

Decision 88 08 063 AUG 24 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GTE MOBILNET OF SAN)
FRANCISCO LIMITED PARTNERSHIP, and)
GTE MOBILNET OF SAN JOSE LIMITED)
PARTNERSHIP for certificates of)
public convenience and necessity)
to construct and operate a domestic)
cellular mobile radio system in the)
San Francisco-Oakland and San Jose)
Metropolitan areas.)

Application 83-07-04
(Petition for Modification
of Decision 84-11-029
Filed February 4, 1988)

James Squeri and David A. Simpson, Attorneys at
Law, for GTE Mobilnet of San Francisco
Limited Partnership, petitioner.
Peter Casciato, Attorney at Law, for Cellular
Resellers Association, Inc., protestant.
Richard Fish, for the Commission Advisory and
Compliance Division.

OPINION ON MODIFICATION OF DECISION 84-11-029

Statement of Facts

On June 1, 1983 GTE Mobilnet of San Francisco Limited Partnership, and GTE Mobilnet of San Jose Limited Partnership (applicants) tendered Application 83-07-04 for filing. After several amendments the application was accepted. By it applicants sought a certificate of public convenience and necessity for authority to provide a cellular mobile radiotelephone system in the San Francisco-Oakland and San Jose metropolitan areas.

The application was strongly protested. Protestants' concerns, as relevant here, centered upon the fact that because the Federal Communications Commission had awarded frequency blocks for wireline carriers including the applicants, while still processing applications of the nonwireline carriers, there would necessarily be an initial head-start period during which applicants would hold a monopoly position as the sole provider of wholesale service.

In addition, as applicants proposed to operate on both the wholesale and retail levels, the protestants were concerned and feared that applicants would be able to exercise a position of price leadership at the retail level because its retail prices would establish an upper level above which other retailers, the independents, could not sell. At the same time it would control wholesale prices. These two positions could enable applicants to regulate reseller entry into the cellular field through effective control of the resellers' profit margins. The protestants sought to have the Commission "build a wall" around the proposed wholesale operation sought by the applicants so as to ensure that wholesale rates would generate a fair rate of return for the independent resellers.

During the hearing which followed the parties and Commission staff presented differing views on future projections of customers, income, expenses, and sales for cellular wholesale and retail business. As a result the Commission determined that the competitive nature of the parties, as well as the perceived headstart issues, required formation of a fully separate entity for applicants' resale cellular service, at least during the headstart period. Decision (D.) 84-11-029 issued November 7, 1984 granted applicants authority to furnish service, but under wholesale tariffs only. But the Commission also authorized applicants to file an application through an affiliated but separate entity for retail provider authority. The Commission went on to state:

"When the headstart period concludes we will reexamine the separate entity concept. We will add that it is our intention to treat the wireline and nonwireline carriers in this market equitably." (D.84-11-029, mimeo. at p. 42.)

Subsequently an affiliated entity of applicants, GTE Mobilnet of California, Inc. (GTEM-Cal), applied for reseller

authority and on April 3, 1985 by D.85-04-008 was awarded a certificate subject to specified conditions relating to the separation of functions between GTEM-Cal and applicants, and maintenance of separate accounting, legal, and customer service functions. On April 10, 1988 GTEM-Cal's retail tariffs were approved.

The applicants have since merged and today are known as GTE Mobilnet of San Francisco Limited Partnership (GTEM-SF), a limited partnership duly organized and existing under the laws of the State of Delaware. At the present time GTEM-SF sells cellular service at wholesale only, and its affiliate, GTEM-Cal resells that cellular service at retail, assertedly while maintaining separate accounting, legal, and customer service functions as required under D.84-11-029.

On February 3, 1986, by D.86-05-010, the Commission awarded a certificate of public convenience and necessity to Bay Area Cellular Telephone Company (BACTC), a nonwireline facilities based carrier, to provide cellular service in the same San Francisco-Oakland and San Jose metropolitan areas. BACTC was authorized to sell cellular service at both wholesale and retail, without the separate reseller-affiliate or accounting requirements imposed on GTEM-SF's predecessors by D.84-11-029.

On February 4, 1988, stating that the competitive factors governing the relationship between itself and BACTC are far different from those existing and contemplated in 1984, and noting that the Commission has permitted all but one other cellular facilities based carrier to operate both wholesale and retail cellular service under one entity, GTEM-SF filed the present petition to modify D.84-11-029 to allow GTEM-SF to provide both wholesale and retail cellular services. It argued in support of its petition that the unequal treatment places GTEM-SF in a disadvantageous cost/expense position vis-a-vis its competitor.

On March 4, 1988, Cellular Resellers Association, Inc. (Association) filed a protest opposing GTEM-SF's petition on numerous grounds. Association asserted that the petition was really a transfer application and as such failed to supply all the financial and other information required under Rules of Practice and Procedure 17 and 36. Association sought Commission review of the wholesale and retail rates of GTEM-SF and GTEM-Cal respectively on the basis of its understanding from D.84-11-029 that these would be revised and reviewed when the separation of wholesale and retail operations would be reconsidered at break-even time. In addition Association offered a long list of allegations to the point that the policies and practices of GTEM-SF have an adverse impact on resellers. The Association stated that there is no pure competition on the wholesale level in the San Francisco-San Jose market area because the wholesale tariffs of GTEM-SF and BACTC are virtually identical; that excessive "bounties" or "commissions" are paid derived from both carriers' excessive retail profits; that there is ongoing cross-subsidization of retail by wholesale; that there are excessive wholesale profits, and that more financial data is needed to make an informed decision. The Association stated that the filed annual reports of GTEM-Cal show great variance with its initial customer base predictions, and when viewed with those of GTEM-SF, point a clear picture of rampant profits from the wholesale operation balanced with rapacious loss at the retail level. The Association asserts that past rejected and currently pending advice letter filings by GTEM-Cal show an unenviable record of anticompetitive practices. By way of relief the Association asked for hearing and that the Commission determine specific rates of return to be applicable to both GTEM-SF and GTEM-Cal, and devise ways to prevent cross-subsidization as well as determine what specific "bounties" could be paid by GTEM-Cal to third parties.

On April 11, 1988 GTEM-SF filed a response to Association's protest. While not questioning Association's right

to bring its expressed concerns to the Commission, GTEM-SF questioned whether these concerns were directly germane to the petition presently before the Commission, or more properly are the subject of other, separate proceedings presently before the Commission, or should be the subject of a full-scale, industry-wide investigation including all affected parties. GTEM-SF pointed out that not only was GTEM-Cal not a party to the petition, but that Commission action on many of the issues could not be taken without soliciting the input of all California certificated cellular wholesalers.

A prehearing conference (PHC) was held on July 6, 1988 in San Francisco before Administrative Law Judge (ALJ) John B. Weiss to determine the scope and scheduling of any hearing. At that conference, in response to a question to the point by the Association, GTEM-SF responded, in accordance with its understanding of Commission policy, that competition between an integrated wholesale/retail operator and its separate affiliated retail entity is not favored, that, as in other instances where integration has been approved, the customer base of its separate affiliated retail entity would be conveyed to the integrated wholesale/retail operator, and its separate retail affiliate would cease to do business in that market. For its part the Association stated it wanted an extension of time to enable it to show that the GTE owned entities had failed to adhere to the separate entity requirements imposed by D.84-11-029. As punishment for these alleged transgressions it would ask that GTEM-SF should not be granted integrated wholesale/retail operations authority. The Association sought an order from the ALJ expanding written discovery already obtained (in a collateral cellular proceeding in hearing elsewhere before the Commission) in order to obtain the work papers underlying information obtained in that collateral discovery, as well as authority to take additional depositions.

In his ruling denying expansion of the scope of the present petition proceedings, the ALJ pointed out, as staff had affirmed, that Commission policy with regard to permitting integrated wholesale/retail operations for facilities based carriers had evolved since 1984, when as a pioneer applicant GTEM-SF had been limited to wholesale/retail operations under separate entities, and that since early 1986 the Commission routinely has been granting integrated authority to facilities based carrier applicants, albeit with appropriate restrictions to segregate accounting, sales, and service. The result today being, the ALJ observed, that with but one exception, GTEM-SF is the only facilities based carrier without integrated authority. The ALJ noted that the Commission plans shortly to initiate an industry-wide investigation into rates, rates of return, and alleged violations and abuses of the restrictions imposed attending integrated operations, and will then consider remedial measures if deemed necessary. The ALJ concluded that these issues, however, were more of industry-wide implication than parochial in nature. The ALJ further ruled that if the Association had specific evidence of GTEM-SF or GTEM-Cal abuses it should file a complaint, not attempt to use this petition as its vehicle for redress; stating that a complaint is the more appropriate vehicle for possible imposition of sanctions or punishment, and that a denial of integrated authority would merely result in continuation of the present separate entity situation which the Association asserts is not working. Accordingly, the ALJ ordered that hearing would proceed August 8, 1988, but be limited to evidence, if any there be, why GTEM-SF should be treated differently and denied the integrated wholesale/retail authority granted to the balance of the facilities based carriers in California.

Subsequent to the PHC, GTEM-SF and GTEM-Cal entered into settlement discussions with the Association, keeping the Commission Advisory and Compliance Division (CACD) Telecommunications Branch

informed. These discussions proved fruitful and a Stipulation resulted which enabled the Association to withdraw its protest, removing any necessity for the scheduled hearing.

By the Stipulation signed by GTEM-SF and GTEM-Cal, the Association, and the CACD Telecommunications Branch, GTEM-SF agreed to adopt an organization chart (Appendix A) applicable to and reflective of its proposed integrated wholesale and retail operations organization. This organization establishes the structural separation and allocation of management and employees between the wholesale and retail divisions, subject, of course, to modification necessary from time to time to meet increased service demands. GTEM-SF, under the Commission's Uniform System of Accounts for Cellular Carriers, will be expected to maintain its books in such detail that financial data relating to its operations will show:

1. Separated wholesale and retail revenue and expenses.
2. Revenue and expenses of utility operations segregated from nonutility operations.
3. Charges for affiliates broken down so that each kind of charge can be identified.
4. Revenue accounts appropriately subdivided (access, peak, off-peak, service order charges, custom calling, directory listing, etc.).
5. Expense accounts grouped to provide a total for sales and marketing expense. This would include subaccounts, advertising, promotion and incentives, sale, salaries and commission, sales vehicle expense, etc.
6. General and administrative (G&A) expenses subdivided to identify rent and lease expense, billing expense, salaries, insurance, and other appropriate subdivisions.

7. Other significant costs separately identified.

GTE Mobilnet Houston Headquarters G&A expenses will be allocated in proportion to ratios developed from incurred direct operating expenses. Plant balances and capital additions will be used to allocate engineering type expenses, using all of the GTE Mobilnet entities as the denominator of the ratio. Allocations will be done monthly or quarterly as appropriate.

If granted authority to provide both wholesale and retail cellular services, GTEM-SF and GTEM-Cal agree that GTEM-Cal would not compete in any market in which GTEM-SF provides, or will provide, cellular services. GTEM-SF and GTEM-Cal further propose to convey to GTEM-SF the existing customer base of GTEM-Cal, in markets in which GTEM-SF provides service, within 90 days of the effective date of this order, and thereafter GTEM-Cal would not compete in any cellular market in which GTEM-SF is the underlying facilities based carrier.

The present unequal position of GTEM-SF vis-a-vis its Bay Area competitor and other facilities based carriers enjoying integrated wholesale and retail authority assertedly places GTEM-SF in a disadvantageous cost/expense position with undesirable tax consequences.

Discussion

D.84-11-029 was issued after a hearing in which the applicants (GTEM-SF's predecessors in interest), intervenors for the then proposed nonwireline San Francisco-Oakland and San Jose facilities based carrier systems, and our staff represented substantially differing views concerning future projections of customers, income, expenses, and sales relative to anticipated and potential wholesale and retail cellular business. We recognized that the applicants would have a monopoly on wholesale cellular operations in the Bay Area until the nonwireline facilities based carrier could construct its system and commence wholesale

operations. We approached this situation with reservations and accordingly required a separate resale subsidiary in D.84-11-029 in an effort to ensure that applicants would treat their separate retail entity the same as independent resellers, and to eliminate any superior position which the applicants' retail organization might otherwise hold over the independent resellers. But we also stated:

"It is our intention to treat the wireline and nonwireline carriers in this market equitably. When the headstart period concludes we will reexamine the 'separate reseller entity' concept." (D.84-11-029, mimeo. at p. 42.)

Subsequently BACTC was, by D.86-05-010 issued May 7, 1986, awarded authority to provide both wholesale and retail cellular services in the same San Francisco-Oakland and San Jose metropolitan areas; and no separate entity affiliate reseller organization or operation was required. Since 1986 a number of facilities based carriers in other cellular market areas have been granted certificates with similar integrated wholesale/retail authority. Indeed, as staff confirmed at the PHC, this integrated operation authority is today the "standard."

The head-start period in this market has concluded. Both facilities based carriers in the market have been in operation for some time. The competitive factors today influencing the relationship between GTEM-SF and BACTC are far different than those existing and contemplated when D.84-11-029 was issued. Today we perceive no compelling policy reasons to continue the limitations imposed upon GTEM-SF that require it to operate reseller cellular services under a separate entity. It is time to permit GTEM-SF to organize and operate on an equitable plane with its competition, just as we stated was our intention when we issued D.84-11-029.

In authorizing removal of the "separate entity" requirement imposed by D.84-11-029, we do not excuse GTEM-SF from its obligation to keep its records as prescribed by our Uniform

System of Accounts for Cellular Carriers, separately reflecting wholesale and retail operations. Our requirements in this regard are summarized in the seven points set forth in the Stipulation signed in this proceeding by GTEM-SF, GTEM-Cal, the Association, and our Telecommunications Branch staff. These merely repeat the requirements set forth applicable to BACTC in D.86-05-010 (See D.86-05-010, mimeo. p. 16).

In our view the ALJ properly refused to permit expansion of the scope of this petition proceeding to encompass the Association's allegations of abuses in cellular marketing practices. To a certain extent these derive from and reflect rate flexibility issues. D.84-11-029 reflected our hesitance in attempting conventional utility regulation in a new technology, start-up industry too soon. We there and in D.86-05-010 determined to defer judgments and more traditional regulation until both Bay Area facilities based carriers were fully operational and experience could produce sufficient data. As we further stated in D.84-11-029:

"We will also investigate what degree of rate flexibility should be in place when two carriers are operational. We will of course consider the interests of the independent resellers and the public in reaching that decision." (Emphasis added.) (D.84-11-029, mimeo. at p. 42.)

The problems the Association wanted to inject may very well be real but they are not necessarily restricted to GTEM-SF. As such we prefer and intend to address them in the near future in an industry-wide investigation we will initiate.

In imposing a "separate entity" concept upon the reseller effort to be initiated by applicants in 1984, one of our primary intentions was to mitigate or limit any adverse effect or unfair advantage that early entry of an integrated wholesale/retail applicant operation into the marketplace might have upon the bona fide competition we desired to eventually establish between the two

facilities based carriers in the San Francisco-Oakland and San Jose cellular market. Federal Communications Commission decisions contemplated that facilities based carriers could operate retail in competition with independent resellers. And a major objective of nonwireline carriers in engaging in resale of cellular services pending construction of their own systems was to develop a customer body which later could be transferred to the carriers' primary retail service when that became available. GTEM-SF has been no different, and has also developed through its "separate entity" GTEM-Cal, a customer body it proposes to transfer to the integrated wholesale/retail entity, GTEM-SF, we are authorizing.

Generally speaking, it is our policy not to allow a separate entity affiliate reseller utility to compete in the same marketplace as a reseller with the retail operation of its affiliated facilities based carrier holding integrated wholesale/retail authority (In D.85-04-015 we stated "PacTel Mobile Services should not be authorized to function as a reseller of services which would compete with similar services offered, directly or indirectly, by its affiliate, PacTel Mobile Access." This has been our stated policy).

Accordingly, GTEM-Cal should be given authority in the following order and should be required, within 90 days of the effective date of this order, to transfer its existing customer base to GTEM-SF in those marketplaces where GTEM-SF provides cellular services. Since rate base accounting was required beginning in 1985 in anticipation of rate base ratemaking, the conveyance price with respect to each customer conveyed should reflect fair market value at time of GTEM-Cal's acquisition, or GTEM-Cal's recorded actual acquisition cost, whichever is the lesser. Following the effective date of this order, GTEM-Cal should not be permitted to compete in any retail cellular services marketplace served by GTE Mobilnet, Inc.

Findings of Fact

1. In part, the wholesale/retail structure of the cellular market was originally established to permit the nonwireline carriers to enter the cellular resale marketplace as bona fide competitors and to mitigate any adverse effects of the early entry of the wireline carriers.

2. It has been and remains Commission policy to treat wireline and nonwireline facilities based carriers in the cellular market equitably.

3. By D.84-11-029 the Commission authorized the predecessors in interest to GTEM-SF to construct and operate a wireline cellular mobile telecommunications system in the San Francisco-Oakland and San Jose metropolitan areas. However, they were authorized to directly provide only wholesale services, and were required to establish a separate reseller subsidiary entity to provide reseller services; this to ensure that independent resellers would be treated the same as the facilities based carrier would treat its own affiliated separate retail entity, and to eliminate any superior position which the carrier's affiliated retail organization might otherwise hold over independent resellers.

4. In D.84-11-029 the Commission stated that when the head-start period of wholesale monopoly ended it would reexamine the "separate reseller entity" concept.

5. By D.86-05-010 the Commission authorized BACTC, GTEM-SF's facilities based carrier competitor, to construct and operate a nonwireline cellular mobile telecommunications system in the San Francisco and San Jose Metropolitan Statistical Areas, and to offer both wholesale and retail services while keeping its wholesale operations separate from its retail operations.

6. In D.88-05-067 the Commission indicated that the "standard" facilities based cellular carrier organization contemplates an integrated wholesale and retail organization.

7. The head-start period has ended in the San Francisco and San Jose Metropolitan Statistical Areas.

8. With one exception GTEM-SF is the only facilities based cellular carrier in California required to conduct its reseller operations under the separate entity concept.

9. The requirement that GTEM-SF operate under the separate entity concept imposes a competitive disadvantage upon GTEM-SF and is inequitable.

10. With two cellular facilities based carriers operating in the same marketplace there no longer is a reason to continue the separate regulatory treatment afforded GTEM-SF.

11. In D.86-05-010 the Commission stated it wished to wait until GTEM-SF and BACTC had been in operation for some time before considering whether changes in ratemaking requirements would be appropriate.

12. By this petition GTEM-SF seeks to modify D.84-11-029 to permit GTEM-SF to provide both wholesale and retail cellular services in the Bay Area marketplace.

13. Assuming the modification stated in Finding 12 was to be granted, in view of the Commission's policy to discourage competition between affiliated entities at the retail level in the same marketplace, GTEM-SF also seeks authorization to convey the customer base of its GTEM-Cal subsidiary retail entity to GTEM-SF, and GTEM-Cal would no longer compete in any retail marketplace served by GTEM-SF.

14. The conveyance of GTEM-Cal's existing retail cellular customer base to GTEM-SF should be at fair market value at time of GTEM-Cal's acquisition, or GTEM-Cal's recorded actual acquisition cost, whichever is the lesser.

15. GTEM-SF's petition to modify D.84-11-029 was timely protested by the Association.

16. Following negotiations, a Stipulation was signed by GTEM-SF, GTEM-Cal, the Association, and the Commission staff's

Telecommunications Branch whereby the Association withdrew its protest in exchange for GTEM-SF's agreement to adopt the organization set forth in Appendix A to the following order, and to adhere to certain accounting requirements relating to the Uniform System of Accounts for Cellular Carriers.

17. The accounting requirements specified for GTEM-SF in the Stipulation are the same as those set forth in D.86-05-010 to be applicable to BACTC's wholesale/retail operations.

18. A public hearing is not necessary.

Conclusions of Law

1. The petition should be granted as provided in the order which follows.

2. To avoid further unequal treatment of the two competing facilities based carriers in this Bay Area marketplace the order should become effective immediately.

ORDER

IT IS ORDERED that:

1. Ordering Paragraph 8 of Decision (D.) 84-11-029 is modified to read:

GTE Mobilnet of San Francisco Limited Partnership (GTEM-SF) is authorized to operate and provide cellular retail mobile telecommunications services in the San Francisco-Oakland and San Jose areas, and is further authorized to adopt and file on 5 days' notice the existing retail tariff schedules of GTE Mobilnet of California (GTEM-Cal).

2. The certificate of public convenience and necessity granted to GTEM-Cal by D.85-04-008 authorizing resale of cellular services, is amended to prohibit future competition with GTEM-SF in any retail cellular marketplace served by GTEM-SF.

3. Within 90 days of the effective date of this order, GTEM-SF shall adopt the organization illustrated by Appendix A to this order.

4. Within 90 days of the effective date of this order, GTEM-Cal shall convey to GTEM-SF its existing retail customer base in the San Francisco-Oakland and San Jose cellular marketplace.

5. The conveyance of GTEM-Cal customers to GTEM-SF shall be at fair market value at time of GTEM-Cal's acquisition or GTEM-Cal's recorded actual acquisition cost, whichever is the lesser.

6. The customers of GTEM-Cal conveyed to GTEM-SF shall be notified of their transfer by bill insert.

7. The requirements of General Order 96-A, as amended by D.88-05-067, shall be applicable to both the wholesale and retail operations of GTEM-SF.


8. GTEM-SF, as agreed in the Stipulation accepted in this proceeding, shall adhere to the accounting requirements relating to the Uniform System of Accounts for Cellular Carriers set forth in the Statement of Facts of this decision.

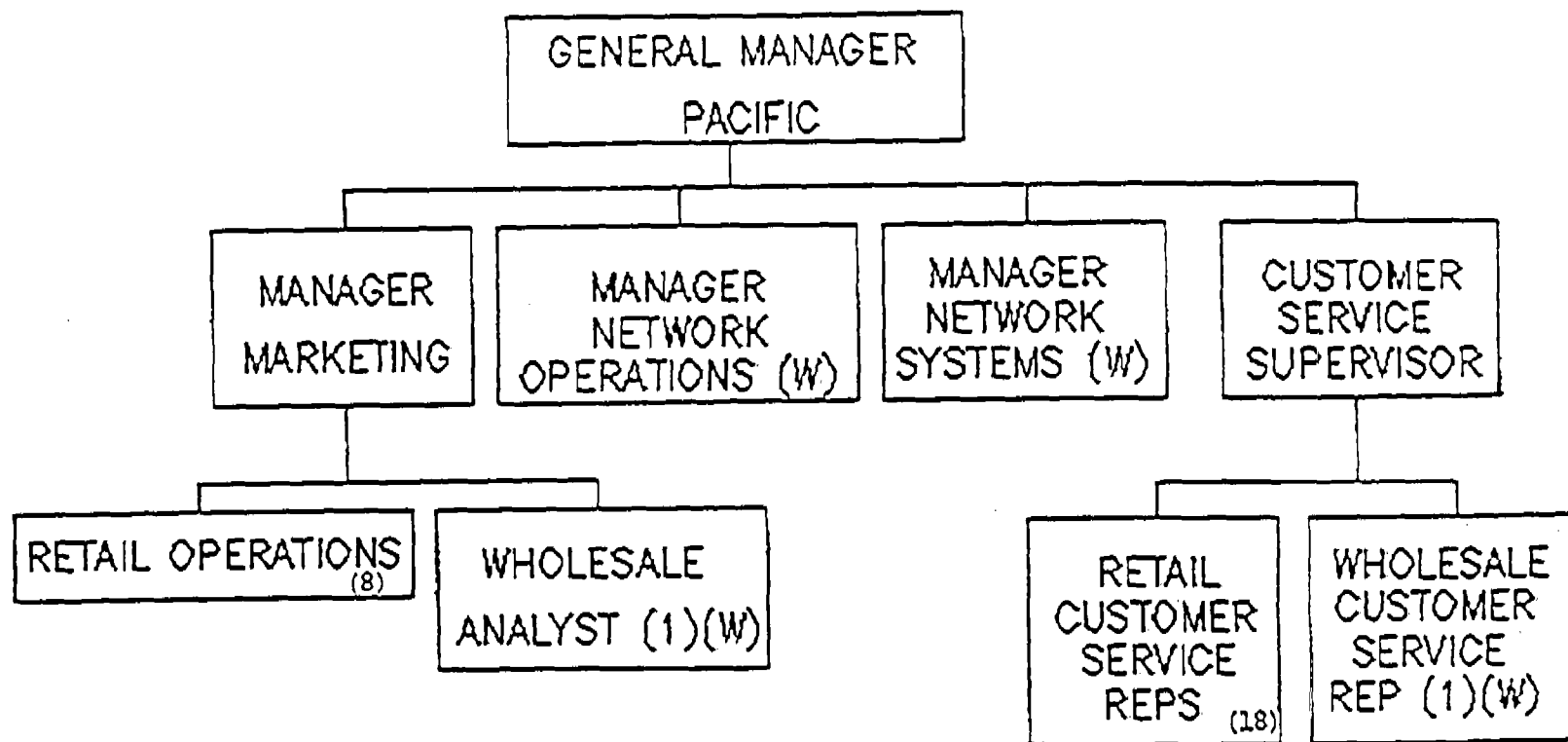
This order is effective today.

Dated AUG 24 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
FREDERICK R. DUDA
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Victor Weisser, Executive Director



1. (W) represents WHOLESALE.
2. Numbers within parenthesis indicate number of employees.
3. Of the 18 "Retail Customer Service Reps", 5 positions are currently vacant.