ALJ/RLR/tcg * *

**Mailed 11/24/98**

Decision 98-11-054 November 19, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| In the Matter of the Application of Landmark Communications, Inc., a California Corporation, for a Certificate of Public Convenience and Necessity to Resell Local, InterLATA, and IntraLATA Telecommunications Services Within California. | Application 97-07-008 (Filed July 10, 1997) |

ORIGINAL

# OPINION

(See Appendix A for appearances.)

## Summary

By this decision, we deny the application filed by Landmark Communications, Inc. (Landmark) for a Certificate of Public Convenience and Necessity (CPCN) on grounds of fitness of the applicant, and dismiss the application without prejudice.

## Procedural Background

By application dated and filed July 10, 1997, Landmark sought a CPCN to resell local, interLATA and intraLATA telecommunications services between points within the State of California (application p. 1) both as a Competitive Local Carrier (CLC) and a Nondominant Interexchange Carrier (NDIEC). By Decision (D.) 97-11-056 issued November 19, 1997, we denied the application finding that Landmark's President and Chief Executive Officer (CEO), William J. Kettle, was unqualified to manage a public utility in the State of California (Finding of Fact (FOF) 5), and concluding that "Applicant lacks managerial competence to provide the proposed services." (Conclusion of Law (COL) 2.)

Following the issuance of D.97-11-056 denying its application, Landmark timely filed an Application for Rehearing arguing essentially that it had not been afforded a hearing on the issue of fitness and thus had been denied due process. By D.98-02-115 dated February 19, 1998, and mailed to the parties on February 23, 1998, we agreed, and remanded the proceeding to our Division of Administrative Law Judges (ALJ Division) for "rehearing ...on the question of whether Applicant is sufficiently qualified for the grant of a CPCN as requested." (D.98-02-115, mimeo., p. 2.)

On March 3, 1998, shortly after the matter was returned to the ALJ Division, applicant filed a Petition for Reassignment of the proceeding from ALJ Timothy Kenney to another ALJ. That Petition was filed under Rule 63.2 of the Commission's Rules of Practice and Procedure (Rules) and thereby sought automatic reassignment. By Ruling dated and issued March 9, 1998, the Chief ALJ granted the Petition and reassigned the proceeding to ALJ Robert L. Ramsey.

A noticed Prehearing Conference (PHC) was held on March 11, 1998, before Commissioner Richard A. Bilas, President of the Commission and the Assigned Commissioner on the application, and ALJ Ramsey. On March 20, 1998, Commissioner Bilas issued an Assigned Commissioner's Classification Ruling and Scoping Memo which classified the proceeding as ratesetting;[1] assigned ALJ Ramsey as principal hearing officer; directed that the [evidentiary] hearing was to be held on June 1, 1998 and that discovery was to be completed

[1] As set forth in Public Utilities (PU) Code § 17.01.1 and Commission Rules of Practice and Procedure, Rules 5(b), ( c ), (d), Commission proceedings are placed into one of three categories: adjudicatory, ratesetting, and quasi-legislative for the purpose of determining what specific internal procedures will apply to the Commission's processing of the case (e.g., what ex parte rules apply, when the assigned Commissioner is required to be present). The "ratesetting" category includes not only proceedings in which the Commission sets or investigates rates, but also cases that do not clearly fit into any of the defined categories. Rule 6.1( c). The Landmark proceeding was deemed "ratesetting" under the default provision of Rule 6.1 (c ).

not later than May 26, 1998; and specified six (6) issues to be resolved at the hearing.

On March 24, 1998, counsel for the Commission's Consumer Services Division (CSD) sent CSD's Data Request #1, consisting of ten questions, to counsel for Landmark. Between April 1, 1998, and April 21, 1998, a number of letters passed between counsel for the parties concerning, on the one hand, why "the press of other business" prevented Landmark from responding to CSD's Data Request #1, and, on the other, why Landmark's failure/refusal to provide answers to CSD's Data Request #1 and Landmarks' request to CSD to delay the proceedings for sixty (60) days was unacceptable. During this time, no motion was made by either party to extend the discovery period or reschedule the hearing date.

On April 21, 1998, CSD filed a Motion to Compel Discovery or [in the alternative] to Dismiss [the] Application. On May 1, 1998, Landmark filed its response to CSD's motion and simultaneously therewith filed a Motion to Revise Hearing Schedule in which it stated that the "press of other business has made it difficult to respond to the lengthy data request submitted by the Consumer Services Division (CSD)" and "Moreover, Landmark has instituted proceedings in the United States District Court [C.98-1638-CAL(USDC; N.D. Cal.)] which may affect the procedural course of this matter."

The Assigned Commissioner was unimpressed with Landmark's "press of other business" argument and elected to formally deny Landmark's request to reschedule the proceedings, but noted that CSD required Landmark's response to CSD's data requests before it could proceed to hearing, and that Landmark's failure to timely provide such responses, as a practical matter, necessitated a delay and rescheduling of further proceedings. Such thwarting of the Commission's rulings is not looked upon with favor, and counsel should bear that in mind. If counsel has a conflict or has knowledge that it will or may be unable to timely comply with a Commission order or ALJ ruling, a motion for extension of time made at the beginning of the compliance period, rather than shortly before the period is about to expire will be viewed in a more charitable light. We believe that our process is entitled to the same respect and priority as that of any other adjudicative body.

By way of factual completeness, we note that Landmark's complaint for Injunctive and Declaratory Relief pending in the U.S. District Court was denied on July 9, 1998.

The evidentiary hearing on applicant's fitness took place before the assigned ALJ on July 1, 1998.

## Applicant's Fitness

In his Classification Ruling and Scoping Memo filed on March 20, 1998, Assigned Commissioner Bilas specified six issues to be resolved at the hearing. They are:

a. Applicant's fitness to be issued a CPCN.

b. The extent of [William J.] Kettle's involvement in events leading to the Chapter 11 bankruptcy filings of Thrifty Tel, Inc. (Thrifty Tel) and STM Corporation (STM).

c. The reason(s) for Kettle's personal Chapter 11 bankruptcy filing.

d. The reason(s) for Kettle's termination of employment at Thrifty Tel as well as the termination of employment of Kettle's wife, Maria Ayala, from her position as Thrifty Tel's Vice President of Marketing and Sales.

e. The extent of Kettle's involvement in the diversion/conversion of federal excise and state taxes collected by Thrifty Tel, but not paid over to the respective governments.

f. The extent of Kettle's involvement in the events leading to the breach of the accounts receivable financing agreement between Thrifty Tel and Fidelity Funding of California, Inc.

We will consider each in order.

**a. Applicant's fitness to be issued a CPCN.**

The answer to this issue is, in reality, a conclusion reached after a review of the totality of the record and information discussed under the other questions posed by Assigned Commissioner Bilas. It will not, therefore, be discussed as a separate question, but it should be understood that our answer to the question reflects our judgment based on the answers to the other questions posed by the Commissioner in his Classification Ruling and Scoping Memo dated March 20, 1998, as well as on the record of the July 1, 1998, evidentiary hearing. We conclude on the basis of all of the information in the record that Kettle, individually and - since he is the sole shareholder and *alter ego* of Landmark - Landmark as a corporate entity, is not fit to be granted a CPCN at this time.

**b. The extent of Kettle's involvement in events leading to the Chapter 11 bankruptcy filings of Thrifty Tel and STM.**

From approximately 1988 through August 10, 1994, when he was removed from office, Kettle served as President and Chief Executive Officer (CEO) of both Thrifty Tel and STM. From the record, it appears that STM was the investment company through which Kettle acquired Thrifty Tel, and that Kettle controlled STM at the time it went bankrupt. Information concerning STM was not developed at the hearing inasmuch as Kettle failed/refused to provide responses to CSD's data requests in sufficient time for CSD to investigate STM's activities and its decline into bankruptcy. Had Kettle timely and completely responded, that issue could have been addressed and resolved; however, because we find Kettle and Landmark unfit on the basis of other evidence which was developed of record, this frustration of an investigation into the reasons behind STM's business failure does not preclude a determination of Kettle's fitness to be granted a CPCN for his company. As President and CEO of STM and Thrifty Tel, Kettle was, from a managerial standpoint, the highest official of both companies, and as such, was the individual upon whom the responsibility for the success or failure of Thrifty Tel, as well as STM ultimately rested. Suffice it to say that in August 1994, the Board of Directors removed Kettle from his position as President and CEO of Thrifty Tel, which, according to Thrifty Tel's 10-KSB filed with the Securities and Exchange Commission (SEC) filed shortly after Kettle's ouster, was based on a breach in the terms of the Fidelity agreement. According to the 10-KSB, subsequent to Kettle's removal, Thrifty Tel's management discovered that federal excise taxes and certain state taxes the company was obligated to collect were either not collected or not paid over to the appropriate agencies.

Kettle denies all of the above and alleges that his ouster was the result of some ill-defined conspiracy between the Chief Financial Officer (CFO) and certain other officials of Thrifty Tel who took that action because they feared that Kettle intended to sell the company and, as a result, they would lose their jobs. Other than his own undocumented testimony, there is nothing in the record that lends credence to Kettle's theory, and we reject his version of events.

Kettle also alleges that the 10-KSB form filed by Thrifty Tel subsequent to his ouster is hearsay and not a proper ground upon which to base a factual finding or a legal conclusion. We disagree. The 10-KSB was filed by corporate officers authorized to prepare and file such documents; the form was submitted to a government agency (SEC) in the normal or usual course of business with knowledge that the government would rely upon the information contained therein as accurate; and there is no basis in the record to believe that the officers who prepared and filed the document were engaging in some scheme to deflect criticism for Thrifty Tel's financial condition away from themselves to Kettle. The converse is far more logical based on the record considered as a whole.

**c. The reason(s) for Kettle's personal Chapter 11 bankruptcy filing**

Kettle failed/refused to provide requested information concerning his personal bankruptcy in sufficient time for CSD to determine the causes of that personal bankruptcy. However, this attempt to avoid our evaluation of the causes, while it thwarts a finding on this question, is not as relevant as other issues in this proceeding, and therefore is not a determining factor.

**d. The reasons for Kettle's termination of employment at Thrifty Tel as well as the termination of employment of Kettle's wife, Maria Ayala, from her position as Thrifty Tel's Vice President of Marketing and Sales.**

Once again, Kettle claims that his ouster from Thrifty Tel was engineered and accomplished by the CFO of Thrifty Tel acting in concert with a few other officers/employees of the company motivated by their fear of losing their jobs in a sale of the company by Kettle. There is simply no record evidence of any such conspiracy; however, there is ample evidence that Kettle failed to exercise that degree of care expected of a CEO of a multi-million dollar corporation. His inattention or lack of oversight to the requirement to collect and remit the Universal Lifeline Telephone Service (ULTS) surcharge, a statutorily mandated charge assessed on all providers of telecommunications services for the purpose of ensuring the availability and affordability of telephone service, resulted in a failure to pay $22,913.62 in applicable surcharges by the period ending August 31, 1993 when Thrifty Tel's last payment was received. That figure does not include the $59,989 reportedly owed ULTS by Thrifty Tel in its

1994 bankruptcy proceeding (Declaration of Terry Wilson-Gray [Exh. 1, p. 2]). In addition, Thrifty Tel's 1994 bankruptcy filing indicates a $55,000 secured creditor's claim (tax lien) filed by the California Franchise Tax Board; a secured creditor's claim for $1.1 million on behalf of Fidelity Funding Acceptance Corp.; unsecured creditor's priority claims for $1.68 million in excise taxes owed to the Internal Revenue Service; $55,000 in favor of the State of California for 1993 income taxes; $65,000 in favor of the State Board of Equalization for emergency telephone users surcharge(s); $35,000 in favor of the City of Los Angeles for excise taxes; and $21,657 in favor of the Treasurer-Tax Collector of the County of Orange for unpaid property taxes; and $65,000 in favor of this Commission for unpaid Deaf and Disabled Surcharge.

e. **The extent of Kettle's involvement in the diversion/conversion of federal excise and state taxes collected by Thrifty Tel, but not paid over to the respective governments.**

In answer to this question, we must look to the totality of the evidence as there is no direct evidence in the hearing record that points to dishonesty or criminal activity on the part of Kettle in the failure of Thrifty Tel to collect the federal excise taxes and state taxes or in the failure to remit those taxes to the respective governments. That, however, does not relieve Kettle of responsibility for that failure. As President and CEO of Thrifty Tel, the proper and timely collection and remittance of those taxes was his ultimate responsibility, and though Kettle may have designated others as the actual collection/remittance clerks, the oversight responsibility remained with him. He simply failed to carry that burden.

**f. The extent of Kettle's involvement in the events leading to the breach of the accounts receivable financing agreement between Thrifty Tel and Fidelity Funding of California.**

Although the actions leading up to it are somewhat hazy, it is uncontested that on June 27, 1994, Thrifty Tel entered into a financing agreement with Fidelity Funding of California, Inc. (Fidelity), under the terms of which Fidelity purchased at face value Thrifty Tel's accounts receivable. Fidelity then advanced Thrifty Tel 65% of the face value of the accounts. This is sometimes referred to as "factoring." The remaining 35% was retained by Fidelity in a reserve account to offset fees, interest and bad debts incurred in the collection process. According to a Form 10-KSB filed with the SEC by Thrifty Tel on December 16, 1994, in August 1994, Thrifty Tel was advised by Fidelity that Thrifty Tel was in default under the terms of the agreement. After investigation, Thrifty Tel determined that the accounts receivable sold to Fidelity were overvalued inasmuch as they included duplicate accounts, aged accounts, and accounts that had already been collected. From the time of the discovery of the overadvance in August, 1994, until November of that year, Fidelity reduced the amount of its advances with the result that Thrifty Tel was forced to implement personnel reductions, most of which occurred in sales and marketing, with the result that sales decreased, which in turn led to an increase in accounts payable, which further restricted the availability of money to pay creditors, leading to eventual, but inevitable, bankruptcy in late 1994.

## Comments on Proposed Decision and Regulatory Background

Both the applicant and CSD filed comments on the Proposed Decision. CSD has properly set forth our controlling precedent that guides our disposition of this proceeding. CSD also proposes minor factual changes, which we have made where appropriate. CSD further proposes that the Commission authorize an investigation of whether the applicant violated Rule 1 by either delaying or providing evasive answers to questions posed by the Assigned Commissioner and by staff investigators. We decline staff's proposal.

Applicant argues in its comments that our finding of lack of fitness relies improperly on hearsay evidence and blames Kettle for the business failures of others. Significantly, applicant does not address its culpability in refusing to cooperate or respond in timely fashion to our staff's investigation. Applicant criticizes as hearsay the Form 10-KSB received into evidence, arguing that this SEC filing does not meet the business record exception to the hearsay rule. Even if that were the case (and we do not agree that it is), applicant overlooks Rule 64 (technical rules of evidence need not be applied in Commission proceedings) and the fact that hearsay is admissible in an administrative hearing and may be relied upon if supported by other credible evidence. In re North Shuttle Service, Inc., D.98-05-019, 1998 Cal.PUC LEXIS 348 (May 7, 1998). Applicant continues to blame a conspiracy by others for the mismanagement of enterprises previously headed by Kettle, an allegation that we considered at hearing and rejected for lack of evidence.

CSD has cited numerous Commission decisions that explain our public policy concerns in ensuring that applicants seeking to provide telecommunications services show that they possess sufficient financial resources and technical expertise to merit the issuance of a CPCN. Among other things, we have routinely examined an applicant's past business record in order to make sure that consumer rights are protected. Over eight years ago, in *Rulemaking on the Commission's Own Motion for the Purpose of Modifying Existing Tariff Filing Rules for Telecommunications Utilities, etc.*, (D.90-12-019), 35 Cal.P.U.C.2d 275 (1990) (1990 C.P.U.C. LEXIS 94 at 27) (1990 Rulemaking), we noted the concern of the California Department of Consumer Affairs over "the lack of stringent review allowing at best poorly prepared carriers to serve the public and at worst some dishonest individuals to take advantage of the public." (*Id.* at 28.) In particular, we recognized the need to protect against the "financial burdens and inconvenience to customers of poorly financed [non-dominant interexchange carriers]," including resellers, that declare bankruptcy. (*Id.* at 30.) These burdens include both loss of customer service deposits, and the abandonment of service without notice to customers. As we explained, because services are billed in arrears, "no carrier would likely be willing to advise customers that it is going out of business in 30 days." (*Id.* at 32.) Indeed, in that proceeding, Landmark's counsel in this case, and Thrifty Tel agreed that "the principals of carriers who abandon service without notifying the Commission should be identified," and that "if [such] individuals should be part of another entity that subsequently applies for a certificate, the application should be denied." (*Id.* at 33.)

In our 1990 Rulemaking, we further explained that in addition to adversely affecting the company's customers, the bankrupt company also could adversely affect California customers of other telephone companies. Specifically, we said:

> "Through the first half of 1985, Pacific stated that it was involved in more than twenty pending Chapter 11 bankruptcy proceedings regarding resellers. The revenue at risk to Pacific in these filings was reported to exceed $6 million, exclusive of legal and administrative expenses generated by these proceedings... The impact of this activity is that *California telephone service ratepayers, at large, may ultimately be in the position of bearing risk of failure in the resale marketplace.*" (D.90-02-019, 1990 C.P.U.C. LEXIS 94 at 34-35 (emphasis added).)

In 1993, in D.93-05-010, we again expressed our concern that applicants for telephone service be financially fit. While we noted that the risks to consumers from the business failure of a reseller are relatively limited, we also stated that "it is part of our responsibility to make reasonable efforts to minimize these risks." We then noted that "the record does not give us confidence that we comprehend the full effects on consumers of the reduced financial requirements [for resellers]. Because of these concerns, we will take several steps to help insure against potential harm to customers." We then explained:

> "First, in our review of applications for CPCNs for resellers, we will scrutinize the allegations of technical expertise more carefully. Reseller applicants should accordingly provide considerable detail to support their claims that they have the requisite technical expertise. By technical expertise, we mean substantial technical education or operating experience in telecommunications, experience in the telecommunications industry, and in particular with NDIECs [non-dominant interexchange carriers]. Previous business and marketing success and other experience or skills that would increase the likelihood that the business will succeed and will offer reliable service to customers will also be given some weight. The applicant should also disclose whether anyone associated with the firm was previously associated with an NDIEC that filed for bankruptcy or went out of business." (D.93-05-010, 49 Cal.P.U.C.2d at 205-206, 1993 C.P.U.C. LEXIS 381, 28-29.)

In that decision we also announced that we would more vigorously enforce user fee collection and payment requirements, including the collection and remittance by carriers of ULTS charges under § 879 of the PU Code, the payment by carriers of surcharges for funding special telecommunications devices and services for the deaf and disabled under § 2881 of the PU Code, and the payment of user fees by carriers based on their intrastate revenues under §§ 431-435 of the PU Code.

Applying these principles and underscoring our concern that applicants demonstrate that they possess basic business skills, we proceeded to deny a CPCN in Application of Peoples Telephone Company, Inc., D.93-05-057 (May 1993), 49 Cal.P.U.C.2d 267, 1993 C.P.U.C. LEXIS 406. In that case, while operating in another state, the applicant had misapplied its tariffs and overcharged its customers by over half a million dollars. Although the applicant had paid a fine and reimbursed its customers, we nevertheless required an affirmative showing that the applicant possessed the requisite business skills before we granted a CPCN. In dismissing the application without prejudice we said:

> "While the application does not indicate that Peoples [had to file bankruptcy or go out of business], its problems in Florida raise analogous kinds of consumer protection issues. It is always of concern to us when, as in this case, an applicant is alleged not to have adhered to its tariffs. We are reluctant to make a finding of technical expertise when part of that expertise must necessarily be the ability to promulgate and follow tariffs, to bill customers accurately, and to inform customers of the proper charges under the carrier's tariffs." (D.93-05-057, 1993 C.P.U.C. LEXIS 406 at 5-6.)

Noting that Peoples claimed to have put new systems in place so as to prevent a recurrence of the problems in Florida, we invited Peoples to reapply in one year to allow the company to demonstrate how well its new systems worked in these other states. (*Id.* at 6.)

Just last year, in adopting consumer protection procedures for NDIECs, we reiterated our concern about NDIECs that had previously filed for bankruptcy. One proposal would have required an applicant to identify whether persons who might exercise significant control over an applicant had previously declared bankruptcy. (D.97-06-107, Finding of Fact 4, 1997 C.P.U.C. LEXIS 535 at 20.) In response to a comment about whether this proposal provided any meaningful protection for consumers, we said:

> "While this question is not required by statute, the Commission has not been favorably impressed with the business practices of [interexchange carriers] that seek bankruptcy protection. In *Sonic Communications dba SCI Communications*, I.95-02-004 (filed February 8, 1995), the Commission initiated the investigation of a company that was allegedly transferring large groups of customers without their authorization and charging these customers exorbitant rates. Although diligently pursuing the company, the Commission was unable to secure reparations for California customers. The public interest would not be furthered by allowing those responsible for Sonic's wrongful activities to obtain a Certificate of Public

Convenience and Necessity (CPCN) via an expedited process." (D.97-06-107, 1997 C.P.U.C. LEXIS 535 at 9-10.)

We did not, however, foreclose NDIECs that had previously declared bankruptcy from entering the California market. Instead, we precluded such entities from using the expedited registration process, and made that process available only to entities which had no previous history of bankruptcy. For NDIECs with a history of bankruptcy, we set up an application procedure to allow us to examine more closely and carefully the applicant's technical expertise, including its business acumen and ability to comply with regulatory and statutory directives. We specifically found that "an applicant's regulatory compliance history is relevant and highly probative of the applicant's prospective compliance with California authorities," and that "expertise is required to operate as an NDIEC and the lack thereof will not be acceptable." (D.97-06-107, Findings of Fact 6-7, 1997 C.P.U.C. LEXIS 535 at 20-21.)

Disposition of Landmark's Application

Against this regulatory backdrop, we have carefully reviewed Landmark's application for a CPCN, the evidentiary record, and parties' comments, and conclude that Landmark has failed to show the requisite financial fitness for a CPCN. Accordingly, we will deny its application. Such denial, however, will be without prejudice. As discussed below, we explain the reasons for our denial and also provide guidance on the type of affirmative evidence that Landmark would need to provide by formal application before we would grant it a CPCN.

a. Basis for Denial

As noted above, we granted a rehearing in this proceeding in order to give Landmark/Kettle the opportunity to demonstrate that Landmark was sufficiently qualified for a CPCN. Kettle, however, repeatedly refused to respond to the Assigned Commissioner's inquiry and to our staff's requests for information, both of which were designed to probe whether Landmark possessed the business acumen to conduct a viable telecommunications business. For example, in its prehearing conference statement, Landmark argued that no hearing was necessary, despite our rules in D.97-06-107 providing for further inquiry for applicants with a history of bankruptcy. (Landmark's Prehearing Conf. Statement at 2.) At the prehearing conference itself, Landmark stated that "half the ALJs here" would not have followed D.97-06-107 (Tr., PHC 8:16-21), thus effectively arguing that it was entitled to a rubber-stamp approval of its application. Landmark also apparently believed that the consumer protection procedures of D.97-06-107 should not apply because no one claimed that Kettle's business practices and bankruptcies have caused financial harm to the public.[2]

Landmark's attempt to avoid responding to Commissioner and staff inquiries, to avoid having a hearing on its application, and to avoid any consideration of its prior business practices demonstrates a lack of respect for Commission procedures, rules and orders, and the public policies that underlie them.

Kettle has also consistently shown a lack of regard for complying with other governmental requirements, such as the payment of statutory charges, fees, and taxes assessed by various federal, state, and local governmental agencies. These include the payment of fees and charges used to support various telecommunications programs administered by the Commission. Specifically, as Thrifty Tel's President and CEO, Kettle failed to pay $125,000 in charges for

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[2] At the hearing, Kettle relied on several documents that he had refused to provide the Commission staff prior to the hearing, notwithstanding staff's formal request for such documents. Kettle's explanation was that he "just had not taken the time" until a few days before the hearing to review his documents. (Tr., Vol.1, 235:17-27; 138:13-22.) Kettle further said that he felt he did not need to cooperate with the data request because the staff could send an investigator to Los Angeles to go through the documents in the courthouse. (*Id.*, 139:2-22.)

ULTS,[3] used to support universal lifeline telephone service; $65,000 in charges to support communications services for the Deaf and Disabled; and $24,000 in other related fees. In addition, as indicated on Thrifty Tel's 10-KSB filed with the Securities and Exchange Commission, Thrifty Tel failed to pay over $1.5 million in certain federal excise taxes. Thrifty Tel also did not pay $55,000 to the California Franchise Tax Board, $65,000 to the State Board of Equalization, $35,000 in excise taxes to the City of Los Angeles, and $21,657 in property taxes to Orange County.

Kettle and Thrifty Tel's failure to remit charges required by the PU Code causes us particular concern. Kettle and Thrifty Tel collected these charges from consumers to fund the specific public policy programs set forth in §§ 879 and 2881. These programs must be funded regardless of whether any particular NDIEC remits the collected charges to the Commission. Thrifty Tel's failure to remit these charges thus means that there will be a shortfall in incremental revenue, which will have to be made up by an increase in charges paid by other consumers. Accordingly, the claims by Landmark/Kettle that the public is not harmed by Thrifty Tel's failure to pay required charges are simply not true. Indeed, the fact that these claims were even made raises a serious concern that Landmark/Kettle will continue to collect but not remit these charges if granted a CPCN.

Questions have also been raised in the record concerning Kettle's business practices in connection with a financing agreement for the acquisition of ThriftyTel's accounts receivable by Fidelity. As discussed above, such practices appear to have greatly contributed to the bankruptcy of Thrifty Tel in late 1994.

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[3] The record indicates that the ULTS debt, although not dischargeable in bankruptcy, remains unpaid. (Tr., Vol. 1, 34:9-12, id. 4:15-17.)

Kettle's response that these claims amount to a conspiracy against him is simply not substantiated in the record.

In sum, Kettle's conduct in operating previous businesses demonstrates, among other things, a troubling pattern and practice of failing to adhere to governmental requirements at every level – federal, state, and local. That conduct continued into this proceeding, as evidenced by Kettle's unwillingness or inability to comply with the Assigned Commissioner's directives and Commission staff data requests necessary to develop a complete administrative record. As we stated, "[a]n applicant's regulatory compliance history is relevant and highly probative of the applicant's prospective compliance with California authorities." (D.97-06-107, Finding of Fact 6, 1997 C.P.U.C. LEXIS 535 at 20-21.) We will therefore deny the application of Landmark/Kettle for a CPCN.

Our denial, however, is without prejudice. Landmark/Kettle may reapply for a CPCN but we will set forth certain guidelines that Landmark/Kettle must satisfy before we will grant the requested authority.

b. Guidance for Formal Reapplication

Under federal law, a state may impose requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C. § 253(b). With these specific goals in mind, we will provide guidance to Landmark/Kettle of the type of affirmative evidence that we will consider in a reapplication for a CPCN.

In particular, we will require Kettle to affirmatively demonstrate that he possesses the requisite managerial fitness to operate a telecommunications company. Affirmative evidence would include, but not necessarily be limited to, a showing by Kettle that: (1) he has completed a course of training whereby he has secured a comprehensive understanding of the proper methods of organizing and managing a business; (2) he has adopted a viable business plan with safeguards to protect against the problems and failures that resulted with his prior businesses; (3) he has adopted a system of rigorous financial and cost controls that can be readily audited; (4) he will repay those charges owed the Commission, including the ULTS charges, if such charges are not dischargeable in bankruptcy; and (5) he has demonstrated a willingness and ability to comply with all statutory and regulatory requirements, including applicable consumer protection rules adopted by the Commission.[4]

We emphasize that an applicant for telecommunications authority in California has the burden of showing by a preponderance of the evidence that it will comply with its public utility obligations, and that it has the financial, technical, and managerial resources to operate responsibly and in the public interest. Upon an affirmative showing by formal application that Landmark/Kettle has provided sufficient evidence of the nature and type illustrated above that demonstrates managerial fitness, and assuming that no other information is adduced that undercuts Landmark/Kettle's showing, we stand ready to grant Landmark/Kettle a CPCN.

## Findings of Fact

1. A rehearing of this application limited to the issue of Landmark's fitness was ordered by the Commission in D.98-02-115.

2. By Assigned Commissioner's ruling dated March 20, 1998, Commissioner Bilas set May 26, 1998 for completion of discovery and June 1, as the date of the evidentiary hearing.

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[4] For example, Landmark/Kettle could demonstrate compliance with all applicable federal, state or local requirements governing the provision of interstate or international telecommunications operations.

3. On March 24, 1998, counsel for CSD served its Data Request No. 1 on Landmark's attorney.

4. On April 21, 1998, CSD filed a motion to compel Landmark to answer CSD's Data Request No. 1.

5. On May 1, 1998, Landmark filed its response to CSD's motion to compel, and simultaneously therewith filed a Motion to Revise Hearing Schedule in which counsel stated that the "press of other business" made it difficult to respond to the lengthy data request [10 questions] submitted by CSD, and on the further ground that Landmark had instituted proceedings in the U.S. District Court [C.98-1638-CAL ( U.S.D.C., N.D. Cal)] which might affect the procedural course of this matter.

6. The Assigned Commissioner denied Landmark's request to reschedule the proceedings, but noted that as a practical matter, Landmark's refusal/failure to timely respond to CSD's Data Request No. 1 necessitated rescheduling the evidentiary hearing to July 1, 1998.

7. Landmark's complaint for Injunctive and Declaratory Relief pending in the U.S. District Court was denied on July 9, 1998.

8. The evidentiary hearing was held on July 1, 1998.

9. Questions raised by the Assigned Commissioner and the answers to those questions, based on the record as a whole, are set forth in the findings that follow.

10. As to the question:

a. **Applicant's fitness to be issued a CPCN.**

Answer: Applicant has not demonstrated fitness to be awarded a CPCN at this time.

b. **The extent of William J. Kettle's [sole shareholder of Landmark and former President and CEO of Thrifty Tel, which went out of business following the company's bankruptcy in 1994] involvement in events leading to the Chapter 11 bankruptcy filings of Thrifty Tel and STM ( a subsidiary or predecessor of Thrifty Tel).**

Answer: From 1988 through August 10, 1994, when he was removed from office, Kettle served as President and CEO of Thrifty Tel and/or STM. The untimely response of Landmark to CSD's Data Request precluded development of information concerning STM at the hearing. However, it is noted that Kettle controlled STM at the time it went bankrupt or shortly before that time. As President and CEO of Thrifty Tel and STM, Kettle was responsible for the success or failure of each company. Further information concerning Kettle's involvement in the affairs of STM and Thrifty Tel appears in one or more of the answers to the questions which follow.

11. As to the question:

c. The reasons for Kettle's personal Chapter 11 bankruptcy filing.

Answer: Kettle failed/refused to provide requested information concerning his personal bankruptcy in sufficient time for CSD to determine the causes of that personal bankruptcy. We therefore make no findings concerning this question. We note, however, Kettle's failure to make that information available on a timely basis.

12. As to the question:

    d. **The reasons for Kettle's termination of employment at Thrifty Tel as well as the termination of employment of Kettle's wife, Maria Ayala, from her position as Thrifty Tel's Vice President of Marketing and sales.**

    Answer: The evidence of record indicates Kettle was removed from office by the Board of Directors of Thrifty Tel on August 10, 1994, because failure to collect and remit ULTS surcharges resulted in a failure to pay $22,913.62 in applicable charges by the period ending August 31, 1993 when Thrifty Tel's last payment was received. That figure does not include the $59,989 reportedly owed ULTS by Thrifty Tel in its 1994 bankruptcy proceeding. In addition, the claimants' schedules in the 1994 bankruptcy list unpaid tax liens of $1.68 million in excise taxes owed to the Internal Revenue Service; $55,000 owed to the State of California for 1993 income taxes; $65,000 owed to the State Board of Equalization; $35,000 owed to the City of Los Angeles in excise taxes; and $21,657 owed to the County of Orange for unpaid property taxes. The list also includes $65,000 owed to the Commission for unpaid surcharges for the Deaf and Disabled Trust Fund, and $1.1 million claim on behalf of Fidelity Fund Acceptance Corp.

13. As to the question:

    e. **The extent of Kettle's involvement in the diversion/ conversion of federal excise and state taxes collected by Thrifty Tel, but not paid over to the respective governments.**

    Answer: There is no credible evidence of criminal activity by Kettle in the record on this point; however, as President and CEO of Thrifty

Tel, he is responsible for the failure of Thrifty Tel to properly and timely collect and remit those taxes to the proper authorities.

14. As to the question:

f. **The extent of Kettle's involvement in the events leading to the breach of the accounts receivable financing agreement between Thrifty Tel and Fidelity Funding of California.**

Answer: The evidence indicates that the accounts receivable funded under the agreement were overvalued in that they contained duplicate accounts, aged accounts, and accounts that had already been collected. This overvaluation was the responsibility of Kettle. The actions taken to correct the effect of this overvaluation were instrumental in leading to the bankruptcy of Thrifty Tel.

15. Kettle's failure to remit charges required by the Commission pursuant to statute results in a shortfall of incremental revenue that will have to be made up by an increase in charges paid by other customers.

## Conclusions of Law

1. A limited rehearing restricted to the question of applicant's fitness to be awarded a CPCN was ordered in D.98-02-115.

2. At the Prehearing Conference, the parties were advised that timely response to discovery was expected.

3. Applicant failed to timely respond to CSD's Data Request No. 1, with the result that the scheduled hearing had to be rescheduled.

4. The Commission rejects applicant's excuse that "pressing other business" precluded compliance with its order.

5. On the basis of record evidence, William Kettle, the sole shareholder and *alter ego* of Landmark, was ultimately responsible for mismanagement and the bankruptcy of Thrifty Tel, of which Kettle was President and CEO.

6. No credible evidence in the record supports Kettle's claims of a conspiracy.

7. Kettle has evidenced a pattern and practice of failing to comply with the requirements of federal, state, and local governmental agencies, including the payment of statutory charges and fees required by the Commission.

8. The Commission is concerned with the bankruptcies of telecommunications service providers of long-standing, based on the need to safeguard the interests of consumers.

9. Kettle has not demonstrated fitness to be awarded a CPCN at this time, but should not be precluded from making another application at such time as he can demonstrate fitness.

10. Should Kettle apply in the future, he should affirmatively demonstrate that he has:

- completed a course of training whereby he has secured a comprehensive understanding of the proper methods of organizing and managing a business;
- adopted a viable business plan with safeguards to protect against the problems and failures that resulted with his prior businesses;
- adopted a system of rigorous financial and cost controls that can readily be audited;
- repaid those charges owed the Commission, including the ULTS charges, if such charges are not dischargeable in bankruptcy;
- demonstrated a willingness and ability to comply with all statutory and regulatory requirements, including applicable consumer protections rules adopted by the Commission.

11. This application should be denied without prejudice for the protection of California consumers.

# ORDER

IT IS ORDERED that:

1. The application of Landmark Communications, Inc. (Landmark) is hereby denied without prejudice for lack of managerial fitness.

2. In the event that Landmark or William J. Kettle reapply for a Certificate of Public Convenience and Necessity (CPCN), Landmark or William J. Kettle shall make an affirmative showing that Landmark/Kettle has complied with the guidelines set forth in this decision.

3. Should Landmark/Kettle choose to reapply for a CPCN, Landmark/Kettle shall file a formal application and serve it upon the Director of the Consumer Affairs Division and all appearances in Application (A.) 97-07-008.

4. A.97-07-008 is closed.

This order is effective today.

Dated November 19, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
HENRY M. DUQUE
Commissioners

We will file a dissent.

/s/ JESSIE J. KNIGHT, JR.
Commissioner

/s/ JOSIAH L. NEEPER
Commissioner

# APPENDIX A

************ SERVICE LIST ************

Last updated on 05-AUG-1998 by: CPL
A9707008 LIST

***************** APPEARANCES *****************

Carol A. Dumond
Legal Division
RM. 5127
505 VAN NESS AVE
SAN FRANCISCO CA 94102
(415) 703-1972
cad@cpuc.ca.gov

Thomas J. Mac Bride, Jr.
Attorney At Law
GOODIN MACBRIDE SQUERI SCHLOTZ & RITCHIE
505 SANSOME STREET, SUITE 900
SAN FRANCISCO CA 94111
(415) 765-8444
tmacbride@gmssr.com
For: Landmark Communications, Incorporated

*************** STATE SERVICE ****************

Barbara Ortega
Executive Division
RM. 5109
107 S. BROADWAY, ROOM 5109
LOS ANGELES CA 90012
(213) 897-4158
bho@cpuc.ca.gov

Glen Walker
Administrative Law Judge Division
RM. 5111
505 VAN NESS AVE
SAN FRANCISCO CA 94102
(415) 703-1232
gew@cpuc.ca.gov

************** INFORMATION ONLY **************

(END OF APPENDIX A)

**Commissioners Jessie J. Knight, Jr. and Josiah L. Neeper, Dissenting:**

We dissent from the majority which denies Landmark Communications Inc. a Certificate of Public Convenience and Necessity (CPCN) . It is our view that the more appropriate outcome should be to subject the firm to certain operating conditions, tied to an approval of a CPCN. These conditions would include a cash deposit of $25,000, prepayment of three months estimated fees and surcharges, and specific late payment charges. There were several issues surrounding the fitness of the applicant that cause our disagreement with the majority.

First, the issue of Mr. Kettle's involvement in events leading to the Chapter 11 bankruptcy filing of Thrifty-Tel is an important concern to us that cannot be minimized. Here the majority makes a conclusion based on a filing made by Mr. Kettle's former business associates which blames Mr. Kettle for Thrifts -Tel's previous bankruptcy. Mr. Kettle provided direct testimony, subject to cross examination, that refuted this evidence. Clearly, Mr. Kettle's business associates had a motive to shift blame for the bankruptcy to their former business adviser. In our judgment, this type of unsupported testimony should not be the basis of a business fitness finding by this Commission.

Secondly, the fact that a former carrier goes bankrupt should not be grounds for disqualification for operating in California, let alone a new enterprise with no business history. The opportunity to use bankruptcy as a legal and legitimate business practice to discharge obligations in the commercial sector is accepted in all other industries in this country, for the majority to deny this here is a bad precedent.

Third, we believe that Mr. Kettle's personal bankruptcy should not have any bearing on whether he is fit to run a telecommunications company. Personal bankruptcy is a private business matter, in addition to being a separable issue from a business entity. It should have no bearing on this case. For the majority to use this as a fundamental consideration is a breach to Mr. Kettle's personal privacy. As a government agency, this Commission must always be careful not to over-step its boundaries of power. Requiring disclosure of personal financial details is an unwarranted invasion of privacy for the purpose for which this agency needs to approve the establishment of a new enterprise, a business that will live or die by its own operational merit in offering products and services to customers.

Fourth, the proceeding sought to determine the extent of Mr. Kettle's involvement in the diversion or conversion of federal excise and state taxes collected by Thrifty-Tel. On this issue, even the majority finds there is no direct evidence in the hearing record that points to criminal intent on the part of Mr. Kettle in the failure of Thrifty-Tel to collect the federal excise taxes and state taxes, or in the failure to remit those taxes to the proper respective government authorities.

Fifth, the proceeding attempted to answer the question as to why Mr. Kettle was terminated by Thrifty-Tel. Once again the evidence is inconclusive. Commission staff only presented documents filed before the Securities and Exchange Commission that contained allegations made by Mr. Kettle's business partners. Mr. Kettle successfully refuted these allegations at trial and this should not be a part of the majority's dicta, or elemental to their decision process.

Sixth, the proceeding attempted to determine the extent of Mr. Kettle's involvement in the events leading to the breach of an accounts receivable financing agreement between Thrifty-Tel and another firm, Fidelity Funding of California. It is our view that there is no reason for this Commission to involve itself in the dispute of a bilateral commercial relationship between two businesses. If there are any concerns to be litigated, this should be a matter for the courts to settle, not this Commission.

Seventh, though the majority has made much of Thrifty-Tel's bankruptcy and Mr. Kettle's termination of employment, neither of these issues caused any direct harm to Thrifty-Tel consumers. All consumers received the services for which they had paid. No consumer was left without phone service, no consumer lost a penny of deposit money. The only harm that came to the public because of Thrifty-Tel's bankruptcy was its failure to pay fees and surcharges. Thrifty-Tel is not alone among telecommunications carriers that have failed to make such payments in the past history of this Commission, many who have been allowed to continue operation with certain restrictions. In order to protect against a repeat of this specific negative occurrence and the legitimate concern of potential bad behavior on part of this new company, the alternate proposed by us set specific and tough conditions designed to assure the Commission that ratepayers would not be harmed if Landmark, like Thrifty-Tel, went out of business owing these charges. The alternate required a cash deposit of $25,000, the prepayment of at least three months estimated payments of fees and surcharges, and a stringent late payment penalty structure. In this way consumers would have been afforded the benefit of Landmark's business services, while guaranteeing that fees and surcharges were paid by Landmark prospectively.

Eighth, the majority does leave open a slim glimmer of hope for Mr. Kettle that his application will be reconsidered by this Commission, if he complies with several requirements. We find these requirements to be unreasonable and would have eliminated them entirely should we have prevailed. It is unreasonable for the Commission to require Mr. Kettle to complete a business course of training to allegedly guarantee that he has secured a comprehensive understanding of the proper methods of organizing and managing a business. Not only does the majority not specify what the course of training should be, in our judgment whether he completes this undescribed academic pursuit or gets an MBA guarantees nothing. How this Commission will judge future success or be assured that his business will be secure on an on-going basis is incomprehensible. Furthermore, the majority insists on a second requirement that he adopt a viable business plan. In our judgment, the Commission does not have the wherewithal to evaluate a business plan to determine if a business is viable in today's ever-changing market, nor is this even appropriate for an agency dedicated to market neutrality in a competitive environment. It is as if the recent efforts to reduce our regulation of this industry have been overturned and now the Commission is back in the business of deciding whether a business plan is viable. It is not this Commission's role to determine whether a business is viable or not viable. The market will do that.

Ninth, the majority also requires that Landmark adopt a system of rigorous financial and cost controls that can be readily audited. It is not this Commission's role to regulate how a new business entrant keeps its financial records. It is unreasonable, discriminatory and anti-competitive to require such micromanagement of this individual business and not others. The majority unfairly singles out this firm for this type of regulation.

Tenth and finally, before Landmark can seek authority in the future, this decision requires that Landmark and Mr. Kettle repay charges owed the Commission, if such charges are not dischargeable by bankruptcy. We would agree to this if the liability for these payments were Mr. Kettle's personal liability. Contrary to the majority's view, these are liabilities of Thrifty-Tel and Thrifty-Tel is not seeking this application. If it is the desire of the majority to obtain further payment from Thrifty-Tel, they should continue to pursue this in other venues.

The majority runs the risk of undermining what this Commission has accomplished since the issuance of the Telecommunications Infrastructure Report in 1994. Since that time this Commission has increasingly followed a "let the market decide" approach in deciding whether a carrier is fit to provide service. This decision reverts back to anachronistic thinking that argues that the best way to protect consumers is to try, on the front end, to weed out "unfit" providers. The majority should be reminded that this approach has already failed. Corporate entities such as Sonic, Cherry and other businesses who have been found guilty of having abused customers and countless other carriers who have since gone out of business for other reasons, all were subjected to this same type of screening. Experience has shown that this heavy-handed scrutiny does not keep bad players out of the market. Respectfully, the majority must recognize that the best way to protect consumers is through vigorous enforcement of Commission rules. The Commission should aggressively investigate carriers that are currently harming consumers, it should not spend countless hours trying to keep a provider out because it might possibly go out of business or harm customers that presently do not even exist.

It is illustrative that the majority expends significant effort to cite decisions issued in 1990 and 1993 as justification for a heavy-handed approach. Yet, they make no reference to the all important and historical Telecommunications Act of 1996. By all accounts, times have changed in the telecommunications market. Attempting to predetermine the fitness of a carrier is not the best use of the Commission's jurisdiction, nor is it consistent with our policy of promoting fully competitive markets.

The majority approach here is a misallocation of Commission resources and harms rather than promotes the public interest. Hopefully, this ruling of the majority is simply an aberration, and they will focus the Commission's customer protection efforts on those carriers that are actually visiting harm on California consumers.

We believe that the Commission should have steered clear of the failed regulatory approach embedded in the majority decision and should have granted Landmark an application to provide service to California consumers. The alternate that was proposed had more than enough safeguards to guarantee that no harm would have fallen upon future consumers without the Commission's intervention.

Dated November 19, 1998 at San Francisco, California.

/s/ Jessie J. Knight, Jr.
Jessie J. Knight, Jr.
Commissioner

/s/ Josiah L. Neeper
Josiah L. Neeper
Commissioner

A. 97-07-008
D. 98-11-054

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