Decision 10-07-023 July 29, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Broadvox-CLEC, LLC for a Certificate of Public Convenience and Necessity to Provide Resold and Limited Facilities-Based Local Exchange and Interexchange Telecommunications Services within California.	Application 09-06-004 (Filed June 4, 2009)

DECISION GRANTING JOINT PARTIES' MOTION FOR COMMISSION ADOPTION OF SETTLEMENT AGREEMENT AND APPROVING SETTLEMENT AGREEMENT

1. Summary

This decision grants the joint motion of Broadvox-CLEC, LLC (Broadvox) and the Commission Consumer Protection and Safety Division (CPSD) for Commission adoption of a settlement agreement in this proceeding (Settlement Agreement) and approves the Settlement Agreement without modification.

Under the terms of the Settlement Agreement, Broadvox has agreed to pay a fine of $5,000 based on its failure to disclose a previous bankruptcy of an affiliate and regulatory violations by its affiliates in this application in violation of Rule 1.1,[1] [2] to file an amendment to this application which includes more

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[1] All Rule citations are to the Commission Rules of Practice and Procedure, unless otherwise stated.

[2] Rule 1.1 States:

1.1. (Rule 1.1) Ethics.

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complete disclosures, and to provide CPSD with verification that Mr. Engin Yesil (Yesil), who at the time of the application owned approximately 16.96 percent of Broadvox, no longer participates in any way in the management of the company. Broadvox's affiliates owned or managed by Yesil have had severe regulatory problems in a number of states. In return, CPSD has agreed to withdraw its protest to this application and to take no further enforcement action against Broadvox based on the issues raised in the protest, so long as Broadvox does not breach the Settlement Agreement or commit subsequent violations of Rule 1.1, other Commission Rules and regulations, or applicable sections of the Public Utilities Code.

Based on the above, we find that this Settlement Agreement meets the criteria stated in Rule 12.1(d), and that approval of the Settlement Agreement is in the public interest. We approve the Settlement Agreement as drafted by the parties, with the additional requirement that Broadvox shall reference this decision in any subsequent applications to the Commission.

This proceeding shall remain open so that Broadvox may file an amendment to the application as consistent with the Settlement Agreement.

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.

2. Background and Procedural History

Broadvox-CLEC, LLC (Broadvox) is a Delaware limited liability company, which has its principal place of business located in Cleveland, Ohio. Broadvox has registered with the California Secretary of State and is authorized to conduct intrastate business in California.

Broadvox filed this application for a certificate of public convenience and necessity (CPCN) authorizing the company to provide limited facilities-based and resold telecommunications services in the service territories of Pacific Bell d/b/a AT&T California, Verizon California Inc., SureWest Telephone, and Citizens Telecommunications Company, and interexchange services statewide on June 4, 2009. The application states that Broadvox will initially resell local exchange and interexchange services, and will also provide local exchange service utilizing unbundled network elements purchased from the incumbent local exchange carriers. All services will be routed solely over facilities owned by other certificated carriers. Applicant does not plan to construct or extend any facilities pursuant to this application.

In the application, Broadvox certified under penalty of perjury that:

1) Neither Broadvox, any affiliate, officer, director, partner, nor owner or more than 10 percent of Broadvox, or any person acting in such capacity whether or not formally appointed, has been sanctioned by the Federal Communications Commission (FCC) or any state or regulatory agency for failure to comply with any regulatory statute, rule or order; and

2) No affiliate, officer, director, partner, or person owning more than 10 percent of Applicant, or anyone acting in such a capacity whether or not formally appointed, held one of these positions with a telecommunications carrier that filed for bankruptcy, or has been found either criminally or civilly liable by a court of appropriate jurisdiction for a violation of Sections 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.

On July 9, 2009, the Commission's Consumer Protection and Safety Division (CPSD) filed a protest to this application, on the grounds that some of the officers of Broadvox have held or currently hold officer positions with other telecommunications carriers that have been sanctioned for regulatory violations in other states.[3]

On August 18, 2009, the parties filed a Joint Case Management Statement (Statement), which states that CPSD had uncovered numerous violations of regulatory requirements in other jurisdictions by telecommunications carriers owned or controlled by the officers, directors, or shareholders of Broadvox that were not disclosed by Broadvox in the application. In addition to other regulatory problems, the Statement notes that Yesil, who owns 16.96 percent of Broadvox, served as either an officer, manager or officer of several telecommunications carriers, NeTel, Inc. (d/b/a Go 2 Telecom, Inc. and Tel 3, Inc.), Intelligent Switching and Software, Inc (ISS)., Netra, Inc., and Radiant Telecom, Inc.(Radiant), which had engaged in extensive regulatory violations and had had their certifications revoked or cancelled by a number of states.[4] According to the Statement, in 2008, as a result of a formal complaint filed by

[3] As described in CPSD's protest, these regulatory violations generally consisted of failure to file required reports, late filing of required reports, and failure to pay required fees.

[4] Among other revocations, on August 21, 2008, in Resolution T-17155, this Commission revoked Radiant's CPCN, based on the company's failure to file required reports.

APCC Services, Inc. (APCC), the FCC ordered ISS to pay damages to APCC in the amount of $574,073.07, plus interest, based on ISS' violation of payphone compensation rules.[5] In addition, NeTel, Inc., for which Yesil serves as President, Director, Secretary, and Treasurer, had filed for bankruptcy in Florida in 1998, and Broadvox did not disclose this fact in its application.

According to the Statement, in February 2009, Broadvox filed litigation against Yesil for breach of contract in the U.S. District Court in Ohio in a law suit, which included claims of fraud and negligent misrepresentation.

Broadvox contends that its nondisclosure of these issues was inadvertent.

A prehearing conference was held before the assigned Administrative Law Judge (ALJ), Myra J. Prestidge, on August 24, 2009. The parties later reached an agreement regarding settlement of the issues in this proceeding (Settlement Agreement). The parties filed a joint motion for Commission adoption of the Settlement Agreement on November 30, 2009. In response to a ruling by the assigned ALJ, Broadvox filed additional information regarding the financial status of the company on March 30, 2010.

A scoping ruling was issued by the assigned Commissioner and assigned ALJ in May 2010.

3. The Settlement Agreement

The principal terms of the Settlement Agreement between Broadvox and CPSD are as follows:

A. Filing of Amendment to Application

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[5] See 2008 FCC LEXIS 4310.

Broadvox has agreed to file an amendment to this application, which adequately discloses the regulatory history of the company and that of its officers, directors, and/or shareholders holding a 10 percent or greater ownership interest in the company.

B. <u>Conditions for Commission / Approval of Amended Application</u>

Broadvox and CPSD consent to a Commission decision in this proceeding which grants approval of the amended application, subject to Commission approval of the Settlement Agreement and inclusion of the following paragraphs in the ordering paragraphs of the Commission decision:

1) **<u>Payment of Fine</u> -** A requirement that Broadvox pay a fine of $5,000 to the Commission within 10 days of the issuance of a Commission decision granting the amended application.
2) **<u>No Further Involvement of Yesil in Ownership or Management of Broadvox</u> -** A satisfied requirement that Broadvox present proof that Yesil no longer has any legal, beneficial, or equitable interest in Broadvox or its affiliates.

C. <u>Admissions by Broadvox</u>

1) **<u>Violation of Rule 1.1</u> -** Broadvox admits that it violated Rule 1.1 by failing to disclose the bankruptcy of NeTel, Inc., if not the regulatory history and other cited matters related to telecommunications carriers in which Yesil had an ownership interest or management role, even if Broadvox's nondisclosure of these facts was inadvertent, as claimed by Broadvox.
2) **<u>No Further Admissions by Broadvox</u> -** Except for the violation of Rule 1.1 stated above, nothing in the Settlement Agreement shall constitute, or be considered as, an admission of liability or wrongdoing by Broadvox.

D. <u>Enforcement</u>

1) **Material Breach of Settlement Agreement - ** Each material breach of the Settlement Agreement constitutes a separate violation and entitles the Commission to take any necessary action to enforce its orders.

2) **Final Release and Settlement - ** After payment of the $5,000 fine described above, the Settlement Agreement shall release Broadvox from, and constitute a final settlement of, any and all costs, direct or indirect, presently known or unknown, accruing to or incurred by the Commission, including without limitation CPSD, during the course of its investigation and review in this proceeding.

E. Jurisdiction of Commission / Applicability of State Law

Broadvox and CPSD agree that the Commission has primary jurisdiction over any interpretation, enforcement, or remedies pertaining to the Settlement Agreement, to the extent provided by law. The Settlement Agreement shall be governed by and interpreted in accordance with California law and Commission rules and regulations.

F. Legal Effect of Settlement Agreement

1) **Binding on all Parties - ** The Settlement Agreement is binding on all parties to this action.

2) **Settlement Agreement Is Not Commission Precedent -** Except as set forth above, the parties agree that pursuant to Rule 12.5, the Settlement Agreement shall not constitute approval of, or precedent regarding, any principle or issue in this or any future proceeding.

G. Subsequent Enforcement Actions Against Broadvox

If the Commission approves the Settlement Agreement, CPSD shall neither initiate nor continue any enforcement action or seek any further administrative or other penalties against Broadvox based on the nondisclosures cited above. This provision shall not apply if Broadvox breaches the Settlement Agreement or the Commission order approving it. This provision shall not prohibit the Commission from considering the Rule 1.1 violation admitted by Broadvox in the Settlement Agreement, if the Commission finds that Broadvox commits subsequent violations of Rule 1.1, other Commission Rules, regulations, or sections of the Public Utilities Code applicable to Broadvox's operations.

H. No Inconsistent Action by the Parties

Broadvox and CPSD agree not to take any action inconsistent with fully supporting the Settlement Agreement.

I. No Further Protest by CPSD

CPSD agrees that it will not further protest this application based on the investigation or allegations of Broadvox's nondisclosures cited above, so long as Broadvox does not further violate the Commission's Rules, regulations, or sections of the Public Utilities Code applicable to Broadvox's operations.

J. Settlement Agreement Is Not Severable / Parties' Consent to Modifications of Settlement Agreement by Commission

If, pursuant to Rule 12.4, the Commission materially modifies or negates any provision of the Settlement Agreement, the parties must consent to such change. A party is deemed to have consented to the Commission modification unless within 15 days following the date of the Commission's proposed modifications (or longer if specified by the Commission), that party notifies the other party and files with the Commission its objection to the modification(s). After the 10^{th} day following the filing of the objection, if the objecting party has not withdrawn, cancelled, or modified its objection, the Settlement Agreement will be deemed rescinded. If this Settlement Agreement is rescinded following Broadvox's payment of all or part of the fine discussed above, the amount paid by Broadvox shall be refunded within 15 days of rescission.

K. Binding Effect of Settlement Agreement

The Settlement Agreement is binding on the parties, their successors, assignees, executors, and administrators.

L. Entry Into Settlement Agreement by the Parties

Upon entering into the Settlement Agreement, the parties state, acknowledge, and agree that:

1) **Investigation of Applicable Facts and Law -** Each party has investigated the facts and law applicable to the matters described in the Settlement Agreement.
2) **No Reliance on Statements, Promises, or Representations Outside of Settlement Agreement -** No party has relied or presently relies upon any oral or written statement, promise or representation by any other party, except as specifically set forth in the Settlement Agreement.
3) **Settlement Is Fair / No Fraud, Duress or Undue Influence by Opposing Party -** The Settlement Agreement is fair and is not the result of any fraud, duress, or undue influence by any other party.
4) **Parties' Understanding of Rights and Duties Under Settlement Agreement / Review of Settlement Agreement by Legal Counsel -** Each party has read and fully understands its rights, privileges, and duties under the Settlement Agreement, and has had its attorney or other authorized person review the Settlement Agreement.
5) **Parties' Free and Voluntary Entry Into Settlement Agreement -** The provisions of the Settlement Agreement are adequate, reasonable, and mutually agreed upon, and each party is entering into the Settlement Agreement freely and voluntarily.

4. Discussion

In this case, we must evaluate whether the Settlement Agreement between Broadvox and CPSD meets Commission requirements for approval. Under

Rule 12.1(d), the Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is:

- Consistent with the law,
- Reasonable in light of the whole record, and
- In the public interest.

We find that the Settlement Agreement meets the criteria for approval under Rule 12.1(d), as follows.

4.1. The Settlement is Consistent With Law and Prior Commission Decisions

Under Public Utilities Code Section 1001,[6] telecommunications carriers must apply to the Commission for a CPCN before offering or providing telecommunications services to the public in this state. The Commission has discretion to deny the application if it finds that the management of the company is not fit to serve the public or has not demonstrated the ability to operate in a manner consistent with the law and regulatory requirements, in order to protect the public interest.[7] The Commission's grant or denial of a CPCN is an exercise of the power of the state to determine whether the rights and interests of the public will be advanced by allowing the entity applying for the CPCN to offer services to consumers in California.[8] Under state law, the Commission has broad powers to supervise and regulate public utilities in order to protect the public.[9]

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[6] All subsequent Code citations are to the Public Utilities Code, unless otherwise stated.

[7] See D.04-05-033.

[8] See *Oro Electric Corporation v. Railroad Commission of California*, 169 Cal. 455 (1915).

[9] Section 701 states:

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Therefore, the Commission clearly has legal authority to require Broadvox to file an amended application which contains more complete disclosures of the regulatory history of the company and its owners, directors, and shareholders holding a 10 percent or greater ownership interest, and to condition its further consideration of this application upon the submission of proof by Broadvox that Yesil, who has been linked to many of the regulatory problems involving Broadvox's affiliates, no longer has any legal, equitable, or beneficial interest in Broadvox or its affiliates.

The Commission also clearly has legal authority to require Broadvox to pay a fine of $5,000, based on the company's failure to disclose both the bankruptcy of its affiliate, NeTel, Inc., and the regulatory violations by Broadvox's affiliates in which Yesil had an ownership interest or management role, in violation of Rule 1.1. Under Section 2107, the Commission may impose a fine ranging from $500 to $20,000 for a violation of a Commission Rule.[10] Under

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§ 701. Commission's authority to supervise and regulate public utilities

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

[10] Section 2107 states:

§ 2107. Penalty for offenses not otherwise provided.

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense.

Section 2107, the Commission has discretion to determine the amount of the fine, based on the circumstances of each case.[11]

Although the Commission has, in some past decisions, imposed higher fines for violation of Rule 1.1,[12] in other cases, the Commission has imposed lesser fines.[13] Here, CPSD has agreed that a fine of $5,000 is reasonable because Broadvox's violation is less serious than violations in other cases in which higher fines were imposed, Broadvox's claim that its violation was inadvertent is not implausible, and Broadvox has cooperated with CPSD in this matter. Broadvox has also agreed to pay the $5,000 fine.

For all of the above reasons, we find that the Settlement Agreement is consistent with applicable law and previous Commission decisions.

4.2. The Settlement Agreement is Reasonable in Light of the Record as a Whole

We find that the Settlement Agreement is reasonable in light of the record as a whole.

A settlement is reasonable in light of the whole record if it is suggested by the seriousness of the allegations and the strength of the evidence, as well as the

[11] In determining the size of a fine, the Commission applies the criteria adopted in D.98-12-075, which generally include: a) the severity of the offense, b) the conduct of the utility, c) the financial resources of the utility, and d) the totality of the circumstances in each case. See D.07-05-040.

[12] For example, see D.06-04-048, D.03-01-079, D.01-08-019, and D.09-06-013.

[13] For example, see D.07-05-060, in which the Commission imposed a fine of $10,000 but suspended payment of all but $500 of the fine, upon the condition that the remaining $9,500 would be waived if the carriers did not engage in any additional violations for two years after approval of the settlement agreement.

prehearing evaluations of the parties.[14] Other relevant factors to a determination of whether a settlement is reasonable include the risk and expense of further proceedings, as well as the protection of the public interest.[15]

Here, Broadvox has admitted its failure to disclose the previous bankruptcy of its affiliate, NeTel, Inc., of which Yesil is President, Director, Secretary, and Treasurer, and the past regulatory problems of Broadvox's affiliates in which Yesil has an ownership interest or a management role, in violation of Rule 1.1. CPSD has represented to the Commission that Broadvox's claim that this violation was inadvertent was not implausible, and that upon the provision of proof that Yesil has no continuing ownership interest or management role in Broadvox, Broadvox appears to be fit to offer telecommunications services to customers in California. Broadvox has cooperated with CPSD in this investigation. Under these circumstances, the Settlement Agreement is reasonable and advances the Commission's interests in both promoting a competitive telecommunications market and ensuring that licensed telecommunications carriers in this state are fit to serve the public. This settlement also eliminates the need for additional proceedings on these issues, which would be expensive and time-consuming for the parties and the Commission.

We therefore find that the proposed Settlement Agreement is reasonable in light of the whole record.

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[14] D.00-09-034.

[15] *Id*.

4.3. The Settlement is in the Public Interest

The Settlement Agreement is in the public interest, because it will resolve the issues raised by the parties without the need for extensive, time-consuming, and costly Commission proceedings and litigation; will allow Broadvox to cure its violation of Rule 1.1 by paying the fine, and filing an amendment to the application with more complete disclosures; and will improve the management of Broadvox and the company's fitness to serve the public.[16]

In addition to the above criteria applicable to all settlements, we note that the Settlement Agreement fairly represents the affected interests, since Broadvox represents the interests of its shareholders, and CPSD represents the interests of all ratepayers in this state and the public. Finally, we note the Settlement Agreement includes sufficient information regarding the rights and obligations of the parties and is adequately clear for the parties and the Commission to understand its terms and for the parties to carry out the agreement.

5. Conclusion

For all of the foregoing reasons, we grant the joint motion of Broadvox and CPSD for approval of the Settlement Agreement and approve the Settlement Agreement, with the additional requirement that Broadvox reference this decision in any subsequent applications to the Commission. We also direct Broadvox to file an amendment to this application, as required by the Settlement Agreement, within 30 days of the issuance of this decision.

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[16] We note that after Broadvox's filing of an amendment to this application, the Commission will conduct further proceedings regarding whether Broadvox's application for a CPCN should be granted. We therefore do not prejudge here whether Broadvox is qualified for a CPCN in this state or whether the application will be granted or denied.

6. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) and Rule 14.6(c)(2), the otherwise applicable 30-day period for public review and comment is waived.

7. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. Broadvox is a Delaware limited liability company that has received authorization from the California Secretary of State to conduct business in California.

2. On June 4, 2009, Broadvox filed this application for a CPCN authorizing the company to provide limited facilities-based and resold telecommunications services in this state.

3. In this application, Broadvox certified under penalty of perjury that:

   a) Neither Broadvox, any affiliate, officer, director, partner, nor owner or more than 10 percent of Broadvox, or any person acting in such capacity whether or not formally appointed, has been sanctioned by the Federal Communications Commission or any state or regulatory agency for failure to comply with any regulatory statute, rule or order; and

   b) No affiliate, officer, director, partner, or person owning more than 10 percent of Applicant, or anyone acting in such a capacity whether or not formally appointed, held one of these positions with a telecommunications carrier that filed for bankruptcy, or has been found either criminally or civilly liable by a court of appropriate jurisdiction for a violation of Sections 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.

4. Yesil holds a 16.96 percent ownership interest in Broadvox.

5. Broadvox's affiliates in which Yesil holds an ownership interest or management position have had significant regulatory problems and have had their certifications revoked or cancelled in a number of states.

6. NeTel, Inc., a Broadvox's affiliate for which Yesil is President, Director, Secretary, and Treasurer, filed for bankruptcy in Florida in December 1998.

7. Broadvox did not disclose the past regulatory problems of affiliates in which Yesil has an ownership interest or management role or the bankruptcy of NeTel, Inc. in this application.

8. On July 9, 2009, CPSD filed a protest to this application, on the grounds that some of the officers of Broadvox have held or currently hold officer positions with other telecommunications carriers that have been sanctioned for regulatory violations in other states.[17]

9. The parties have agreed to settle this case after extensive discussions and review of the record.

10. The parties filed a joint motion for Commission adoption of the Settlement Agreement on November 30, 2009.

11. Broadvox admits that its failure to disclose the NeTel, Inc.'s bankruptcy and the past regulatory problems of Broadvox's affiliates in which Yesil has an

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[17] As described in CPSD's protest, these regulatory violations generally consisted of failure to file required reports, late filing of required reports, and failure to pay required fees.

ownership interest or management role violated Rule 1.1, but claims that this violation was inadvertent.

12. The principal terms of the Settlement Agreement are set forth in the foregoing decision.

13. Broadvox and CPSD fairly reflect all affected interests in this proceeding. Broadvox represents the interests of its shareholders. CPSD represents the interests of ratepayers and the public.

14. Litigating the issues in this case would unnecessarily consume the time and valuable resources of the Commission and the parties.

Conclusions of Law

1. The Settlement Agreement fully resolves and settles all disputed issues between the parties in this proceeding.

2. The Settlement Agreement is reasonable in light of the whole record, consistent with law, consistent with prior Commission decisions, and in the public interest, and therefore meets the requirements of Rule 12.1(d).

3. The Settlement Agreement contains adequate information regarding the rights and obligations of the parties and is sufficiently clear for the Commission and the parties to understand its terms and for the parties to carry out the agreement.

4. The Settlement Agreement is in the public interest and should be approved, with the additional requirement that Broadvox disclose this decision in any subsequent applications to this Commission.

5. This decision should be effective today so that the Settlement Agreement will take effect immediately.

O R D E R

IT IS ORDERED that:

1. The joint motion of Broadvox-CLEC, LLC and the Commission Consumer Protection and Safety Division for adoption of the proposed Settlement Agreement on file in this docket is granted.
2. The Settlement Agreement is approved without modification.
3. Broadvox-CLEC, LLC shall reference this decision in any subsequent application to this Commission.
4. Broadvox-CLEC, LLC shall file an amendment to this application, which contains the information required by the Settlement Agreement, within 30 days of the issuance of this decision.
5. Application 09-06-004 remains open, for further adjudication of Broadvox-CLEC, LLC's application for a certificate of public convenience and necessity

authorizing the company to provide limited facilities-based and resold local exchange and interexchange services in this state.

This order is effective today.

Dated July 29, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners