

Decision 89 03 056 MAR 22 1989

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mailed

In the Matter of the Application of)
Redding Cellular Partnership for a)
certificate of public convenience)
and necessity under Section 1001 of the)
Public Utilities Code of the State of)
California for authority to construct)
and operate a new domestic public)
cellular radio telecommunication service)
to the public in the Redding MSA)
encompassing Shasta County.)
(U-3020-C))

MAR 23 1989

Application 88-07-008
(Filed July 6, 1988)

FINAL OPINION

Background

On July 6, 1988, Redding Cellular Partnership (applicant), a California general partnership, filed a request for a certificate of public convenience and necessity (CPC&N) to construct and operate a new domestic public cellular radio telephone service within the Redding MSA encompassing Shasta County.

Notice of the application appeared in the Commission's Daily Calendar of July 11, 1988. A protest to the application, which asserts that applicant has not justified its proposed rates, was filed by Cellular Resellers Association, Inc. (CRA) on August 5, 1988.

Interim Decision (D.) 88-08-062 granted applicant a CPC&N to construct the necessary facilities for its proposed public cellular radio telephone communication service. The interim decision also addressed applicant's environmental report, ownership change, proposed facilities, financial plans, and management. However, it did not grant applicant authority to operate its cellular system until applicant's proposed rates and service are addressed.

Subsequent to the protest and prior to the interim decision, applicant and CRA commenced settlement discussions to resolve CRA's protest. Through such discussions an agreement was reached and on January 9, 1989 applicant filed a motion to adopt the agreement, to waive the Commission's settlement rules, and to provide applicant authority to operate. Concurrently, CRA filed a request to withdraw its protest conditioned upon approval of the agreement in its entirety. Subsequently, on March 1, 1989, applicant and CRA jointly filed an amendment to the agreement.

Settlement Agreement

Copies of the agreement and amendment are attached hereto as Appendices A and B, respectively. The agreement, as amended, provides for applicant to offer resellers:

- a. Special roaming rates and charges to those resellers not controlled or owned by a facilities-based carrier or an affiliate of a facilities-based carrier;
- b. Billing credits to applicant's resellers when a reseller's customer roams on any of the McCaw Systems;
- c. Volume sensitive wholesale rates based on an aggregation of the reseller's monthly local usage volume with monthly local usage volumes on the facilities of other McCaw systems on the Sacramento Cellular Telephone Company Switch. Applicant will obtain such volume aggregation from the billing tapes it receives monthly from a central billing source based at Sacramento Cellular Telephone Company's switch;
- d. Blocks of numbers with the required initial order to be no more than 25 numbers;
- e. A charge for wholesale access fees only when the number is activated within 60 days of order. The reseller is required to start paying access fees for those numbers not activated after 60 days of order;

- f. Direct computer access for number activation and deactivation, provided that the cost of a computer terminal and modem on a reseller's premise and a business telephone line is borne by the reseller and that a dial-up modem port and software necessary to accommodate direct number activation and deactivation by a reseller is furnished by applicant; and
- g. Wholesale tariffs, applicable to certificated resellers only.

Under the agreement, applicant and CRA "have also agreed to stipulate as to the outcome of the Commission's final Decision in Cellular Reseller's Association Inc. v. GTE Mobilnet C.86-12-023..." (Appendix A, page 5.) The term of the agreement is for a one-year period and may be terminated by either party upon written notice after the other party breaches the agreement if such breach is not cured within 30 days.

Discussion

In the amended agreement applicant and CRA assert that the Commission's Settlement Rule (Rule 51) is not applicable to the proposed agreement in this proceeding because there are no parties to this proceeding as defined by Rule 51(a). Rule 51(a) defines a party to a stipulated agreement as a person on whose behalf an appearance has been filed in the proceeding.

The agreement achieved between applicant and CRA, the only protestant to the application, is the result of a compromise of disputed claims between applicant and CRA. Applicant and CRA believe that no benefit will be served by convening a prehearing conference so that applicant and CRA may enter an appearance and invoke the Settlement Rule. Rather than challenge the applicability of Rule 51, applicant and CRA request that the agreement be approved under the Commission's inherent authority to approve the negotiated results of a protest.

Although the term of the agreement is limited to one year, applicant's proposed tariffs will remain in effect and will not change until such time as applicant files an advice letter to amend its tariffs, pursuant to Public Utilities Code Section 491 and General Order 96-A. If either party breaches the agreement prior to the termination date of the agreement, such breach will not have any effect upon applicant's authorized tariffs.

Applicant and CRA do not oppose the extension of the agreement to certificated resellers not a member of CRA.

We concur with applicant and CRA that Rule 51 is not applicable in this instance. The agreement, as amended, is in the public interest and should be adopted because it will enhance the cellular reseller market in the Redding MSA and provide end users within the MSA a choice of competitive cellular service from two facilities-based carriers and numerous resellers. The only issue remaining is whether applicant's proposed rates are reasonable. These rates, as attached to the agreement, are as follows:

	<u>Wholesale</u>	<u>Retail</u>
<u>Basic Service</u>		
Number Activated	\$15.00	\$
Service Established		50.00
Change Service	10.00	15.00
Service Restoral Charge	10.00	15.00
<u>Basic Plan Access Charge</u>		
Up to 25 numbers	22.00	
Each number in excess of 25 numbers & under 100	21.45	
Each Number		30.00
Peak usage	0.285	0.35
Off-peak usage	0.205	0.25

Subsequent to the setting of an evidentiary hearing on this application, an investigation into the regulation of cellular utilities (Investigation (I.) 88-11-040) was issued. The investigation was opened to determine whether the initial cellular framework established in early CPC&N proceedings is meeting our

objectives. The method of setting cellular rates is an integral part of the investigation. Pending a change in setting cellular rates, applicant and other cellular utilities are required to demonstrate the reasonableness of the rates they propose to offer.

Applicant's financial data and projections included in its application show that, although applicant will operate at a loss the first two years of operation, it expects to operate at a profit in its third year of operation. When the actual experience data is submitted, we will be in a much better position to judge the appropriateness of the applicant's rates. We emphasize to the applicant the importance of filing annual reports of financial results. We intend to monitor these reports so that we can make sure that the return for the business is reasonable and commensurate with risk.

Applicant's proposed operation constitutes a start-up business. Therefore, it is reasonable and necessary to use marketing projections to set initial rates. It is also reasonable to expect applicant to operate at a loss in its first two years of operation. Although marketing projections are useful to estimate call volumes, which in turn are used as the basis for setting rates, such projections are no substitute for actual volume data. To the extent that applicant's marketing projections are correct, applicant's proposed rates are reasonable. As experience develops with applicant's service, applicant should scrutinize its authorized rates to determine the appropriateness of its rates and seek rate adjustments if warranted.

Applicant's proposed rates are reasonable. Applicant should be granted authority to operate its cellular system as provided in its agreement. With no other issue remaining, this proceeding is closed.

Findings of Fact

1. CRA's protest asserts that applicant does not justify its proposed rates.

2. Interim D.88-08-062 granted applicant a CPC&N to construct its proposed cellular facilities.
3. A stipulated agreement between applicant and CRA was filed on January 9, 1989.
4. CRA filed a motion to withdraw its protest conditioned upon approval of the agreement in its entirety.
5. An amendment to the agreement was filed on March 1, 1989.
6. Rule 51 is not applicable in this proceeding.
7. I.88-11-040 was opened to investigate the regulation of cellular utilities and the method of setting cellular rates.
8. Applicants and other cellular utilities are required to demonstrate the reasonableness of the rates they propose to offer.
9. Applicant has demonstrated in its application that, as a start-up business, applicant will show a profit in its third year of operation.

Conclusions of Law

1. The agreement as modified by applicant and CRA's joint amendment should be adopted.
2. Applicant's rates attached to the agreement and as modified by the amendment to the agreement are reasonable and should be adopted.
3. There being no issues remaining to be considered, this proceeding should be closed.

FINAL ORDER

IT IS ORDERED that:

1. A certificate of public convenience and necessity (CPC&N) is granted to Redding Cellular Partnership (applicant) to operate a cellular mobile telecommunications system in the Redding Metropolitan Statistical Area.
2. The provisions of the agreement attached as Appendix A and as modified by Appendix B shall be adopted.

3. California Resellers Association's (CRA) protest is dismissed.

4. Within 30 days after this order is effective applicant shall file a written acceptance of the CPC&N with the Commission Advisory and Compliance Division (CACD) Director.

5. Applicant shall keep its books as directed by the Uniform System of Accounts for cellular communications licenses as prescribed by D.86-01-043.

6. Applicant shall file annual financial reports concerning the operations permitted by this decision. Applicant's actual financial performance will provide the basis for ensuring that applicant's future rates provide a return that is reasonable and commensurate with risk.

7. Applicant shall notify the CACD Director in writing of the day it starts operating.

8. On or after the effective date of this order, applicant is authorized to file wholesale and retail tariff schedules in accordance with the rates identified in this order and as attached to its January 9, 1989 motion to adopt a stipulated agreement. The filing shall comply with General Order Series 96 and shall be effective not earlier than 5 days after filing.

9. Within 60 days after the effective date of this order, applicant shall prepare and issue to each employee who, in the course of employment, enters a customer's or subscriber's premise, an identification card in a distinctive format having a photograph of the employee and shall notify CACD of such compliance. Applicant shall require each employee to present the identification card when requesting entry into any building or structure of a customer or subscriber, pursuant to PU Code § 708.

10. Applicant's filed tariffs shall provide for a user fee surcharge of 0.10%, pursuant to PU Code §§ 431-435.

11. Applicant is subject to a one-half percent (1/2%) surcharge on gross intrastate revenues to fund Telecommunications

Devices for the Deaf, pursuant to PU Code § 2881 as set forth in Resolution T-13005.

12. The corporate identification number assigned to Redding Cellular Partnership is U-3020-C which should be included in the caption of all original filings with this Commission and in the titles of other pleadings filed in existing cases.

13. The authority granted in this order will expire if not exercised within 12 months after the effective date of this order.

14. This proceeding is closed.

This order is effective today.

Dated MAR 22 1990, at San Francisco, California.

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

Commissioner Patricia Eckert,
present but not participating

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

Victor Weiszer
Victor Weiszer, Executive Director

DO

II.

SUMMARY OF THE PROPOSED SETTLEMENT
AS IT APPLIES TO RCP

Under the Settlement Agreement, CRA has agreed to withdraw its protest to RCP's Application and to refrain from filing any further protests to the Application, provided that RCP complies with the terms of the Settlement Agreement and as long as the Application retains terms and conditions as favorable to CRA as those contained in the tariffs presently proposed by RCP, as amended by the terms of the Settlement Agreement.

For its part, RCP has agreed to amend its draft tariffs prior to commencing service in the Redding CGSA to provide the following:

A. Roaming Rates.

1. Special roaming rates and roaming charge reimbursements will be available to any reseller that is not controlled or owned by a facilities-based carrier or an

affiliate of a facilities-based carrier ("Independent Reseller") when either:

- (a) The Independent Reseller provides service to a customer on the facilities of certain McCaw-owned or McCaw-controlled cellular systems in California, identified in Attachment C hereto (the "McCaw Systems") (the facility providing service to the Independent Reseller will be referred to as the "Home System"); or
- (b) The Independent Reseller's customer roams on the facilities of the McCaw Systems (such carrier will be referred to as the "Serving System").

2. When an Independent Reseller's customer roams on any of the McCaw Systems, the Independent Reseller shall either pay a special roaming rate or be entitled to a credit upon billing depending on whether the Home System and the Serving System operate on a common cellular Mobile Telephone Switching Office ("Switch") or operate on different Switches, respectively.

a. If the Home System and the Serving System operate on a common Cellular Switch, the Independent Reseller shall pay for roaming at the same rates as are set forth in the Serving System's wholesale tariffs.

b. If the Home System and the Serving System do not operate on a common cellular Switch, the Independent Reseller shall be entitled to a credit upon billing.

The Independent Reseller shall pay for roaming in accordance with the rates set forth in the Serving System's roamer tariffs applicable to the Home System's customers, less a credit equal to a sum calculated according to the following formula:

- (a) The product of the amount paid by the Independent Reseller for roaming usage charges under the Serving System's tariff by a percentage equal to the difference between the Serving System's retail and wholesale usage rates, expressed as a percentage of the retail usage rate; and
- (b) The product of the amount to be paid by the Independent Reseller for any roaming access charges under the Serving System's tariff multiplied by the percentage equal to the difference between the Serving System's retail and wholesale access charges, expressed as a percentage of the retail access charge.

B. Volume Aggregation.

For the purpose of qualifying for volume-sensitive wholesale rates, Independent Resellers will be permitted, under the wholesale tariffs of RCP, to aggregate their monthly local usage volumes on the facilities of RCP with their monthly local usage volumes on the facilities of McCaw systems operating in California on the Sacramento Cellular Telephone Company switch.

C. Access Fee.

With respect to any numbers allocated to an Independent Reseller, RCP's tariffs will provide that the wholesale access fee shall be paid at the time of activation, and not at the time of the allocations of such numbers. The Independent Reseller shall have agreed not to maintain unreasonably high inactive inventories which would limit the furnishing of numbers by RCP to other customers. A reseller's failure to activate all of the numbers in its minimum initial order of numbers within sixty (60) days or more after their allocation shall be conclusively deemed to be the retention of an unreasonably high inventory, and shall result in all access fees for such numbers being due at the next billing cycle applicable to such reseller. RCP agrees to file tariffs providing that the initial order of numbers shall be no more than twenty-five (25).

D. Direct Computer Access.

RCP has agreed to allow resellers direct computer access for number activation and deactivation, provided that the costs of a computer terminal and modem on a reseller's premises and a business telephone line will be borne by such reseller, and that a dial-up modem port and software necessary to accommodate direct number activation and deactivation by a reseller will be furnished by RCP. If in the future RCP is unable to accommodate resellers' request for direct computer access due to a lack of ports or a need to revise software, RCP would have the right to allocate expenditures necessary to accommodate such requests among

its retail operations and all resellers requesting to use direct computer access on RCP's system.

E. Applicability of Wholesale Tariff.

RCP's wholesale tariffs are to be applicable only to certificated resellers, subject to the following exception. If RCP identifies any potential customer in its service territory that would purchase a large enough quantity of cellular numbers to qualify for wholesale rates under the tariff of the Block B facilities-based carrier in that service territory, RCP may, following reasonable advance notice to CRA, amend its wholesale tariffs in order to provide wholesale service to that customer or other similarly situated customers. CRA has agreed not to oppose such amendment.

F. Miscellaneous Provisions.

The Parties have also agreed to stipulate as to the outcome of the Commission's final decision in Cellular Resellers Association, Inc. v. GTE Mobilnet, Case No. 86-12-023, and RCP has agreed to adhere to the accounting requirements relating to the Uniform System of Accounts for Cellular Carriers, including the segregation of wholesale and retail revenues and expenses.

The term of the Settlement Agreement is to be one (1) year from the date that tariffs required under the Settlement Agreement are filed. The Settlement Agreement may be terminated by either Party upon written notice after the other Party breaches the Settlement Agreement and such

breach is not cured prior to the end of the thirty (30) day period.

The Parties have agreed to file a motion of waiver of Rule 51 of the Commission's Rules of Practice and Procedure, pursuant to Rule 51.10. The Parties further agreed to cooperate in obtaining such a waiver in good faith.

The Parties have agreed that no partnership, agency or franchise agreement is to be created by the Settlement Agreement, and no other person or entity besides the Parties are to acquire any rights thereby or thereunder.

All notices required by the Settlement Agreement are to be sent to the Parties' addresses set out in an attachment to the Settlement Agreement.

The Settlement Agreement is to be governed by and construed in accordance with the laws of California and any action brought for breach of the Settlement Agreement shall be brought before a court or agency of competent jurisdiction within the State of California.

The Settlement Agreement is subject to such changes as either the FCC or this Commission may direct in its exercise of jurisdiction. Should there be any conflict between the provisions of the Settlement Agreement and any regulatory action affecting the subject matter of the Settlement Agreement, the Parties have agreed to amend the Settlement Agreement to conform to such regulatory action.

The Settlement Agreement is intended as a compromise of disputed claims and shall not be deemed an

admission by any Party that the other Party is entitled to the relief provided under the Settlement Agreement as a matter of law or regulatory policy.

CRA has warranted that it has the authority to enter into a binding agreement with RCP on behalf of each of its members. CRA has agreed to furnish a copy of the Settlement Agreement to each of its present members and to require each new member during the term of the Settlement Agreement to agree in writing to be bound by its terms.

The Settlement Agreement is binding upon the Parties, their members, and the partners, shareholders, officers, successors or assigns and subsidiaries and affiliates of such Parties and their members.

The Parties have agreed to file such motions, stipulations, agreements or other pleadings with the Commission as are necessary and appropriate to effect the withdrawal of protests by the CRA to RCP's application.

The Settlement Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument.

Any reseller which seeks to benefit from the provisions of the Settlement Agreement must become an individual signatory of the Settlement Agreement.

(END OF APPENDIX A)

The purpose of this joint Motion is to clarify the following matters in the Motion:

Rule 51. This settlement was achieved between RCP and CRA, the only protestant to RCP's Application, before any prehearing conference was scheduled or any appearance filed. Accordingly, RCP and CRA wish to clarify that because there are no parties to this proceeding as defined by Rule 51(a), Rule 51 by its terms does not apply to this settlement. However, rather than challenge the applicability of Rule 51 or expend the Commission's limited resources on convening a prehearing conference merely to enter appearances and invoke the Rule, RCP and CRA respectfully urge the Commission to approve the Settlement Agreement under its inherent authority to approve the negotiated resolution of a protest. RCP and CRA further request that the Commission incorporate the Settlement Agreement, as clarified below, in its order granting RCP's Certificate of Public Convenience and Necessity.

Roaming Rates. On pages 5-7 of the Motion, roaming charge reimbursements and a special roaming rate are set forth. CRA and RCP wish to clarify that the credit referred

to on page 6 of the Motion in paragraph 2 is available, in the context of this proceeding, only to RCP's resellers. Thus, the only utility's tariffs affected by the Settlement Agreement in the context of this proceeding will be RCP's.

Volume Aggregation. On page 7 of the Motion, paragraph B states that for the purpose of qualifying for volume-sensitive wholesale rates, resellers will be permitted under the wholesale tariffs of RCP to aggregate their monthly local usage volumes on RCP's system with their monthly local usage volumes on the facilities of other McCaw systems operating in California on the Sacramento Cellular Telephone Company Switch, specifically Sacramento and Stockton Cellular Telephone Companies. CRA and RCP wish to clarify that information regarding volume aggregation by the resellers will be readily available to RCP on the billing tapes it receives monthly from a central billing source based at Sacramento Cellular Telephone Company's Switch.

Term of the Settlement Agreement. On page 9, third full paragraph of the Motion, the term of the Settlement Agreement is set forth as being one year from the date that tariffs required under the Agreement are filed. The Motion also states that the Agreement may be terminated by either party upon written notice after the other party breaches the Agreement and such breach is not cured prior to the end of the thirty (30) day period. CRA and RCP wish to clarify that under the Agreement, CRA has agreed to withdraw its protest to RCP's Application and to refrain from filing any further protests to the Application so long as RCP complies

with the terms of the Settlement Agreement. These terms include RCP's filing and maintenance of tariffs containing the provisions described on pages 5-9 of the Motion. Although the term of the Settlement Agreement is limited to one year, such tariffs filed with the Commission shall remain in effect indefinitely and will not change until such time as RCP files an advice letter to amend the tariffs, pursuant to Section 491 of the Public Utilities ("PU") Code and General Order No. 96-A.

Should one party to the Agreement breach the Agreement prior to the expiration of its term or should the Agreement terminate upon its expiration, such breach or expiration of the Agreement would not by itself have any effect upon RCP's effective tariffs absent an advice letter filing. Once the Agreement is terminated due to either breach or expiration of the one year term, RCP may file an advice letter to change its tariffs, and CRA would be free to protest such advice letter filing since both parties will no longer be restrained by the Agreement.

Applicability of Wholesale Tariffs. On page 9, paragraph E of the Motion, the parties wish to clarify that, in the event RCP identifies a potential bulk user in its CGSA and files an advice letter to amend its wholesale tariff in order to provide service to bulk users, the "reasonable advance notice" that will be given to CRA will be the 40 days' notice afforded under General Order No. 96-A. Such advice letter will be served upon CRA members pursuant to General Order No. 96-A.

Benefits to Resellers. RCP and CRA wish to clarify that they have no objections to the extension of the benefits proposed in the Settlement Agreement to all certificated resellers and would comply with a Commission order to extend such benefits.

(END OF APPENDIX B)