MAIL DATE
4/5/99

Decision 99-04-033 April 1, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Coral Communications, Inc. (Coral) and Michael Tinari, President of Coral; William Gallo, Senior Vice President of Coral; Devon Porcella, Vice President of Sales and Operations of Coral; Neal Deleo, Vice President Finance and MIS of Coral to determine whether the corporation or its principals have operated within California without having a certificate to operate from the Commission and whether they have charged California subscribers for telecommunications services the subscribers never authorized.	Investigation 98-08-004 (Filed August 6, 1998)

ORDER GRANTING LIMITED REHEARING, MODIFYING DECISION 98-12-010 AND DENYING REHEARING

I. SUMMARY

In Decision (D.)98-12-010, the Commission granted the motion of the Consumer Services Division (CSD) to add Easy Access International, Inc. (Easy Access), Ed Tinari and Celestine Spoden as respondents in Investigation (I.)98-08-004 (the OII). The Commission found "good cause" to add Easy Access as a respondent. The Decision did not address Ed Tinari or Celestine Spoden, but the Order added them as respondents.

II. BACKGROUND

In January 1998, CSD became aware of complaints that Coral Communications, Inc. (Coral) was charging consumers for telephone calling cards that were never ordered. CSD began its investigation, and the Commission issued I.98-08-004 into the operations of Coral on August 6, 1998. The investigation was to determine if Coral had operated without a certificate of public convenience and necessity (CPCN)[1] in violation of Pub. Util. Code § 1001 and violated Pub. Util. Code § 451 by billing subscribers for calling card services that were never ordered or were not provided (known as cramming). Coral had applied for a CPCN on March 2, 1998, and CSD filed a protest to the application. Coral's application states that it would provide intrastate service as a "switchless reseller". A.98-03-015.

Previously, Coral had 300,475 California subscribers. Coral has approximately 149,011 current subscribers in California. (*See* Second Patterson Decl., tab 1.) Coral obtained information to charge subscribers from sweepstakes entry forms which include an authorization to bill the entrant a $2.99 set up fee and a $6.99 monthly fee for the calling card whether it was used or not. The forms also state that the calling card intrastate rate may vary from the 25 cents per minute interstate rate. The fees and charges appear on the subscribers' local exchange carrier bills. Coral's billings are made through an intermediary, International Telemedia Associates, Inc. (ITA). ITA is a third party clearing house that has billing and collection agreements with local exchange carriers, such as Pacific Bell.

CSD subsequently discovered information suggesting that Easy Access had purchased Coral's calling card business. CSD filed a motion to add

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1 With to respect to *prepaid* debit telephone cards, which are not at issue in the OII, Assembly Bill No. 1424, 1998 Regular Session, § 1 requires registration with the Commission.

Easy Access and two of its directors, Ed Tinari and Celestine Spoden, as respondents in the OII on September 17, 1998. Ed Tinari is also the President of Easy Access, and Celestine Spoden is its Chief Financial Officer. Easy Access opposed the motion based on a lack of jurisdiction but did not file a motion to dismiss. There was no hearing on CSD's motion. On December 3, 1998, the Commission issued D.98-12-010 granting CSD's motion. The Commission found "good cause" to add Easy Access as a respondent, identifying a "business relationship" between Easy Access and Coral. (D.98-12-010, p. 2-3.) The Decision did not address Ed Tinari and Celestine Spoden, but the Order added them as respondents.

On December 23, 1998, respondents[2] timely filed an Application for Rehearing of D.98-12-010. Respondents allege the following legal errors: (1) the Decision fails to determine that respondents are public utilities, thereby divesting the Commission of jurisdiction; and (2) there are insufficient findings to support the Decision.[3] A Response in Opposition to the Application was filed by CSD. Respondents also filed a petition for writ of review of D.98-12-010 in the Court of Appeals on March 11, 1999.

III. DISCUSSION

We have reviewed the arguments raised by respondents in their Application for Rehearing of D.98-12-010 as well as the arguments in the Response in Opposition filed by CSD. As discussed below, we conclude that

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[2] Easy Access, Ed Tinari and Celestine Spoden are hereinafter collectively referred to as "respondents."

[3] Respondents are preserving their challenge to the Commission's power to act, which is a subject matter challenge. Although respondents' counsel at the prehearing conference stated that he was making a special appearance, "which is a method of appearing for the sole purpose of objecting to lack of jurisdiction over the person," 2 Witkin, *Cal. Proc.* (4th ed.), Jurisdiction § 197, there is no personal jurisdiction challenge in the Application. There is no argument that respondents lacked minimum contacts with California. Respondents also did not file a motion to quash or a motion to dismiss for lack of personal jurisdiction.

sufficient grounds for a limited rehearing have been shown. Respondents have demonstrated legal error with respect to the findings or lack thereof in D.98-12-010, as required under Pub. Util. Code § 1732. *See also* Pub. Util. Code § 1705. Respondents' other allegations of error are without merit. As set forth below, we modify D.98-12-010 to include findings demonstrating good cause to add respondents in the OII. We then deny rehearing on D.98-12-010 as modified. Based on the present record, the legal error can be corrected with modifications to D.98-12-010. A separate hearing is not required. The Commission's decision on respondents' subject matter jurisdiction challenge will be made at the evidentiary hearing scheduled for April 12-14, 1999.

Respondents contend that the Commission erred in asserting its jurisdiction.[4] Respondents argue that the Commission's jurisdiction is limited to persons and corporations which are public utilities, citing Television Transmission, Inc. v. Public Utilities Commission (1956) 47 Cal.2d 82, 84. Television Transmission held that the Commission only has jurisdiction over individuals and corporations which are public utilities, as defined in Art. XII § 23 (repealed in 1974; see, now, Art. XII § 3) of the California Constitution and Pub. Util. Code § 216(a). *Id.* at p. 84-85. Respondents emphasize that the Decision contains no findings that either Easy Access, Ed Tinari or Celestine Spoden are public utilities.

In addition, respondents contend that the Decision violates Pub. Util. Code[5] § 1705. Section 1705 requires Commission decisions to contain "separately stated, findings of fact and conclusions of law" on all material issues. Respondents cite Greyhound Lines, Inc. v. Public Utilities Commission (1967) 65 Cal.2d 811, 813, which stated that findings in Commission decisions aid judicial

[4] Easy Access' answer in the superior court action brought by the Monterey County District Attorney states that "primary jurisdiction for this dispute lies with the State of California's Public Utilities Commission."

[5] Unless otherwise indicated, all statutory references are to the Public Utilities Code.

review and "help the [C]ommission avoid careless or arbitrary action." Respondents argue that the Decision is not supported by adequate findings of fact and conclusions of law. Again, respondents note that the Decision contains no findings whatsoever as to Ed Tinari and Celestine Spoden.

As to the Decision's one factual finding for Easy Access, respondents argue that it is conclusory and not supported by the evidence. The Finding of Fact states "Easy Access admitted that it has a business relationship with Coral regarding Coral's calling card business." (D.98-12-010, p. 2.) Easy Access denies making any such admission. Further, respondents deny that they exercise financial or managerial control over Coral. Assuming, arguendo, there was an admission, respondents assert that the finding is still insufficient for not describing the nature of the "business relationship." The Decision contains no finding that Easy Access owned Coral or its calling card business. The body of the Decision states that Easy Access owns an "income stream" from Coral's calling card business. (D.98-12-010, p. 2.)

As an initial matter, CSD contends that it is premature to even reach the jurisdictional issues. CSD argues that these issues should be addressed "in the course of this proceeding and resolved through evidence adduced at hearings and through briefs." (CSD Response, p. 5.) CSD thus concludes that the Commission need not make a public utility finding as to Easy Access, Ed Tinari and Celestine Spoden. Alternatively, CSD contends that there is good cause to find Easy Access is a public utility. CSD disputes that Coral's ownership of Easy Access is relevant. CSD argues that Easy Access is the owner of the Coral calling card and voice mail business. (*See* Third Patterson Decl., CSD's motion.) CSD also argues that Easy Access hired Coral to provide management services in return for 10% of the gross revenues. *Id.*

As to Ed Tinari and Celestine Spoden, CSD cites various enforcement proceedings which named corporate officers as respondents. *See, e.g,*

Investigation of Cherry Payment Systems, I.95-10-007; Investigation of Future Telephone Communications, I.97-04-046. CSD notes that a company's management is considered in determining its fitness to operate as a public utility, including restrictions on the ability to apply for a CPCN. *See* Rulemaking to Establish a Simplified Process for Non-Dominant Telecommunications Firms, D.97-0-107. CSD argues that there is sufficient evidence showing Ed Tinari and Celestine Spoden are responsible for the operations of Easy Access. (*See* Third Patterson Decl., CSD's motion.) CSD reiterates that the issue of piercing the corporate veil of Easy Access to each reach Ed Tinari and Celestine Spoden is better addressed at an evidentiary hearing.

As an initial matter, we note that respondents did not file a motion to dismiss for lack of subject matter jurisdiction. *See, e.g.*, Re Regulation of Cellular Radiotelephone Utilities (1989) 32 CPUC2d 271, 282 (motions to dismiss complaint granted because "no demonstration that either is a public utility.") Respondents instead opposed CSD's motion based on lack of jurisdiction. The Commission must therefore determine whether CSD demonstrated "good cause" to add respondents to the OII. Neither the Public Utilities Code nor the Commission's Rules of Practice and Procedure purport to define "good cause." For purposes of this motion, we will define "good cause" very generally as an adequate cause that comports with the purposes of the Public Utilities Code and with other laws. The Commission will look for a factual basis and good reason to add respondents under the circumstances of each particular OII. The OII Order merely commences these proceedings, schedules a hearing and requires the added respondents to preserve and produce documents.

Respondents' jurisdictional challenge will be resolved in the Commission's decision after the hearing. As the Commission explained in D.98-08-004, "general principles of administrative law do not allow parties to terminate administrative proceedings prematurely by alleging jurisdiction uncertainty. . .

[A]n agency may lawfully commence proceedings and address jurisdictional questions in its final decision." *Id.* at p. 4. We cited United States v. Superior Court (1941) 19 Cal.2d 189, 194, which held that "it lies within the power of an administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction." We also relied upon Abelleira v. Dist. Court of Appeal (1941) 17 Cal.2d 290, 293-294, which indicated that subject matter jurisdiction is to be resolved in the course of the administrative proceeding:

> [T]he long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body *lacked power over the subject matter*. The . . . rule is one of judicial administration - not merely a rule governing the exercise of discretion. *Id.* (Emphasis added.)

Upon review of the OII allegations and the third F. Patterson declaration submitted in support of CSD's motion, we find good cause to add respondents to the OII. The facts and allegations contained therein, if supported by the evidence adduced at the hearing, provide a legal basis for the exercise of the Commission's jurisdiction. At the very least, the legal bases discussed below may support the exercise of jurisdiction by the Commission. The evidence adduced at the hearing may also reveal other legal bases to support the exercise of our jurisdiction.

As a regulatory body of constitutional origin, the Commission only has such powers as it derives from the Constitution and the Legislature. Television Transmission, *supra*, 47 Cal.2d at 84. Respondents are correct that our jurisdiction is limited to public utilities absent specific legislation to the contrary. *Id*; Los

Angeles Met. Transit Authority v. Public Utilities Com. (1959) 52 Cal.2d 655. For example, in D.88312, the Commission dismissed a complaint against a corporation because it was not a public utility. The Commission stated that "a corporation or individual may not be named as a defendant simply because it might possess evidence useful to a complainant." *Id.*

To begin with, the evidence may support our jurisdiction under the "alter ego" doctrine or piercing the corporate veil. Coral is operating as a public utility. *See* Cal. Const. Art. XII § 3; Pub. Util. Code § 216, 233 and 234. Coral applied for a CPCN to provide intrastate service as a switchless reseller. A.98-03-015. A switchless reseller is a public utility. Re Tariff Filing Rules for Telecommunications Utilities, Other than Local Exchange Carriers and AT&T-C (1992) 44 CPUC 2d 747, 750. Coral admitted that it was "Coral's belief, although incorrect, that they were not required to be certificated in California." Coral Response to CSD Protest to A.98-03-015. Because Coral is operating as a public utility, we can assert jurisdiction if Easy Access is the "alter ego" of Coral. We can similarly assert jurisdiction if Ed Tinari and/or Celestine Spoden are the "alter ego" of Coral.

Easy Access, as a separate corporation, is a distinct legal entity apart from Coral. Likewise, Coral is a distinct legal entity apart from its stockholders and officers. Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal.3d 724, 729-30. Corporate entities may be disregarded in certain circumstances, however. When a corporation is used by another corporation or individuals to circumvent a statute or accomplish some other wrongful purpose, the corporate entity may be disregarded with its acts treated as if they were done by the controlling corporation or individuals. This is known as "piercing the corporate veil" or the "alter ego" doctrine.

No precise test exists for piercing the corporate veil; rather, the outcome depends on the facts of each particular case. There are, nonetheless, two

general requirements: (1) a unity of interest and ownership such that the separate personalities of the corporation and the controlling corporation or individuals no longer exist and (2) an inequitable result will follow. *See* Automotriz etc. De California v. Resnick (1957) 47 Cal.2d 792, 796. Other relevant factors include: the use of a single address; the ownership of stock by a single individual or family; the domination or control of the corporation by the stockholders; the concealment of the ownership of the corporation; and the attempts to segregate liabilities to the corporation. Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-40. Among other things, CSD should address these factors at the evidentiary hearing.

For example, in H.A.S. Loan Service, Inc. v. McColgan (1943) 21 Cal.2d 518, 521, two corporations were formed with similar stock ownership. The first corporation lent money, and the second corporation brokered the loans. It was alleged that the two corporations together assessed charges which made the loans usurious. The Supreme Court concluded: "Under the circumstances here presented the two corporate entities were in fact one, or if they be considered separate, two, in effect, engaged in a single business. The corporate entity may be disregarded when it is used to evade the law." *Id.* at p. 523. Similarly, the Commission has invoked the alter ego doctrine. *See, e.g.,* Lee Gale v. Mobile Concrete, Inc. (1991) 42 CPUC2d 341, 344 ("the existence of the alter ego relationship is undeniable.")

In addition to the OII supported by the first F. Patterson declaration, CSD alleged the following based on the third F. Patterson declaration and its supporting exhibits: Both Easy Access and Coral operate from different suites at the same business. (Third F. Patterson, Decl., Tab 3, Spoden Affidavit.) Ed Tinari is the father of Michael Tinari, an officer and shareholder in Coral. (Third F. Patterson, Decl., p. 17) Ed Tinari is both a shareholder of Coral and Easy Access. *Id.* at Tab 4, 26, 27. Celestine Spoden is an officer, director and principal shareholder in Easy Access. *Id.* at Tab 4, p. 70. Interoffice memos are distributed

to officers of Easy Access as well as Coral. *Id.* at Tab 14. A telephone directory for Easy Access also lists Coral employees. *Id.* at Tab 13. An October 16, 1997 "Agreement" provides for "the sale of the Coral business. . ." to Easy Access. *Id.* at Tab 3, Spoden Affidavit, Exhibit A. Easy Access' limited debt offering document also states that "In October 1997, the Company consummated an agreement with Coral Communications, Inc. to purchase its voice mail and domestic long distance calling card business. . ." *Id.* at Tab 4. CSD's allegations, if prove true at the hearing, could support an alter ego basis for jurisdication.

Of course, the Commission may also assert jurisdiction if the evidence shows that Easy Access by itself is a public utility or is offering the services of a public utility. Cal. Const. Art. XII § 3; Pub. Util. Code § 216(a)-(c). This determination will turn on whether Easy Access' business triggers the definitions of a telephone corporation and a telephone line in Pub. Util. Code § 233, 234, and, if so, whether Easy Access has dedicated its property to public use. *See* Re Tariff Filing Rules for Telecommuncations Utilities, Other than Local Exchange Carriers and AT&T-C (1992) 44 CPUC2d 747, 749. The test for dedication to public use is "whether or not those offering the services have expressly or impliedly held themselves out as engaging in the business of supplying to the public as a class, not necessarily to all the public, but to any limited portion . . ." S. Edwards Associates v. Railroad Commission (1925) 196 Cal. 62, 70; *See also* Yucaipa Water Company No. 1 v. Public Utilities Commission (1960) 54 Cal.2d 823, 827.

Nonetheless, findings of fact and conclusions of law consistent with the above discussion are absent from D.98-12-010. Our Decision violates Section 1705 which requires "separately stated, findings of fact and conclusions of law" on all material issues. The California Supreme Court has stated that "'[e]very issue that must be resolved to reach that ultimate finding is 'material to the order or decision,' and findings are required of the basic facts upon which the ultimate

finding is based." Greyhound Lines, *supra*, 65 Cal.2d at 813, quoting California Motor Transport Co v. Public Utilities Commission (1963) 59 Cal.2d 270, 273.

We therefore grant a limited rehearing and modify D.98-12-010 to add the requisite findings of fact and conclusions of law, as set forth below. Rehearing is then denied on D.98-12-010 as modified. CSD demonstrated good cause to add respondents to the OII, and the Commission did not err in granting the motion. Respondents' jurisdictional challenge will be resolved in the Commission's decision after hearing.

IV. CONCLUSION

No further discussion is required of respondents' allegations of error. Accordingly, upon review of each and every allegation of error, we conclude that sufficient grounds for a limited rehearing have been shown. D.98-12-010 is modified as set forth below, and rehearing is denied on D.98-12-010 as modified.

IT IS ORDERED that:

1. A limited rehearing of D.98-12-010 is granted for the purposes of modifying D.98-12-010, as follows:

    a. At page 2 of the D.98-12-010, the following paragraphs are added under the heading Discussion:

> As an initial matter, we note that respondents did not file a motion to dismiss for lack of subject matter jurisdiction. *See, e.g.*, Re Regulation of Cellular Radiotelephone Utilities (1989) 32 CPUC2d 271, 282 (motions to dismiss complaint granted because "no demonstration that either is a public utility.") Respondents instead opposed CSD's motion based on lack of jurisdiction. The Commission must therefore determine whether CSD demonstrated "good cause" to add respondents to the OII. Neither the Public Utilities Code nor the Commission's Rules of Practice and Procedure purport to define "good cause." For purposes of this motion, we will define "good cause" very generally as an adequate cause that comports with the purposes of the Public Utilities Code and with other laws. The Commission will look for a factual basis

and good reason to add respondents under the circumstances of each particular OII. The OII Order merely commences these proceedings, schedules a hearing and requires the added respondents to preserve and produce documents.

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> [T]he long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body *lacked power over the subject matter*. The . . . rule is one of judicial administration - not merely a rule governing the exercise of discretion. *Id.* (Emphasis added.)

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No precise test exists for piercing the corporate veil; rather, the outcome depends on the facts of each particular case. There are, nonetheless, two general requirements: (1) a unity of interest and ownership such that the separate personalities of the corporation and the controlling corporation or individuals no longer exist and (2) an inequitable result will follow. *See* Automotriz etc. De California v. Resnick (1957) 47 Cal.2d 792, 796. Other relevant factors include: the use of a single address; the ownership of stock by a single individual or family; the domination or control of the corporation by the stockholders; the concealment of the ownership of the corporation; and the attempts to segregate liabilities to the corporation. Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-40. Among other things, CSD should address these factors at the evidentiary hearing.

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Of course, the Commission may also assert jurisdiction if the evidence shows that Easy Access by itself is a public utility or is offering the services of a public utility. Cal. Const. Art. XII § 3; Pub. Util. Code § 216(a)-(c). This determination will turn on whether Easy Access' business triggers the definitions of a telephone corporation and a telephone line in Pub. Util. Code § 233, 234, and, if so, whether Easy Access has dedicated its property to public use. *See* Re Tariff Filing Rules for Telecommuncations Utilities, Other than Local Exchange Carriers and AT&T-C (1992) 44 CPUC2d 747, 749. The test for dedication to public use is "whether or not those offering the services have expressly or impliedly held themselves out as engaging in the business of supplying to the public as a class, not necessarily to all the public, but to any limited portion . . ." S. Edwards Associates v. Railroad Commission (1925) 196 Cal. 62, 70; *See also* Yucaipa Water Company No. 1 v. Public Utilities Commission (1960) 54 Cal.2d 823, 827.

b. The heading Finding of Fact is changed to Findings of Fact.

c. The following Findings of Fact are added:

2. CSD alleges that both Easy Access and Coral operate from different suites at the same business, as supported by the Third F. Patterson declaration and its support exhibits.

3. CSD alleges that Ed Tinari is the father of Michael Tinari, an officer and shareholder in Coral. CSD alleges that Ed Tinari is both a shareholder of Coral and Easy Access. *Id.* CSD also alleges that Celestine Spoden is an officer, director and principal shareholder in Easy Access. CSD's allegations are supported by the third F. Patterson declaration and its supporting exhibits.

4. CSD alleges that interoffice memos are distributed to officers of Easy Access as well as Coral. CSD also alleges that a telephone directory for Easy Access also lists Coral employees. CSD's allegations are supported by the third F. Patterson declaration and its supporting exhibits.

5. CSD alleges that an October 16, 1997 "Agreement" provides for "the sale of the Coral business. . ." to Easy Access. CSD also alleges that Easy Access' private debt offering document also states that "[i]n October 1997, the Company consummated an agreement with Coral Communications, Inc. to purchase its voice mail and domestic long distance calling card business. . ." CSD's allegations are supported by the third F. Patterson declaration and its supporting exhibits.

d. The heading Conclusion of Law is changed to Conclusions of Law.

e. The following Conclusions of Law are added:

2. Respondents' jurisdictional challenge will be resolved at the evidentiary hearing.

3. CSD has alleged facts which, if proven at hearing, could establish that Easy Access is the alter ego of Coral or is operating as a public utility.

4. CSD has alleged facts which, if proven at hearing, could establish that Ed Tinari and/or Celestine Spoden are the alter egos of Coral.

5. Based on the OII allegations and the allegations in the third F. Patterson declaration and its supporting exhibits, good cause exists to grant the motion of CSD to add Easy Access as a respondents to the OII. .

6. Based on the OII allegations and the allegations in the third F. Patterson declaration and its supporting exhibits, good cause exists to add Celestine Spoden and Ed Tinari as respondents in the OII.

3. Rehearing of D.98-12-010, as modified, is denied in all other respects.

This order is effective today.

Dated April 1, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners