci and Titan are entitled to due process and the opportunity to respond to the allegations that ACI operated unlawfully.

4. To hold Bucci personally liable for the restitution ordered by the Commission would violate his due process rights.

5. Pub. Util. Code § 2107 provides for a penalty between $500 and $20,000 for each offense of a public utility.

6. Titan should be assessed a penalty of $17,500 for violating Rule 1 after applying the criteria adopted in D.98-12-075.

7. Titan and Bucci were not eligible to use the registration process to apply for a CPCN and the authority we granted in D.99-08-049 is invalid and should be revoked.

8. Today's order should be made effective immediately to provide conduct guidance generally and to resolve the status of the Respondents.

O R D E R

IT IS ORDERED that:

1. The certificate of public convenience and necessity of Titan Telecommunications, Inc. (Titan) is revoked.

2. Titan shall pay a fine of $17,500 for the Rule 1 violation, payable to the State of California General Fund and tendered to the Commission's Fiscal Office within 20 days from the effective date of this order.

3. Any future request to this Commission for operating authority by Titan shall be made by formal application.

4. Titan and its directors, officers, partners, owners, and agents shall not apply for a certificate of public convenience and necessity for Titan or any other telecommunications carrier until Titan has paid the fine ordered herein.

5. Any future request to this Commission for operating authority by Christopher Bucci, or by any entity in which Christopher Bucci is a director, officer, partner, principal, or agent, shall be made by formal application.

6. Investigation 01-03-021 is closed.

This order is effective today.

Dated _____, at San Francisco, California.