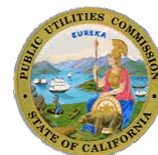


BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

05/22/20
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Order Instituting Investigation on the Commission's Own Motion into the California's One Million New Internet Users Coalition's Misuse of California Advanced Services Fund Grant Funds; and Order to Show Cause Why the Commission Should Not Impose Penalties and/or Other Remedies for Violating Terms of Their Grant and for Refusing to Return Funds Previously Demanded by the Commission's Division.

Investigation 18-07-009

**JOINT REPLY OF THE CONSUMER PROTECTION AND ENFORCEMENT
DIVISION AND KOREAN CHURCHES FOR COMMUNITY DEVELOPMENT
TO COMMUNITY UNION, INC. MOTION TO OPPOSE THE JOINT MOTION
FOR APPROVAL OF SETTLEMENT**

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May 22, 2020

Pursuant to the May 20, 2020 email ruling of Administrative Law Judge, Zhen Zhang, (Ruling) the Consumer Protection and Enforcement Division (CPED) and the Korean Churches for Community Development/Faith and Community Empowerment (KCCD) (jointly, CPED/KCCD) submit this response to the *Motion of Community Union, Inc. to Oppose the Joint Motion in Order Instituting Investigation 18-07-009 for Approval of Settlement with Korean Churches for Community Development* (Opposition). The Ruling specified that this Reply would be due on May 22, 2020.

On April 2, 2020, CPED and KCCD filed their *Joint Motion for Approval of Settlement with Korean Churches for Community Development* (Joint Settlement). Larry Ortega, on behalf of Community Union, Inc., (collectively “Ortega”) late filed their opposition (due May 4, 2020) to the Joint Settlement on May 12, 2020.

As a preliminary matter, Ortega improperly seeks to enter into the record documents in support of their Opposition. The Commission should give no weight to these documents as Ortega fails to authenticate and support its attached exhibits with a declaration under penalty of perjury attesting that the exhibits are true and correct copies of the business records gathered in the ordinary course of Ortega’s business¹. Moreover, even if these documents were considered, the Opposition should be denied. As CPED/KCCD have explained, the Joint Settlement is reasonable in light of the record, consistent with the law and in the public interest.

I. DISCUSSION

Ortega’s opposition is without merit. Ortega argues that KCCD as the consortium’s fiscal agent assumes the liability for all violations of Ortega.² Ortega appears to proffer legal arguments based on KCCD’s obligations to a contract, yet no legal authority is provided. Ortega also suggests that this administrative hearing cannot go forward without the participation of KCCD.³ Essentially, Ortega maintains KCCD cannot be severed from this proceeding since all of the Coalition members are liable. Furthermore, according to Ortega, this Order Instituting Investigation (OII) should be concluded if KCCD is dismissed from this proceeding. These arguments are specious and devoid of any factual and legal support.

¹ See California Public Utilities Commission Rules of Practice and Procedure, Rules 13.6 and 13.7 (e).

² Opposition, p. 5.

³ Opposition, p. 6.

Ortega fails to explain why it believes that if the Joint Settlement is approved, the Commission cannot continue this OII against Ortega. As described in the OII, “[t]he Commission has authority to regulate entities, including corporations and individuals that provide a public service, to protect ratepayers, to enforce the constitution, statutes, and Commission rules, orders, decisions, requirements, and demands, and to remedy violations thereof.”⁴ Additionally, ALJ Zhang explained at the case management conference on May 4, 2020 that “the fiscal agent’s responsibilities do not relieve any member organizations performing what was promised in the work plan.”⁵

Ortega contends that the agreement between the Commission and all of California’s One Million New Internet Users Coalition (NIU) members⁶ cannot be severed into individual organizations named in the agreement; he uses the term “nonexecutable.”⁷ California law sets forth that “[w]aiver is the intentional relinquishment of a known right after knowledge of the facts.”⁸ Here, Ortega failed to object to the motions to dismiss the Black Business Association, Soledad Enrichment Action, Inc., and Asian Pacific Community Fund.⁹ Ortega’s “nonexecutable” argument has no merit and fails as a matter of course. Ortega, therefore, fails to explain how KCCD’s contractual obligations nullifies Ortega’s liability in this OII.

Ortega also fails to address its own culpability in thwarting KCCD efforts to maintain all financial and other business records related to CASF grants expenses.¹⁰ KCCD fulfilled its fiscal responsibilities when it fully performed all required training and provided all backup invoices

⁴ OII, p. 2.

⁵ Case Management Transcript, May 4, 2020, p. 16, lns. 8-11; *See also* California Code of Civil Procedure Section 877 (a) which provides that where a party to an action is dismissed or settled out of the matter, the remaining parties are not discharged from the proceeding.

⁶ Members of the NIU Coalition are: the Asian Pacific Community Fund, Black Business Association, Community Union, Inc., Korean Churches for Community Development, and Soledad Enrichment Action – Charter Schools. All members of the Coalition jointly applied for receipt of CASF broadband consortia grant monies.

⁷ Opposition, p. 3.

⁸ *Roesch v. De Mota*, 24 Cal. 2d 563, 572 (1944); *Gould v. Corinthian Colleges, Inc.*, 192 Cal. App. 4th 1176, 1179 (2011) (Waiver can be implied by conduct); *See also* California Civil Jury Instruction 336.

⁹ *See* Joint Motions for Dismissal of Respondents to Order Instituting Investigation 18-07-009 submitted on April 1, 2020 and May 1, 2020.

¹⁰ Joint Motion in Order Instituting Investigation 18-07-009 For Approval of Settlement with Korean Churches for Community Development, April 2, 2020, p. 5 (Joint Motion for Settlement).

and financial records in its possession when seeking reimbursement under the California Advanced Services Fund (CASF) Grant.¹¹ However, Ortega prevented KCCD's full performance of duties as the fiscal agent by refusing KCCD access to Ortega's records. In *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.*, 22 Cal. App. 5th 970, 978 (2018), the Court of Appeal noted that, "hindrance of the other party's performance operates to excuse that party's nonperformance." Essentially, one party to a contract is excused from performance where the other contracting party prevents his performance. Here, Ortega refused to allow KCCD to inspect its financial files and records thereby precluding KCCD from conducting its due diligence inspection.

Ortega has hindered the investigations of Commission Staff and the State Controller's Office audit. Attachments "A" and "B" to the OII present material and irrefutable evidence that Ortega refused to cooperate, attempted to obstruct the audits and investigations and chastised public servants charged to protect the performance of Commission programs and the public interest. For instance, Ortega refused to comply with the State Controller's Office and Commission Staff requests for financial information.¹² Ortega maintained that the State Controller's Office, the Commission itself and its staff lack the legal authority to request Ortega's financial records.¹³ Ortega also fired its Certified Public Accountant and refused to provide the evidence needed to verify the legality of its conduct.¹⁴

Furthermore, the Declaration of Hyepin Im included in KCCD's response to the OII provides documentary evidence of Ortega's obstructionist conduct and intentional prevention of performance by coalition members such as KCCD in complying with Commission staff and the State Controller's Office's inquiries.¹⁵ Exhibit E of KCCD's response to the OII contains an

¹¹ Joint Settlement, p. 5.

¹² See Response of Respondents Korean Churches for Community Development/Faith and Community Empowerment to Order Instituting Investigation and Order to Show Cause; Request for Evidentiary Adjudicatory Hearing, Attachment A at pp. 9-10, 12.

¹³ See Response of Respondents Korean Churches for Community Development/Faith and Community Empowerment to Order Instituting Investigation and Order to Show Cause; Request for Evidentiary Adjudicatory Hearing, Attachment A at p. 15-19.

¹⁴ See Response of Respondents Korean Churches for Community Development/Faith and Community Empowerment to Order Instituting Investigation and Order to Show Cause; Request for Evidentiary Adjudicatory Hearing, Attachment A at pp. 26-28.

¹⁵ Response of Respondents Korean Churches for Community Development/Faith and Community Empowerment to Order Instituting Investigation and Order to Show Cause; Request for Evidentiary

email chain between Larry Ortega and CPED's Brian Hom. In these emails, Larry Ortega refuses to provide financial evidence claiming that the Commission lacks jurisdiction to make any request. Additionally, Exhibit F is an email from Larry Ortega to Mr. Dulin (former Director of Communications Division) in which Larry Ortega labels the State Controller's Office's audit as "racist." Exhibit G is an email exchange between Hyepin Im and Larry Ortega where Ms. Im explains Larry Ortega's attempts to lay blame on KCCD for his own bad faith and refusal to comply with the audits and SCO investigation. Exhibit H is a letter from Ms. Im to Larry Ortega where Ms. Im chastises Larry Ortega for refusing to cooperate with CPUC document requests.

Ortega's Opposition is just one of a long series of attempts to stall, delay and prevent the ultimate adjudication of Ortega's conduct. CPED/KCCD respectfully request that the Commission afford no weight to the Opposition and find the Joint Settlement between CPED and KCCD reasonable in light of the record and in the public interest.

II. CONCLUSION

For the foregoing reasons and based on the record in this matter, CPED and KCCD respectfully request that the Commission deny the Ortega Opposition and approve the Joint Settlement. As explained in the Joint Motion for Settlement, the settlement between KCCD and CPED is in the public interest, reasonable in light of the record and consistent with the law.

Respectfully submitted,

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May 22, 2020

Adjudicatory Hearing; Supporting Declarations of Maria Luisa Oakey; Hyepin Im, dated September 21, 2018.