

Decision 89 07 019

JUL 6 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
own motion into the regulation of)
cellular radiotelephone utilities.)

I.88-11-040
(Filed November 23, 1988)

Cellular Resellers Association,
Inc.,

Complainant,

Case 88-11-036
(Filed November 17, 1988)

v.

PacTel Cellular, et al.,

Defendants.

INTERIM OPINION

Cellular Resellers' Association (CRA) filed this complaint and request for an immediate cease and desist order on November 17, 1988, against PacTel Cellular (PacTel) and Pack Cell. On December 9, 1988, CRA amended its complaint to include Los Angeles SMSA Limited Partnership (LASMSA), and Cellular Mobile Phone Company (CMPC) as defendants. CRA's complaint alleges that the "bundling" by agents of cellular equipment and cellular services is unlawful under Public Utilities (PU) Code §§ 532 and 702. "Bundling" refers to a practice by which cellular equipment dealers offer discounts on that equipment to customers who agree to also purchase cellular service from a specified cellular utility.

CRA represents cellular resellers, which purchase services from cellular wholesale utilities and sell them as retail services directly to customers. PacTel is the general partner of LASMSA, which is a wholesale and retail provider of cellular service in the Los Angeles area. The Commission currently regulates the rates and services of both wholesale and retail cellular service providers.

Pack Cell and CMPC are cellular equipment dealers. The Commission does not regulate the provision of cellular equipment.

Summary

This order resolves certain legal issues raised in the complaint. We find that discounting a package of tariffed and unregulated products by utility agents is unlawful, and that utilities may be liable for related code violations under PU Code § 702. We also address motions to dismiss filed by defendants to this proceeding. We dismiss the complaints filed against CMPC and Pack Cell, and deny PacTel/LASMSA's motion to dismiss the complaint against it.

This order interprets the PU Code and other applicable laws as they pertain to allegations in this complaint case. It does not make any factual findings with regard to the actions of respondents to the complaint.

I. CRA's Complaint

CRA's complaint, as amended, alleges that CMPC and Pack Cell, in cooperation with or at the direction of PacTel and/or LASMSA, have implemented a plan which provides for the free installation of a cellular telephone and antenna purchased from CMPC and/or Pack Cell. In return, the customer must purchase equipment from CMPC and/or Pack Cell and retail cellular service from PacTel and LASMSA.

The complaint alleges that Pack Cell and CMPC, as agents of PacTel and LASMSA, tie the sale of equipment to the sale of cellular service in violation of PU Code § 532 and staff guidelines established by the Commission Advisory and Compliance Branch (CACD). CRA alleges the prices quoted for cellular equipment are below cost and are made profitable by virtue of the fact that CMPC

and/or Pack Cell receive commission payments from PacTel and/or LASMSA in the amount of about \$250 per transaction.

The complaint asserts that PacTel and LASMSA have failed to comply with PU Code § 702 which requires the utilities to comply with Commission rules and orders, and to "do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

CRA's complaint requests relief in the form of a cease and desist order prohibiting the offering of telephone equipment below cost, installation of equipment, or any form of free service or service rebate to induce the public to purchase cellular service from LASMSA and PacTel. It also requests that customers who have taken advantage of such offerings be informed of the illegality of LASMSA's and PacTel's actions and be given the opportunity to receive cellular service from other providers. Finally, the complaint asks that the Commission require LASMSA and PacTel to relinquish all profits received from the subject offering, and fine PacTel and LASMSA \$2,000 for each subscriber acquired through tying service to other offerings.

II. Motions to Dismiss

In response to CRA's complaint, each of the three defendants filed answers and motions to dismiss. On January 13, 1989, PacTel and LASMSA (PacTel/LASMSA) jointly filed an answer and motion to dismiss CRA's complaint. The answer states that LASMSA is a provider of cellular service in the Los Angeles area and that PacTel is a general partner of LASMSA. It also states that CMPC is an agent of LASMSA, and that neither LASMSA nor PacTel had any relationship with Pack Cell at any time relevant to the complaint.

The motion to dismiss is made on the grounds that the actions alleged by the complaint were not taken on behalf of PacTel or LASMSA, that none of the alleged actions are violations of

Commission rules, regulations, or orders, and that the Commission has no jurisdiction over the parties whose alleged actions are the basis of the complaint.

CMPC, on January 17, 1989, filed an answer and motion to dismiss. CMPC states it is a nonexclusive agent of PacTel for the limited purposes of soliciting and referring potential subscribers to cellular service, and that PacTel has no control whatsoever over the prices or services provided by CMPC with respect to its equipment business. The motion emphasizes that the acts of which CRA complains are not those of CMPC but of Pack Cell, and that CMPC has no control or influence over Pack Cell's business practices with respect to equipment sales.

On February 27, 1989, Pack Cell filed a motion to dismiss stating that it has not been an agent of either PacTel or CMPC since August 1986. It admits the co-defendants may have been aware of Pack Cell's business conduct, since it has had a business relationship with them, but denies any agency relationship.

All three of these motions argue that the case against CMPC and Pack Cell should be dismissed on the grounds that neither defendant is a public utility, and the Commission therefore has no authority over them.

On February 1, 1989, CRA filed a consolidated opposition to the motions to dismiss of PacTel, LASMSA, and CMPC. Its response alleges, among other things, that Pack Cell and CMPC are under the jurisdiction of the Commission because they have direct contact with customers for the sale of cellular service.

On March 7, 1989, PacTel/LASMSA filed a reply to CRA's consolidated opposition asking for a summary judgment pursuant to California Code of Civil Procedure § 437(c). It argues that summary judgment is appropriate in this case because no triable issues of fact are alleged. CMPC also filed a reply, on March 9, further clarifying its position.

On March 14, 1989, Celluphone, Inc. (Celluphone) filed a motion requesting that it be allowed to make a special appearance in this case in order that it might file comments in support of defendants' motions to dismiss. Celluphone is an authorized agent of PacTel and argues that the Commission does not have jurisdiction over utility agents. We will grant Celluphone's motion to consider its comments in this order. We also find that, contrary to CRA's statement that in order to grant Celluphone's motion, Celluphone "must participate as a full party in the proceeding and not attempt to avail itself of Commission process on the one hand, and hide from Commission jurisdiction on the other," we encourage public participation in our proceedings and do not require any particular level of participation or acquiescence to our jurisdiction as a condition of submitting comments for consideration.

Finally, on March 21, 1989, CRA filed an opposition to Pack Cell's motion to dismiss.

III. Issues Relating to Motions to Dismiss

In order to resolve the motions to dismiss of the defendants in this case, we must consider four issues:

1. May a complaint be brought against Pack Cell or CMPC?
2. Does CRA's complaint raise controverted factual issues against public utilities under the Commission's jurisdiction?
3. Are staff directives binding on the utilities?
4. Should the complaint be dismissed on the grounds that the Commission has no authority to award damages?

A. May a Complaint Be Brought
Against Pack Cell or CMPC?

CRA contends that Pack Cell and CMPC are public utilities because their business agreements with PacTel provide that:

1. PacTel/LASMSA customers are to be accorded equipment, installation, warranty and maintenance service prior to customers who do not subscribe to PacTel/LASMSA cellular service;
2. PacTel/LASMSA agents are given confidential marketing information which is considered the property of PacTel/LASMSA;
3. Agents and dealers are required to enter into noncompetition agreements whereby they are not permitted to compete for cellular service for varying lengths of time;
4. Agents and dealers receive both an up-front Commission for activating a retail cellular service customers and, in some cases, ongoing residual payments based on the customer's monthly bill.

According to CRA, CMPC and Pack Cell are utility agents and these arrangements make them similar to resellers. In support of its position that they are public utilities, CRA refers to the testimony of an intervenor in a cellular investigation who stated that agents are "similar to certificated resellers."

CRA alleges that CMPC's and Pack Cell's control over the process by which a customer is acquired and maintained by PacTel/LASMSA is "part and parcel" of a utility service, and the Commission is well within its authority to regulate agent and dealer activities.

CRA cites Commercial Communications v Public Utilities Commission (1958) 50 C 2d 512, in which the Commission held that private mobile communications systems are of "public concern" and the exercise of Commission jurisdiction over them was "cognate and germane" to the regulation of public utility telephone companies.

In Decision (D.) 80168, the Commission used this authority to regulate activities it found to be those of public utilities.

In its motion to dismiss, Pack Cell argues that it is not a public utility because it does not own, operate, or manage a telephone line, a prerequisite for a determination of being a telecommunications utility under PU Code §§ 233 and 234. Pack Cell states the Commission has declined to regulate dealers of goods and services which are related to the work of public utilities, but which do not fall clearly within the definitions which the PU Code provides. It cites our decisions in cases where we declined to regulate reselling of energy to tenants by landlords, fees charged by hotels for the use of telephone service by guests, and private radio telephone systems.

CMPC's motion argues that it is not a public utility under Article XII, § 3 of the California Constitution, and PU Code § 216. Its reply to CRA's opposition to the motions to dismiss cites D.87-11-055 which found that defendant tariff agents were not public utilities because they did not perform public utility functions, had no discretion as to the setting of rates or the formulation of tariff rules, and provided an administrative function to the public utility. CMPC states that it is in a similar position of providing administrative services to a public utility. Accordingly, the Commission has no jurisdiction over it.

PacTel/LASMSA similarly argue that the Commission has no jurisdiction over Pack Cell, the entity whose actions are the basis for the complaint. PacTel/LASMSA cite several decisions of the courts and the Commission to argue that neither Pack Cell nor CMPC are public utilities because they do not hold themselves out as providers of cellular service. PacTel/LASMSA challenge CRA's interpretation of Commercial Communications, citing that portion of the Court's ruling which "if defendant['s]...activity does not qualify as a 'public utility service,' because it does not involve or facilitate the 'transmission of telephone messages' [or]

'communication by telephone'...the other cited provisions of the PU Code do not operate to confer such status."

PacTel/LASMSA make numerous distinctions between cellular service providers and agents. According to PacTel/LASMSA, agents do not bill for services, have no discretion to set rates or formulate tariff rules, and do not own utility plant or offer utility service to the public. Agents perform "purely administrative functions" relating to identifying potential customers and referring them to the service provider, a fact which CRA does not challenge.

Discussion. PU Code § 1702 states in part that:

"Complaint may be made...by written petition or compliant, setting forth any act or thing done or omitted to be done by any public utility..."

PU Code § 216 defines "public utility" subject to the jurisdiction of the Commission and includes "telephone corporations." PU Code § 234 defines "telephone corporation" to include "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

Complainant has not asserted or demonstrated that defendants Pack Cell or CMPC either own, control, operate, or manage any telephone line (which is defined in PU Code § 233 to include plant which does not employ transmission wires). CRA does not cite any order or rule which would otherwise distinguish Pack Cell or CMPC as public utilities.

We have no basis on which to find that either Pack Cell or CMPC is a public utility. In D.88312, which addressed our jurisdiction over an advertising agency employed by Pacific Telephone and Telegraph, we dismissed a complaint against a corporation on the basis that it was not a public utility. Furthermore, D.87714 found that "a corporation or individual may

not be named as a defendant simply because it might possess evidence useful to a complainant."

Finally, we note that cellular agents are required to comply with any order the Commission may issue in this proceeding if that order addresses agency arrangements. Under PU Code § 2101, the Commission must assure that the provisions of the Constitution and statutes of this state are enforced. In D.87-11-055, which addressed agency relationships in the transportation industry, we stated:

"PU Code Sections 2110 and 2111 make it a misdemeanor, subject to a fine, for, among other things, an agent of a public utility to fail to comply with any order of the Commission. While we have no power to directly assess such penalties, we would not, in appropriate circumstances, hesitate to seek the assistance of those that do."

D.87-11-055 also found that under PU Code § 2113, a tariff agent which fails to comply with any order of the Commission is in contempt of the Commission and punishable by the Commission in the same manner and to the same extent as contempt is punished by courts of record. At this time, no Commission order specifically addresses the activities of cellular utility agents. However, where such an order has been issued, our authority to find an agent in contempt is clear.

Because we find that neither CMPC nor Pack Cell are public utilities, we will dismiss the complaint as to CMPC and Pack Cell.

**B. Does CRA's Complaint Raise Controverted
Factual Issues Against Public Utilities
Under Our Jurisdiction?**

The issue of whether PacTel/LASMSA is acting in accordance with applicable rules and regulations is distinct from the issues of whether we have authority over agents, and whether Pack Cell and CMPC are acting as public utilities. CRA asserts

that PacTel/LASMSA have violated PU Code § 532 and cites that portion of the section which states:

"...any public utility engaged in furnishing or rendering more than one product, commodity, or service, [shall not] charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time...."

This portion of PU Code § 532 prohibits utilities offering any service or product in combination with any other service or product at rates or under conditions which differ from tariffed rates and conditions. CRA states that under PU Code § 702, PacTel/LASMSA are liable for the actions of their agents. CRA also states that business relationships between PacTel/LASMSA, CMPC, and Pack Cell "fit within the classic definition of an agent: Anyone who undertakes to transact business, or manage some affair for another, by authority of and on account of the latter, and to render an account of such transactions."

The PacTel/LASMSA's motion states CRA's complaint alleges no cause of action because the actions alleged in the complaint were not the actions of either PacTel or LASMSA but those of unregulated equipment providers. According to the motion, neither PacTel nor LASMSA has had any relationship with or control over Pack Cell during the period relevant to this complaint, and Pack Cell is not an agent of CMPC. It claims that, as a matter of law, the actions complained of (even if they occurred and even if there had been an agency arrangement between PacTel and Pack Cell) were beyond the scope of the relationship defined by PacTel's agency agreements.

PacTel/LASMSA's motion also states that even if the actions alleged in the complaint had been taken on behalf of PacTel or LASMSA, such actions would not have violated PU Code § 532 so

long as the free installation or other financial concession provided by the agent was not paid for or financed by PacTel and/or LASMSA. PacTel/LASMSA state that no such arrangement existed. In its reply to CRA's opposition to PacTel/LASMSA's motion, PacTel/LASMSA adds that commissions paid to CMPC cannot be considered a violation of PU Code § 532 unless "the provider of service had financially supported the concession which was made to the customer." Pack Cell concurs with this interpretation. PacTel/LASMSA characterize CRA's complaint in this regard as an attack upon referral commissions, which are properly the subject of C.86-12-023, a complaint case filed by CRA regarding the lawfulness of cellular utility commissions.

In its motion, CMPC argues that the Commission has no authority to regulate the commissions paid by public utilities to CMPC or others. It cites Pacific Telephone & Telegraph Company v Public Utilities Commission (1950) 34 Cal 2d 822, 215 P 2d 441, in which the court found that the Commission's control over contracts affecting rates and services is "limited to regulation of the contracts that directly affect the service the ratepayer will receive at a particular rate." CMPC therefore argues that PacTel's commissions are lawful payments for services rendered.

Discussion. In a subsequent section of this order, we address the lawfulness of certain business arrangements and pricing practices as they pertain to PU Code §§ 532 and 702. Our determination of whether CRA's complaint states a cause of action, and whether this complaint against PacTel and LASMSA should be dismissed, is determined consistent with those findings.

C. Are Staff Directives Binding on the Utilities?

As support for its allegations of unlawful utility activity, CRA refers to letters from CACD staff to cellular service providers regarding PU Code § 532. One letter is dated February 17, 1988 and presents staff guidelines for its interpretation of PU Code § 532 as it may apply to cellular offerings. The other

letter, dated December 14, 1988, was sent to all cellular utilities and outlines circumstances under which CACD staff will investigate potential violations of PU Code § 532.

PacTel/LASMSA's motion argues that public utilities are not liable for violations of the directives in letters from staff. PU Code § 2107 describes penalties for violations by public utilities of any order or other directive of the Commission, but not its staff.

Discussion. Commission staff letters are regulatory tools which may be used to indicate staff's interpretation of Commission rules, regulations, and orders. They are also used to promote compliance with Commission rules and orders. They are not, however, themselves Commission rules and orders. Accordingly, there cannot be a "violation" of a staff interpretation letter.

D. Should the Complaint Be Dismissed on the Grounds That the Commission Does Not Have Authority to Award Damages?

PacTel/LASMSA request dismissal of the complaint on the grounds that the Commission does not have authority to award damages. It cites numerous cases to support its position.

Discussion. It is well-settled that the Commission does not award damages. CRA's complaint, however, does not request damages. It asks the Commission, among other things, to fine PacTel/LASMSA for violations of Commission rules, under the authority of PU Code §§ 2107 and 2108, and to turn over to the Commission profits received from subscribers acquired by way of alleged violations. In any event, whether or not the complainant requests damages is not grounds for dismissing a case where violations of the PU Code or our orders are alleged. Therefore, we will not dismiss this case.

IV. Issues Relating to the Lawfulness of Agent Activities

A. Background

One of the key issues in CRA's complaint, and replies by defendants, is whether CRA has cited a cause of action. In order to determine whether a cause of action exists, the administrative law judge (ALJ) in this proceeding determined that certain legal issues needed to be resolved.

Several parties filed briefs addressing the legal issues in this complaint case following an ALJ Ruling dated April 12, 1989 which consolidated this case with our investigation into the regulation of cellular utilities. The purpose of the consolidation was to permit all interested parties to comment on the lawfulness of the subject utility practices. The ALJ Ruling requested briefs from interested parties on the following issues:

- o Is it lawful under PU Code § 532 for cellular utilities to offer commissions to agents in return for signing up customers for cellular services?
- o If such commissions are lawful, is it lawful for the utilities to offer them on a nontariffed basis?
- o If such commissions are lawful, what are the business arrangements under which they could be or should be offered?
- o What business arrangements between cellular utilities and agents, if any, would be in violation of PU Code § 702?

A number of parties filed briefs on May 1, 1989; among them PacTel (with Sacramento Valley Limited Partnership, LASMSA, and PacTel Mobile Services), CRA, Los Angeles Cellular Telephone Company (LA Cellular), Sacramento Cellular Dealers Association (SCDA), McCaw Cellular Communications, Inc. (McCaw), Celluphone, Inc., The Advantage Group, GTE Mobilnet of California, Inc., Fresno MSA Limited Partnership, US West Cellular of California, Inc., Bay

Area Cellular Telephone Company (BACTC), Pack Cell, and the Division of Ratepayer Advocates. Comments were also received from ICC Investors Communication Company, Maritime Cellular, MicroImage Cellular Telephone Company, and Los Angeles Cellular Dealers Association (LACDA). LACDA's comments included letters from about forty dealers opposing the practice of "bundling".

The allegations in this complaint turn in large part over interpretations of PU Code §§ 532 and 702.

As stated in a previous section of this order, CRA's complaint cites that portion of PU Code § 532 which refers to two different tariffed utility services. The complaint does not, however, allege that PacTel/LASMSA offered two different services or that the two services offered were tariffed. One of the subject services is cellular equipment, over which we have no jurisdiction and which is not tariffed by the utilities or any other firm. Consequently, the cited section of PU Code § 532 does not apply in this case.

The portion of PU Code § 532 which may be pertinent to this proceeding is that portion which states:

"(N)o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, and rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time...nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons...."

Simply stated, utility rates for tariffed services must be consistent with those filed in their tariffs, whether utility products are sold separately or in combination.

PU Code § 702 states that:

"Every public utility shall...do everything necessary or proper to secure compliance by all of its officers, agents, and employees."

PU Code § 702 requires utilities to assure that their agents comply with Commission orders, rules, and directions.

**B. Are Commissions Paid by Cellular
Utilities to Agents Lawful?**

In the case before us, two types of commissions are allegedly paid to cellular utility agents by cellular utilities. "Up-front" commissions are those paid to the agent for signing up a customer to cellular service. CRA alleges that agents are using these up-front payments to discount equipment when such equipment is sold in conjunction with sales of cellular service. "Residual" commissions are those paid to the agent based on customer usage and toll billing. CRA does not allege that these commissions are passed along to consumers in any particular fashion. Neither type of commission is currently tariffed by PacTel.

No party alleges that up-front commissions are unlawful, including CRA. CRA and SCDA, however, do believe that the law prohibits certain uses of those commissions, as discussed in Section IV.D. of this order.

CRA alleges that residual commissions violate PU Code § 532 because they are a form of "contract or agreement" that are not tariffed or offered uniformly to all persons. CRA recommends that residual commission payments be banned or tariffed. Other parties generally did not make distinctions between the two types of commissions.

Discussion. We do not find sales commissions paid by cellular utilities to their agents are unlawful. Such commissions are payments by utilities for sales and marketing efforts of nonutility entities. The services provided by these nonutility agents may reduce the utility's cost of doing business by

supplanting salaries the utility would otherwise pay to its own employees. This is consistent with our finding in Postal Telegraph Cable Company v Western Union Telegraph Company (1915) 8 CRC 138. In that case, we found that a telegraph company has "the right to establish agencies and to employ agents of its own selection and choice and to compensate such agents, either by commission or fixed salary..." (Ibid. at 140.)

We do not distinguish between residual and up-front payments in this context as CRA does. As CRA describes them, both types of commissions are a payment for a marketing or sales service provided by the agent, whether the service is an initial customer referral or ongoing customer contact. The two types of commissions are only distinguished by the basis on which payments are made. Up-front payments are made according to the number of customers who sign up for the service. Residual payments are made according to how much service the customer uses.

If, as CRA suggests, residual commissions are unlawful because they are untariffed, it follows that up-front commissions are unlawful because they are untariffed. We do not presume that they are unlawful, just as we do not presume that untariffed salaries are unlawful. PU Code § 532 refers specifically and exclusively to services provided by and payments made to public utilities. Since the subject residual payments are not charged by utilities for utility services, they are not the subject of PU Code § 532.

C. May Agents Discount Tariffed Services?

The parties agree that PU Code §§ 532 and 702 prohibit discounting of tariffed services by agents, whether sold separately or in combination. We concur that the PU Code clearly prohibits such discounting.

D. May Agents Discount Untariffed Services When Those Services Are Sold in Combination With Tariffed Services?

The major issue in this proceeding is the lawfulness of tying cellular equipment discounts to purchases of cellular services. In this complaint case, CRA alleges that PacTel has required or allowed its agents to tie the purchasing of cellular equipment to the sale of cellular service. CRA believes agents are using commissions provided by the utility to discount equipment in violation of PU Code § 532.

CRA states the tying or bundling arrangements are unlawful because they inhibit retail rate competition. For this reason, CRA recommends prohibiting the commissions. Alternatively, CRA recommends that commissions either be limited to \$50 or tariffed so that they are nondiscriminatory.

SCDA agrees with CRA that the Commission should prohibit discounting equipment which is tied to the sale of cellular service. It comments that through this arrangement the utilities are indirectly discounting cellular services, and that they are fully aware that agents are tying service and equipment sales. SCDA proposes a variety of regulatory options for treatment of commissions in the event the Commission does not prohibit them. It recommends, among other things, that contracts should be filed as part of utility tariffs or that rebates be placed in a separate account and passed along directly to consumers.

PacTel argues that commissions are payments by utilities to sales persons, not refunds to subscribers. Agents earn commissions regardless of whether they sell any other product. McCaw states that commissions are compensation for a service provided to PacTel. The cellular utilities and dealers generally support these comments.

The cellular utilities and cellular equipment dealers also argue that bundling is lawful as long as utilities do not

require discounting of any product. Some comment that the Commission has no jurisdiction over how unregulated equipment dealers use the commission payments they receive for providing a service to the utilities.

Discussion. PU Code § 532 prohibits the utilities from charging rates which differ from those in applicable tariffs. In the case before us, CRA does not allege that the utilities are directly discounting tariffed services. It is undisputed that the tariffed services are billed for and collected by the utilities at tariffed rates and that their contracts with agents do not require agents to bundle products.

Dealers that receive the commissions are ostensibly discounting unregulated products. They are, however, tying these discounts to purchases of regulated tariffed services.

PU Code § 702 requires the utilities to secure compliance of their agents with Commission rules and orders. Although the utilities may delegate certain operational duties to agents, they may not delegate their obligations as public utilities (Snyder v Southern Cal. Edison Co (1955) 44 C 2d 793). Under PU Code § 702, we must consider the actions of a utility agent to be the actions of the utility. Therefore, the test for determining whether bundling by agents is lawful is whether the same practice would be lawful if it were to be undertaken by the utility. The utility's liability for compliance with PU Code § 702 depends upon whether the utility took adequate steps to secure its agents' compliance with Commission rules and orders.

We have found that a special rate offered on one product, conditional on the purchase of a tariffed product, constitutes an indirect and unlawful discount on the tariffed product (In re App. of Pacific Gas and Electric Company (1920) 18 CRC 201). In the case now before us, it is alleged that agents are offering a special rate on cellular equipment conditional on the purchase of tariffed cellular services. Such a transaction would be unlawful

under the PU Code. Furthermore, in Coombs v Burk (1919) 40 Cal App 8, the court found that a municipal gas utility transaction similar to that considered by this order to be an unlawful restraint of trade. A gas utility sold certain gas appliances at discounted prices. These discounts were contingent upon continued use of the utility's gas service. The court found this contract to be "not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business..." (ibid. at 10) and therefore unlawful.

The positions of the utilities are inconsistent with the plain meaning of PU Code §§ 702 and 532, and with court interpretations of those sections. We do not agree with PacTel's analysis that, because commissions are payments for services, bundling is lawful. We agree that commissions themselves may be lawful payments for services. The issue, however, is whether discounting a package of tariffed and unregulated services by an agent represents an indirect discount on tariffed services. We find that it is. If the utility is aware, or should be aware, that such discounting is taking place and fails to take appropriate action, it is in violation of PU Code § 702.

Further, we disagree with LA Cellular's assertion that the utilities are liable only within the confines of their contractual agreements with agents or other utility representatives. LA Cellular implies the utilities are powerless to act, and invulnerable to PU Code violations, if those contracts do not specify that bundling arrangements are prohibited. Utilities that offer commissions to sales agents have various means for securing compliance with our rules and orders, including termination of their agency relationships. If a utility is unable to secure compliance through the terms of its contract, the contract may be improperly drawn. In any event, the terms of the contract do not relieve the utility of its obligations under the PU Code.

In sum, the practice of bundling unregulated products with regulated services and discounting the package is unlawful whether it is practiced by the utility or its agent. Whether such practices are occurring, and under what circumstances they may be occurring, are factual matters on which we cannot rule at this time.

Because a number of factual issues remain to be resolved as to the actions of PacTel/LASMSA, we will deny the motion to dismiss which argues that the complaint has not stated a cause of action or that there are no triable issues.

E. May Agents Impose Untariffed Service Conditions on Customers?

CRA states that PacTel requires or allows agents to require that a cellular service subscriber stay on the service for 95 days or face a \$250 charge imposed by the cellular equipment dealer. CRA states this condition of service differs from service conditions in PacTel's tariff. SCDA agrees with CRA that tying equipment prices to longevity of service should be prohibited.

The practice by agents of imposing untariffed utility service conditions on their customers is unlawful under PU Code §§ 532 and 702, just as bundling by agents is unlawful. CRA is correct that any offering by a utility or its agent which strays from the terms and conditions of the tariff is explicitly prohibited.

F. Does the Commission Have Authority to Regulate Commissions to Utility Agents?

Numerous parties who briefed these issues commented on the competitive effects of commissions and the bundling of cellular products. CRA claims that they are damaging to the industry because they discriminate in favor of some dealers at the expense of resellers and other dealers. Other parties commented that the commissions and bundling are improving the competitiveness of the

industry by increasing the availability and use of cellular products and are providing economic benefits to consumers.

At this stage, we do not have evidence to determine how commissions may affect the competitiveness of the industry. We do have concerns, however, that commissions paid to sales agents by cellular utilities could dampen competition in the long run if they benefit some dealers and cellular service providers at the expense of others. In the case before us, CRA alleges commissions are offered only to those dealers of the utilities' choice. If this is true and the commissions are sufficiently high, the utilities may be in a position of determining the viability of certain firms or submarkets.

McCaw, BACTC, and LA Cellular argue that commissions are not in any way a charge for a utility service and that the Commission either should not or cannot regulate them, just as it cannot regulate the salaries paid to utility employees. We disagree. PU Code § 701 empowers the Commission to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Normally, we do not regulate the payments utilities make to firms which provide them with services. In this case, however, we are fully within our authority to regulate the terms and conditions of agreements between cellular utilities and their agents if those agreements affect the price, terms, or competitiveness of regulated services and the rates paid by and services provided to ratepayers for these services.

Finally, we reiterate that our primary focus in the regulation of the cellular industry is the provision of good service, reasonable rates, and customer convenience. Commissions arrangements may improve those consumer benefits. Generally, we do not wish to eliminate any near-term consumer benefits as long as

their application does not harm consumers in the long run by dampening competition.

In general, this decision recognizes that certain transactions may impede the development and maintenance of a fair competitive market in cellular services at the expense of cellular customers. To the extent such transactions hamper competition, some customers may pay higher rates than others in the short run for reasons unrelated to the cost of service. In the long run, all customers are harmed if a handful of retail providers dominate the market because, in such circumstances, individual providers may influence prices or service quality.

We also recognize that cellular customers could benefit from the discounts which this decision finds unlawful. For that reason, our decision today is troubling to us. On the other hand, all customers would benefit from lower tariffed rates or service improvements which the utilities could implement now in lieu of commissions or other discounts which are unlawful. We note that we will be very attentive to commissions and utility rate levels in our ongoing investigation of the cellular industry in I.88-11-040.

V. Conclusion

In summary, we find that commissions paid by cellular service providers to agents for their marketing and sales efforts are lawful. The Commission is, however, within its authority to regulate the terms and conditions of those commissions if they affect the competitiveness of the cellular industry and the rates and services to customers.

Discounts on cellular equipment which are contingent upon the purchases of tariffed cellular services violate PU Code §§ 532 and 702 if those discounts are offered by utilities or their agents. Similarly, conditions on cellular services that differ

from those in effective tariffs are unlawful if they are imposed by utilities or their agents.

We will grant the motions of Pack Cell and CMPC to dismiss the complaint against them. There is no demonstration that either is a public utility.

We will not dismiss this complaint as to PacTel/LASMSA because a cause of action has been stated, and pertinent factual issues are disputed between the parties. Because outstanding factual matters remain as to the actions of PacTel/LASMSA, we will deny its motion to dismiss the complaint, except that portion of the motion which requests dismissal of the complaint against CMPC and Pack Cell. This proceeding will remain open to determine as a matter of fact whether respondents have, in fact, violated PU Code §§ 532 and 702.

CRA's complaint requests that the Commission issue a cease and desist order requiring respondents to discontinue unlawful practices. This order effectively puts the utilities on notice that certain agent practices are unlawful. We will not issue a cease and desist order at this time but utilities continue these practices, if they are occurring, at their own risk.

Findings of Fact

1. CRA filed this complaint against PacTel/LASMSA, Pack Cell, and CMPC.
2. CRA has not demonstrated that either Pack Cell or CMPC are public utilities for purposes of this complaint.
3. A number of disputed factual issues are raised in this complain.
4. CRA's complaint requests, among other things, that the Commission fine PacTel/LASMSA for tying, or bundling, service to the purchase of equipment of the offering, pursuant to PU Code §§ 2107 and 2108.
5. This complaint proceeding has been consolidated with I.88-11-040 for the purpose of providing interested parties the

opportunity to comment on legal and policy issues raised in the complaint proceeding.

6. Intervenors to I.88-11-040 were provided an opportunity to comment on the lawfulness of certain activities alleged in C.88-11-036.

7. The Commission does not have adequate evidence at this time to rule on whether PacTel/LASMSA violated PU Code §§ 532 or 702.

Conclusions of Law

1. PU Code § 532 prohibits utilities from offering utility services at rates or with terms and conditions other than those posted in applicable tariffs.

2. PU Code § 702 requires utilities to do all things necessary to assure that their agents comply with Commission rules, orders, and applicable tariffs.

3. Commissions paid by utilities to their agents for customer referrals and ongoing customer contact are lawful.

4. Making discounts on cellular equipment contingent upon the purchase of cellular service is unlawful under PU Code § 702 or § 532 if those discounts are offered by utilities or their agents.

5. Discounting tariffed services by agents is unlawful under PU Code §§ 702 and 532.

6. Service conditions imposed by utility agents are unlawful under PU Code §§ 702 and 532 if they differ from those in applicable tariffs.

7. The Commission has authority to regulate the provision of commissions to agents if such commissions affect the competitiveness of the industry or otherwise affect the rates and services to utility ratepayers.

8. Pack Cell is not a public utility, as defined under the California Constitution and PU Code § 216.

9. CMPC is not a public utility, as defined under the California Constitution and PU Code § 216.

10. Commission staff directives are not themselves Commission orders or rulings, and parties which "violate" these directives are not subject to penalties under PU Code § 2101.

11. The Commission cannot award damages.

12. Pack Cell's motion to dismiss this complaint against it should be granted.

13. CMPC's motion to dismiss this complaint against it should be granted.

14. PacTel/LASMSA's motion to dismiss this complaint should be denied except that portion which requests dismissal of this complaint as to Pack Cell and CMPC.

15. Celluphone's motion to file comments should be granted under Rule 53 of the Commission's Rules of Practice and Procedure, which addresses intervention in complaint proceedings.

INTERIM ORDER

IT IS ORDERED that:

1. Cellular Mobile Phone Company's (CMPC) motion to dismiss is granted.

2. Pack Cell's motion to dismiss is granted.

3. The motion to dismiss of PacTel Cellular and Los Angeles SMSA Limited Partnership is denied except that portion which requests dismissal as to CMPC and Pack Cell.

4. Celluphone, Inc.'s motion to file comments is granted under Rule 53 of the Commission's Rules of Practice and Procedure.

5. Case 88-11-036 shall remain open to determine whether PacTel Cellular or Los Angeles SMSA Limited Partnership violated Public Utilities Code §§ 702 and 532.

This order is effective today.

Dated JUL 6 1989, at San Francisco, California.

I will file a written concurring opinion.

/s/ FREDERICK R. DUDA
Commissioner

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

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

Victor Weiss
Victor Weiss, Executive Director

PB

#6

I.88-11-040
C.88-11-036
D.89-07-019

FREDERICK R. DUDA, Commissioner, Concurring:

I agree with both the result and the reasoning of today's decision. This concurrence emphasizes my concern with the effect of commission payments on cellular competition.

This decision raises many questions which I expect to be answered in later phases of this case and its companion proceeding I.88-11-040 (Cellular OII). These questions include:

1. Do present marketing programs contribute to improved service, reasonable rates, and customer satisfaction (e.g., does the bundling of equipment and cellular service contribute to customer convenience?)?
2. Are agent commissions substantially more costly than direct company marketing operations or other alternatives?
3. Could rate competition allow more people access to the benefits of cellular service at the same time it allowed cellular providers to improve their market positions?
4. Could market share competition based upon expansion of the overall market through the incentive of lower rates produce more non-discriminatory benefits than cut-rate equipment and installation offers, bundled equipment and service discounts, or other non-tariffed discounts?
5. Could rate competition improve a cellular provider's market share more effectively than commission payments?
6. How does the volume of benefits conferred on a select few customers through direct or indirect discounting of tariffed services compare to the volume of benefits that customers as a whole could have received if the commission payments associated with those discounts had instead been allocated to rate decreases?

1.88-11-040
C.88-11-036
D.89-07-019

7. Would customers as a whole have been better off if some, or all, of the money spent on agent commissions had instead been allocated to price decreases? Would cellular providers have been better off as well? I am particularly interested in customer economics, market size and market share implications, service quality impacts, and industry stability.

Once the parties have reported on how their agent commissions and other marketing practices have affected service quality and cellular prices we can see whether these practices have made quality cellular service more available to Californians. Cellular telephone service should not be available only to a limited few, but rather be made universally available as an important business tool that can make Californians more efficient, competitive, successful and happy. It's time to get on with the business of reaching these objectives. We should do no less.


Frederick R. Duda, Commissioner

July 6, 1989
San Francisco, California

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the regulation of
cellular radiotelephone utilities.

T.88-11-040
(Filed November 23, 1988)

Cellular Resellers Association,
Inc.,

Complainant,

v.

Case 88-11-036
(Filed November 17, 1988)

PacTel Cellular, et al.,

Defendants.

INTERIM OPINION

Cellular Resellers' Association (CRA) filed this complaint and request for an immediate cease and desist order on November 17, 1988, against PacTel Cellular (PacTel) and Pack Cell. On December 9, 1988, CRA amended its complaint to include Los Angeles SMSA Limited Partnership (LASMSA), and Cellular Mobile Phone Company (CMPC) as defendants. CRA's complaint alleges that the "bundling" by agents of cellular equipment and cellular services is unlawful under Public Utilities (PU) Code §§ 532 and 702.

This order resolves certain legal issues raised in the complaint. We find that discounting a package of tariffed and unregulated products by utility agents is unlawful, and that utilities may be liable for related code violations under PU Code § 702.

We also address motions to dismiss filed by defendants to this proceeding. We dismiss the complaints filed against CMPC and

Pack Cell, and deny PacTel/LASMSA's motion to dismiss the complaint against it.

This order interprets the PU Code and other applicable laws as they pertain to allegations in this complaint case. It does not make any factual findings with regard to the actions of respondents to the complaint.

I. CRA's Complaint

CRA's complaint, as amended, alleges that CMPC and Pack Cell, in cooperation with or at the direction of PacTel and/or LASMSA, have implemented a plan which provides for the free installation of a cellular telephone and antenna purchased from CMPC and/or Pack Cell. In return, the customer must purchase equipment from CMPC and/or Pack Cell and retail cellular service from PacTel and LASMSA.

The complaint alleges that Pack Cell and CMPC, as agents of PacTel and LASMSA, tie the sale of equipment to the sale of cellular service in violation of PU Code § 532 and staff guidelines established by the Commission Advisory and Compliance Branch (CACD). CRA alleges the prices quoted for cellular equipment are below cost and are made by virtue of the fact that CMPC and/or Pack Cell receive commission payments from PacTel and/or LASMSA in the amount of about \$250 per transaction.

The complaint asserts that PacTel and LASMSA have failed to comply with PU Code § 702 which requires the utilities to comply with Commission rules and orders, and to "do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

CRA's complaint requests relief in the form of a cease and desist order prohibiting the offering of telephone equipment below cost, installation of equipment, or any form of free service or service rebate to induce the public to purchase cellular service

from LASMSA and PacTel. It also requests that customers who have taken advantage of such offerings be informed of the illegality of LASMSA's and PacTel's actions and be given the opportunity to receive cellular service from other providers. Finally, the complaint asks that the Commission require LASMSA and PacTel to relinquish all profits received from the subject offering, and fine PacTel and LASMSA \$2,000 for each subscriber acquired through tying service to other offerings.

II. Motions to Dismiss

In response to CRA's complaint, each of the three defendants filed answers and motions to dismiss. On January 13, 1989, PacTel and LASMSA (PacTel/LASMSA) jointly filed an answer and motion to dismiss CRA's complaint. The answer states that LASMSA is a provider of cellular service in the Los Angeles area and that PacTel is a general partner of LASMSA. It also states that CMPC is an agent of LASMSA, and that neither LASMSA nor PacTel had any relationship with Pack Cell at any time relevant to the complaint.

The motion to dismiss is made on the grounds that the actions alleged by the complaint were not taken on behalf of PacTel or LASMSA, that none of the alleged actions are violations of Commission rules, regulations, or orders, and that the Commission has no jurisdiction over the parties whose alleged actions are the basis of the complaint.

CMPC, on January 17, 1989, filed an answer and motion to dismiss. CMPC states it is a nonexclusive agent of PacTel for the limited purposes of soliciting and referring potential subscribers to cellular service, and that PacTel has no control whatsoever over the prices or services provided by CMPC with respect to its equipment business. The motion emphasizes that the acts of which CRA complains are not those of CMPC but of Pack Cell, and that CMPC

has no control or influence over Pack Cell's business practices with respect to equipment sales.

On February 27, 1989, Pack Cell filed a motion to dismiss stating that it has not been an agent of either PacTel or CMPC since August 1986. It admits the co-defendants may have been aware of Pack Cell's business conduct, since it has had a business relationship with them, but denies any agency relationship.

All three of these motions argue that the case against CMPC and Pack Cell should be dismissed on the grounds that neither defendant is a public utility, and the Commission therefore has no authority over them.

On February 1, 1989, CRA filed a consolidated opposition to the motions to dismiss of PacTel, LASMSA, and CMPC. Its response alleges, among other things, that Pack Cell and CMPC are under the jurisdiction of the Commission because they have direct contact with customers for the sale of cellular service.

On March 7, 1989, PacTel/LASMSA filed a reply to CRA's consolidated opposition asking for a summary judgment pursuant to California Code of Civil Procedure § 437(c). It argues that summary judgment is appropriate in this case because no triable issues of fact are alleged. CMPC also filed a reply, on March 9, further clarifying its position.

On March 14, 1989, Celluphone, Inc. (Celluphone) filed a motion requesting that it be allowed to make a special appearance in this case in order that it might file comments in support of defendants' motions to dismiss. Celluphone is an authorized agent of PacTel and argues that the Commission does not have jurisdiction over utility agents. We will grant Celluphone's motion to consider its comments in this order. We also find that, contrary to CRA's statement that in order to grant Celluphone's motion, Celluphone "must participate as a full party in the proceeding and not attempt to avail itself of Commission process on the one hand, and hide from Commission jurisdiction on the other," we encourage public

participation in our proceedings and do not require any particular level of participation or acquiescence to our jurisdiction as a condition of submitting comments for consideration.

Finally, on March 21, 1989, CRA filed an opposition to Pack Cell's motion to dismiss.

III. Issues Relating to Motions to Dismiss

In order to resolve the motions to dismiss of the defendants in this case, we must consider four issues:

1. May a complaint be brought against Pack Cell or CMPC?
2. Does CRA's complaint raise controverted factual issues against public utilities under the Commission's jurisdiction?
3. Are staff directives binding on the utilities?
4. Should the complaint be dismissed on the grounds that the Commission has no authority to award damages?

A. May a Complaint Be Brought Against Pack Cell or CMPC?

CRA contends that Pack Cell and CMPC are public utilities because their business agreements with PacTel provide that:

1. PacTel/LASMSA customers are to be accorded equipment, installation, warranty and maintenance service prior to customers who do not subscribe to PacTel/LASMSA cellular service;
2. PacTel/LASMSA customers are given confidential marketing information which is considered the property of PacTel/LASMSA;
3. Agents and dealers are required to enter into noncompetition agreements whereby they are not permitted to compete for cellular service for varying lengths of time;

4. Agents and dealers receive both an up-front Commission for activating a retail cellular service customers and, in some cases, ongoing residual payments based on the customer's monthly bill.

According to CRA, these arrangements make agents like Pack Cell and CMPC similar to resellers. In support of its position that they are public utilities, CRA refers to the testimony of an intervenor in a cellular investigation who stated that agents are "similar to certificated resellers."

CRA alleges that CMPC's and Pack Cell's control over the process by which a customer is acquired and maintained by PacTel/LASMSA is "part and parcel" of a utility service, and the Commission is well within its authority to regulate agent and dealer activities.

CRA cites Commercial Communications v Public Utilities Commission (1958) 50 C 2d 512, in which the Commission held that private mobile communications systems are of "public concern" and the exercise of Commission jurisdiction was "cognate and germane" to the regulation of public utility telephone companies. In Decision (D.) 80168, the Commission used this authority to regulate activities it found to be those of public utilities.

In its motion to dismiss, Pack Cell argues that it is not a public utility because it does not own, operate, or manage a telephone line, a prerequisite for determination of a telecommunications utility under PU Code §§ 233 and 234. Pack Cell states the Commission has declined to regulate dealers of goods and services which are related to the work of public utilities, but which do not fall clearly within the definitions which the PU Code provides. It cites our decisions in cases where we declined to regulate reselling of energy to tenants by landlords, fees charged by hotels for the use of telephone service by guests, and private radio telephone systems.

CMPC's motion argues that it is not a public utility under Article XII, § 3 of the California Constitution, and PU Code § 216. Its reply to CRA's opposition to the motions to dismiss cites D.87-11-055 which found that tariff agent defendants were not public utilities because they did not perform public utility functions, had no discretion as to the setting of rates or the formulation of tariff rules, and provided an administrative function to the public utility. CMPC states that it is in a similar position of providing administrative services to a public utility. Accordingly, the Commission has no jurisdiction over it.

PacTel/LASMSA similarly argue that the Commission has no jurisdiction over Pack Cell, the entity whose actions are the basis for the complaint. PacTel/LASMSA cite several decisions of the courts and the Commission to argue that neither Pack Cell nor CMPC are public utilities because they do not hold themselves out as providers of cellular service. PacTel/LASMSA challenge CRA's interpretation of Commercial Communications, citing that portion of the Court's ruling which "if defendant['s]...activity does not qualify as a 'public utility service,' because it does not involve or facilitate the 'transmission of telephone messages' [or] 'communication by telephone'...the other cited provisions of the PU Code do not operate to confer such status."

PacTel/LASMSA make numerous distinctions between cellular service providers and agents. According to PacTel/LASMSA, agents do not bill for services, have no discretion to set rates or formulate tariff rules, and do not own or offer to the public utility plant. Agents perform "purely administrative functions" relating to identifying potential customers and referring them to the service provider, a fact which CRA does not challenge.

Discussion. PU Code § 1702 states in part that:
"Complaint may be made...by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility..."

PU Code § 216 defines "public utility" subject to the jurisdiction of the Commission and includes "telephone corporations." PU Code § 234 defines "telephone corporation" to include "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

Complainant has not asserted or demonstrated that defendants Pack Cell or CMPC either own, control, operate, or manage any telephone line (which is defined in PU Code § 233 to include plant which does not employ transmission wires). CRA does not cite any order or rule which would otherwise distinguish Pack Cell or CMPC as public utilities.

We have no basis on which to find that either Pack Cell or CMPC is a public utility. In D.88312, we dismissed a complaint against a corporation on the basis that it was not a public utility. Furthermore, D.87714 found that "a corporation or individual may not be named as a defendant simply because it might possess evidence useful to a complainant."

Finally, we note that cellular agents are required to comply with any order the Commission may issue in this proceeding if that order addresses agency arrangements. Under PU Code § 2101, the Commission must assure that the provisions of the Constitution and statutes of this state are enforced. In D.87-11-055, we stated:

"PU Code Sections 2110 and 2111 make it a misdemeanor, subject to a fine, for, among other things, an agent of a public utility to fail to comply with any order of the Commission. While we have no power to directly assess such penalties, we would not, in appropriate circumstances, hesitate to seek the assistance of those that do."

D.87-11-055 also found that under PU Code § 2113, a tariff agent which fails to comply with any order of the Commission is in contempt of the Commission and punishable by the Commission

in the same manner and to the same extent as contempt is punished by courts of record. At this time, no Commission order specifically addresses the activities of cellular utility agents. However, where such an order has been issued, our authority to find an agent in contempt is clear.

Because we find that neither CMPC nor Pack Cell are public utilities, we will dismiss the complaint as to CMPC and Pack Cell.

B. Does CRA's Complaint Raise Controverted Factual Issues Against Public Utilities Under Our Jurisdiction?

The issue of whether PacTel/LASMSA is acting in accordance with applicable rules and regulations is distinct from the issues of whether we have authority over agents, and whether Pack Cell and CMPC are acting as public utilities. CRA asserts that PacTel/LASMSA have violated PU Code § 532 and cites that portion of the section which states:

"...any public utility engaged in furnishing or rendering more than one product, commodity, or service, [shall not] charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time...."

This portion of PU Code § 532 prohibits utilities offering any service or product in combination with any other service or product at rates or under conditions which differ from tariffed rates and conditions. CRA states that under PU Code § 702, PacTel/LASMSA are liable for the actions of their agents. CRA also states that business relationships between PacTel/LASMSA, CMPC, and Pack Cell "fit within the classic definition of an agent: Anyone who undertakes to transact business, or manage some affair

for another, by authority of and on account of the latter, and to render an account of such transactions."

The PacTel/LASMSA's motion states CRA's complaint alleges no cause of action because the actions alleged in the complaint were not the actions of either PacTel or LASMSA but those of unregulated equipment providers. According to the motion, neither PacTel nor LASMSA has had any relationship with or control over Pack Cell during the period relevant to this complaint, and Pack Cell is not an agent of CMPC. It claims that, as a matter of law, the actions complained of (even if they occurred and even if there had been an agency arrangement between PacTel and Pack Cell) were beyond the scope of the relationship defined by PacTel's agency agreements.

PacTel/LASMSA's motion also states that even if the actions alleged in the complaint had been taken on behalf of PacTel or LASMSA, such actions would not have violated PU Code § 532 so long as the free installation or other financial concession provided by the agent was not paid for or financed by PacTel. PacTel/LASMSA state that no such arrangement existed. In its reply to CRA's opposition to PacTel/LASMSA's motion, PacTel/LASMSA adds that commissions paid to CMPC cannot be considered a violation of PU Code § 532 unless "the provider of service had financially supported the concession which was made to the customer." Pack Cell concurs with this interpretation. PacTel/LASMSA characterize CRA's complaint in this regard as an attack upon referral commissions, which are properly the subject of C-86-12-023.

In its motion, CMPC argues that the Commission has no authority to regulate the commissions paid by public utilities to CMPC or others. It cites Pacific Telephone & Telegraph Company v Public Utilities Commission (1950) 34 Cal 2d 822, 215 P 2d 441, in which the court found that the Commission's control over contracts affecting rates and services is "limited to regulation of the contracts that directly affect the service the ratepayer will

receive at a particular rate." CMPC therefore argues that PacTel commissions are lawful payments for services rendered.

Discussion. In a subsequent section of this order, we address the lawfulness of certain business arrangements and pricing practices as they pertain to PU Code §§ 532 and 702. Our determination of whether CRA's complaint states a cause of action, and whether this complaint against PacTel and LASMSA should be dismissed, is determined consistent with those findings.

C. Are Staff Directives Binding on the Utilities?

As support for its allegations of unlawful utility activity, CRA refers to letters from CACD staff regarding PU Code § 532. One letter is dated February 17, 1988 and presents staff guidelines for its interpretation of PU Code § 532 as it may apply to cellular offerings. The other letter, dated December 14, 1988, was sent to all cellular utilities and outlines circumstances under which CACD staff will investigate potential violations of PU Code § 532.

PacTel/LASMSA's motion argues that public utilities are not liable for violations of the directives in letters from staff. PU Code § 2107 describes penalties for violations by public utilities of any order or other directive of the Commission, but not its staff.

Discussion. Commission staff letters are regulatory tools which may be used to indicate staff's interpretation of Commission rules, regulations, and orders. They are also used to promote compliance with Commission rules and orders. They are not, however, themselves Commission rules and orders. Accordingly, there cannot be a "violation" of a staff interpretation letter without a Commission finding that the staff interpretation is correct.

D. Should the Complaint Be Dismissed on the Grounds That the Commission Does Not Have Authority to Award Damages?

PacTel/LASMSA request dismissal of the complaint on the grounds that the Commission does not have authority to award damages. It cites numerous cases to support its position.

Discussion. It is well-settled that the Commission does not award damages. CRA's complaint, however, does not request damages. It asks the Commission, among other things, to fine PacTel/LASMSA for violations of Commission rules, under the authority of PU Code §§ 2107 and 2108, and to turn over to the Commission profits received from subscribers acquired by way of alleged violations. In any event, whether or not the complainant requests damages is not grounds for dismissing a case where violations of the PU Code or our orders are alleged. Therefore, we will not dismiss this case.

IV. Issues Relating to the Lawfulness of Agent Activities

A. Background

Several parties filed briefs addressing the legal issues in this complaint case following an Administrative Law Judge's (ALJ) Ruling dated April 12, 1989 which consolidated this case with our investigation into the regulation of cellular utilities. The purpose of the consolidation was to permit all interested parties to comment on the lawfulness of the subject utility practices. The ALJ Ruling requested briefs from interested parties on the following issues:

- o Is it lawful under PU Code § 532 for cellular utilities to offer commissions to agents in return for signing up customers for cellular services?
- o If such commissions are lawful, is it lawful for the utilities to offer them on a nontariffed basis?

- o If such commissions are lawful, what are the business arrangements under which they could be or should be offered?
- o What business arrangements between cellular utilities and agents, if any, would be in violation of PU Code § 702?

A number of parties filed briefs on May 1, 1989; among them PacTel (with Sacramento Valley Limited Partnership, LASMSA, and PacTel Mobile Services), CRA, Los Angeles Cellular Telephone Company (LA Cellular), Sacramento Cellular Dealers Association (SCDA), McCaw Cellular Communications, Inc. (McCaw), Celluphone, Inc., The Advantage Group, GTE Mobilnet of California, Inc., Fresno MSA Limited Partnership, US West Cellular of California, Inc., Bay Area Cellular Telephone Company (BACTC), Pack Cell, and the Division of Ratepayer Advocates. Comments were also received from ICC Investors Communication Company, Maritime Cellular, MicroImage Cellular Telephone Company, and Los Angeles Cellular Dealers Association (LACDA). LACDA's comments included letters from about forty dealers opposing the practice of "bundling".

The allegations in this complaint turn in large part over interpretations of PU Code §§ 532 and 702.

As stated in a previous section of this order, CRA's complaint cites that portion of PU Code § 532 which refers to two different tariffed utility services. The complaint does not, however, allege that PacTel/LASMSA offered two different services or that the two services offered were tariffed. One of the subject services is cellular equipment, over which we have no jurisdiction and which is not tariffed by the utilities or any other firm. Consequently, the cited section of PU Code § 532 does not apply in this case.

The portion of PU Code § 532 which may be pertinent to this proceeding is that portion which states:

"(N)o public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for

any service rendered or to be rendered, than the rates, tolls, and rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time..."

Simply stated, utility rates for tariffed services must be consistent with those filed in their tariffs, whether utility products are sold separately or in combination.

PU Code § 702 states that:

"Every public utility shall...do everything necessary or proper to secure compliance by all of its officers, agents, and employees."

PU Code § 702 requires utilities to assure that their agents comply with Commission orders, rules, and directions.

B. Are Commissions Paid by Cellular Utilities to Agents Lawful?

In the case before us, two types of commissions are allegedly paid to cellular utility agents by cellular utilities. "Up-front" commissions are those paid to the agent for signing up a customer to cellular service. CRA alleges that agents are using these up-front payments to discount equipment when such equipment is sold in conjunction with sales of cellular service. "Residual" commissions are those paid to the agent based on customer usage and toll billing. CRA does not allege that these commissions are passed along to consumers in any particular fashion. Neither type of commission is currently tariffed by PacTel.

No party alleges that up-front commissions are unlawful, including CRA. CRA and SCDA, however, do believe that the law prohibits certain uses of those commissions, as discussed in a subsequent section of this order.

CRA alleges that residual commissions violate PU Code § 532 because they are a form of "contract or agreement" that are not tariffed or offered uniformly to all persons. CRA recommends that residual commission payments be banned or tariffed. Other

parties generally did not make distinctions between the two types of commissions.

Discussion. We do not find sales commissions paid by cellular utilities to their agents are unlawful. Such commissions are payments by utilities for sales and marketing efforts of nonutility entities. The services provided by these nonutility agents may reduce the utility's cost of doing business by supplanting salaries the utility would otherwise pay to its own employees. This is consistent with our finding in Postal Telegraph Cable Company v Western Union Telegraph Company (1915) 8 CRC 138. In that case, we found that a telegraph company has "the right to establish agencies and to employ agents of its own selection and choice and to compensate such agents, either by commission or fixed salary..." (Ibid. at 140.)

We do not distinguish between residual and up-front payments in this context as CRA does. As CRA describes them, both types of commissions are a payment for a marketing or sales service provided by the agent, whether the service is an initial customer referral or ongoing customer contact. The two types of commissions are only distinguished by the basis on which payments are made. Up-front payments are made according to the number of customers who sign up for the service. Residual payments are made according to how much service the customer uses.

If, as CRA suggests, residual commissions are unlawful because they are untariffed, it follows that up-front commissions are unlawful because they are untariffed. We do not presume that they are unlawful, just as we do not presume that untariffed salaries are unlawful. PU Code § 532 refers specifically and exclusively to services provided by and payments made to public utilities. Since the subject residual payments are not charged by utilities for utility services, they are not the subject of PU Code § 532.

C. May Agents Discount Tariffed Services?

The parties agree that PU Code §§ 532 and 702 prohibit discounting of tariffed services by agents, whether sold separately or in combination. We concur that the PU Code is clear on this matter.

D. May Agents Discount Untariffed Services When Those Services Are Sold in Combination With Tariffed Services?

The major issue in this proceeding is the lawfulness of tying cellular equipment discounts to purchases of cellular services. In this complaint case, CRA alleges that PacTel has required or allowed tying the purchasing of cellular equipment to the sale of cellular service. CRA believes agents are using commissions provided by the utility to discount equipment in violation of PU Code § 532.

CRA states the tying arrangements are unlawful because they inhibit retail rate competition. For this reason, CRA recommends prohibiting the commissions. Alternatively, CRA recommends that commissions either be limited to \$50 or tariffed so that they are nondiscriminatory.

SCDA agrees with CRA that the Commission should prohibit discounting equipment which is tied to the sale of cellular service. It comments that the utilities are indirectly discounting cellular services, and that they are fully aware that agents are tying service and equipment sales. SCDA proposes a variety of regulatory options for treatment of commissions in the event the Commission does not prohibit them. It recommends, among other things, that contracts should be filed as part of utility tariffs or that rebates be placed in a separate account and passed along directly to consumers.

PacTel argues that commissions are payments by utilities to sales persons, not refunds to subscribers. Agents earn commissions regardless of whether they sell any other product.

McCaw states that commissions are compensation for a service provided to PacTel. The cellular utilities and dealers generally support these comments.

The cellular utilities and cellular agents also argue that bundling is lawful as long as utilities do not require discounting of any product. Some comment that the Commission has no jurisdiction over how unregulated equipment dealers use the commission payments they receive for providing a service to the utilities.

Discussion. PU Code § 532 prohibits the utilities from charging rates which differ from those in applicable tariffs. In the case before us, CRA does not allege that the utilities are directly discounting tariffed services. It is undisputed that the tariffed services are billed for and collected by the utilities at tariffed rates and that their contracts with agents do not require agents to bundle products.

Dealers that receive the commissions are ostensibly discounting unregulated products. They are, however, tying these discounts to purchases of regulated services.

PU Code § 702 requires the utilities to secure compliance of their agents with Commission rules and orders. Although the utilities may delegate certain operational duties to agents, they may not delegate their obligations as public utilities (Snyder v Southern Cal. Edison Co (1955) 44 C 2d 793). Under PU Code § 702, we must consider the actions of a utility agent to be the actions of the utility. Therefore, the test for determining whether bundling by agents is lawful is whether the same practice would be lawful if it were to be undertaken by the utility. The utility's liability for compliance with PU Code § 702 depends upon whether the utility took adequate steps to secure its agents' compliance with Commission rules and orders.

We have found that a special rate offered on one product, conditional on the purchase of a tariffed product, constitutes an

indirect and unlawful discount on the tariffed product (In re App. of Pacific Gas and Electric Company (1920) 18 CRC 201). In this case, it is alleged that agents are offering a special rate on cellular equipment conditional on the purchase of tariffed cellular services. Such a transaction would be unlawful under the PU Code. Furthermore, in Coombs v Burk (1919) 40 Cal App 8, the court found that a municipal gas utility transaction similar to that considered by this order to be an unlawful restraint of trade. A gas utility sold certain gas appliances at discounted prices. These discounts were contingent upon continued use of the utility's gas service. The court found this contract to be "not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business..." (ibid. at 10) and therefore unlawful.

The positions of the utilities are inconsistent with the plain meaning of PU Code §§ 702 and 532, and with court interpretations of those sections. We do not agree with PacTel's analysis that because commissions are payments for services that bundling is lawful. We agree that commissions themselves may be lawful payments for services. The issue, however, is whether discounting a package of tariffed and unregulated services by an agent represents an indirect discount on tariffed services. We find that it is. If the utility is aware, or should be aware, that such discounting is taking place and fails to take appropriate action, it is in violation of PU Code § 702.

Further, we disagree with LA Cellular's assertion that the utilities are liable only within the confines of their contractual agreement. LA Cellular implies the utilities are powerless to act, and invulnerable to PU Code violations, if those contracts do not specify that bundling arrangements are prohibited. Utilities that offer commissions to sales agents have various means for securing compliance with our rules and orders, including termination of their agency relationships. If a utility is unable

to secure compliance through the terms of its contract, the contract may be improperly drawn. In any event, the terms of the contract do not relieve the utility of its obligations under the PU Code.

In sum, the practice of bundling unregulated products with regulated services and discounting the package is unlawful whether it is practiced by the utility or its agent. Whether such practices are occurring, and under what circumstances they may be occurring, are factual matters on which we cannot rule at this time.

Because a number of factual issues remain to be resolved as to the actions of PacTel/LASMSA, we will deny the motion to dismiss which argues that the complaint has not stated a cause of action or that there are no triable issues.

**E. May Agents Impose Untariffed
Service Conditions on Customers?**

CRA states that PacTel requires or allows agents to require that a cellular service subscriber stay on the service for 95 days or face a \$250 charge. CRA states this condition of service differs from service conditions in PacTel's tariff. SCDA agrees with CRA that tying equipment prices to longevity of service should be prohibited.

The practice by agents of imposing untariffed utility service conditions on their customers is unlawful under PU Code §§ 532 and 702, just as bundling by agents is unlawful. CRA is correct that any offering by a utility or its agent which strays from the terms and conditions of the tariff is explicitly prohibited.

**F. Does the Commission Have Authority to
Regulate Commissions to Utility Agents?**

Numerous parties who briefed these issues commented on the competitive effects of commissions and the bundling of cellular products. CRA claims that they are damaging to the industry

because they discriminate in favor of some dealers at the expense of resellers and other dealers. Other parties commented that the commissions and bundling are improving the competitiveness of the industry by increasing the availability and use of cellular products and are providing economic benefits to consumers.

At this stage, we do not have evidence to determine how commissions may affect the competitiveness of the industry. We do have concerns, however, that commissions paid to sales agents by cellular utilities could dampen competition in the long run if they benefit some dealers and cellular service providers at the expense of others. In the case before us, CRA alleges commissions are offered only to those dealers of the utilities' choice. If this is true and the commissions are sufficiently high, the utilities may be in a position of determining the viability of certain firms or submarkets.

McCaw, BACTC, and LA Cellular argue that commissions are not in any way a charge for a utility service and that the Commission either should not or cannot regulate them, just as it cannot regulate the salaries paid to utility employees. We disagree. PU Code § 701 empowers the Commission to "do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Normally, we do not regulate the payments utilities make to firms which provide them with services. In this case, however, we are fully within our authority to regulate the terms and conditions of agreements between cellular utilities and their agents if those agreements affect the price, terms, or competitiveness of regulated services and the rates paid by and services provided to ratepayers for these services.

Finally, we reiterate that our primary focus in the regulation of the cellular industry is the provision of good service, reasonable rates, and customer convenience. Commissions

arrangements may improve those consumer benefits. Generally, we do not wish to eliminate any near-term consumer benefits as long as their application does not harm consumers in the long run by dampening competition.

Tying arrangements may reduce the prices customers pay for service and equipment packages, at least in the short run. However, the lawful avenues for passing along savings to consumers are rate reductions or service improvements which are available to all customers and which are not discriminatory.

We plan to consider the effects of commissions on industry competitiveness in our pending investigation into cellular utility regulation. At that time, we will also consider what, if any, changes should be made to existing commission arrangements between cellular providers and their agents.

V. Conclusion

In summary, we find that commissions paid by cellular service providers to agents for their marketing and sales efforts are lawful. The Commission is, however, within its authority to regulate the terms and conditions of those commissions if they affect the competitiveness of the cellular industry and the rates and services to customers.

Discounts on cellular equipment which are contingent upon the purchases of cellular services are violations of PU Code §§ 532 and 702 if those discounts are offered by utilities or their agents. Similarly, conditions on cellular services are unlawful if they are imposed by utilities or their agents and differ from those in effective tariffs.

We will grant the motions of Pack Cell and CMPC to dismiss the complaint against them. There is no demonstration that either is a public utility.

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In general, this decision recognizes that certain transactions may impede the development and maintenance of a competitive market in cellular services at the expense of cellular customers. To the extent subject transactions hamper competition, some customers may pay higher rates than others in the short run for reasons unrelated to the cost of service. In the long run, all customers are harmed if a handful of providers dominate the market and may individually influence prices or service quality.

We also recognize that some cellular customers have benefited from the discounts which this decision finds unlawful. For that reason, our decision today is troubling to us. On the other hand, all customers would benefit from lower tariffed rates or service improvements which the utilities could implement now in lieu of commissions or other discounts which may be discriminatory. We note that we will be very attentive to commissions and utility rate levels in our ongoing investigation in I.88-11-040.

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We will not dismiss this complaint as to PacTel/LASMSA because pertinent factual issues are disputed between the parties. Because outstanding factual matters remain as to the actions of PacTel/LASMSA, we will deny its motion to dismiss the complaint, except that portion of the motion which requests dismissal of the complaint against CMPC and Pack Cell. This proceeding will remain open to determine as a matter of fact whether respondents have violated PU Code §§ 532 and 702.

CRA's complaint requests that the Commission issue a cease and desist order requiring respondents to discontinue unlawful practices. This order effectively puts the utilities on notice that certain agent practices are unlawful. We will not issue a cease and desist order at this time but note that utilities continue these practices at their own risk.

Findings of Fact

1. CRA filed this complaint against PacTel/LASMSA, Pack Cell, and CMPC.
2. CRA has not demonstrated that either Pack Cell or CMPC are public utilities for purposes of this complaint.
3. A number of outstanding factual issues raised in this complaint cannot be resolved with the information available at this time.
4. CRA's complaint requests, among other things, that the Commission fine PacTel/LASMSA for tying service to the purchase of equipment of the offering, pursuant to PU Code §§ 2107 and 2108.
5. This proceeding has been consolidated with I.88-11-040 for the purpose of providing interested parties the opportunity to comment on legal and policy issues raised in this proceeding.
6. Intervenors to I.88-11-040 were provided an opportunity to comment on the lawfulness of certain activities alleged in D.88-11-036.
7. The Commission does not have adequate evidence to rule on whether PacTel/LASMSA violated PU Code §§ 532 or 702.

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We also recognize that some cellular customers have benefited from the discounts which this decision finds unlawful. For that reason, our decision today is troubling to us. On the other hand, all customers would benefit from lower tariffed rates or service improvements which the utilities could implement now in lieu of commissions or other discounts which are unlawful. We note that we will be very attentive to commissions and utility rate levels in our ongoing investigation of the cellular industry in I.88-11-040.

V. Conclusion

In summary, we find that commissions paid by cellular service providers to agents for their marketing and sales efforts are lawful. The Commission is, however, within its authority to regulate the terms and conditions of those commissions if they affect the competitiveness of the cellular industry and the rates and services to customers.

Discounts on cellular equipment which are contingent upon the purchases of tariffed cellular services violate PU Code §§ 532 and 702 if those discounts are offered by utilities or their agents. Similarly, conditions on cellular services that differ

Conclusions of Law

1. PU Code § 532 prohibits utilities from offering utility services at rates or with terms and conditions other than those posted in applicable tariffs.
2. PU Code § 702 requires utilities to do all things necessary to assure that their agents comply with Commission rules, orders, and applicable tariffs.
3. Commissions paid by utilities to their agents for customer referrals and ongoing customer contact are lawful.
4. Making discounts on cellular equipment contingent upon the purchase of cellular service is unlawful under PU Code § 702 or § 532 if those discounts are offered by utilities or their agents.
5. Discounting tariffed services by agents is unlawful under PU Code §§ 702 and 532.
6. Service conditions imposed by utility agents are unlawful under PU Code §§ 702 and 532 if they differ from those in applicable tariffs.
7. The Commission has authority to regulate the provision of commissions to agents if such commissions affect the competitiveness of the industry or otherwise affect the rates and services to utility ratepayers.
8. Pack Cell is not a public utility, as defined under the California Constitution and PU Code § 216.
9. CMPC is not a public utility, as defined under the California Constitution and PU Code § 216.
10. Commission staff directives are not themselves Commission orders, rulings, or other formal interpretations of fact or law, and parties which "violate" these directives are not liable for penalties under PU Code § 2101.
11. The Commission cannot award damages.
12. Pack Cell's motion to dismiss this complaint against it should be granted.

6. Intervenors to I.88-11-040 were provided an opportunity to comment on the lawfulness of certain activities alleged in D.88-11-036.

7. The Commission does not have adequate evidence to rule on whether PacTel/LASMSA violated PU Code §§ 532 or 702.

Conclusions of Law

1. PU Code § 532 prohibits utilities from offering utility services at rates or with terms and conditions other than those posted in applicable tariffs.

2. PU Code § 702 requires utilities to do all things necessary to assure that their agents comply with Commission rules, orders, and applicable tariffs.

3. Commissions paid by utilities to their agents for customer referrals and ongoing customer contact are lawful.

4. Making discounts on cellular equipment contingent upon the purchase of cellular service is unlawful under PU Code § 702 or § 532 if those discounts are offered by utilities or their agents.

5. Discounting tariffed services by agents is unlawful under PU Code §§ 702 and 532.

6. Service conditions imposed by utility agents are unlawful under PU Code §§ 702 and 532 if they differ from those in applicable tariffs.

7. The Commission has authority to regulate the provision of commissions to agents if such commissions affect the competitiveness of the industry or otherwise affect the rates and services to utility ratepayers.

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10. Commission staff directives are not themselves Commission orders, rulings, or other formal interpretations of fact or law,

13. CMPC's motion to dismiss this complaint against it should be granted.

14. PacTel/LASMSA's motion to dismiss this complaint should be denied except that portion which requests dismissal of this complaint as to Pack Cell and CMPC.

15. Celluphone's motion to file comments should be granted under Rule 53 of the Commission's Rules of Practice and Procedure, which addresses intervention in complaint proceedings.

INTERIM ORDER

IT IS ORDERED that:

1. Cellular Mobile Phone Company's motion to dismiss is granted.
2. Pack Cell's motion to dismiss is granted.
3. The motion to dismiss of PacTel Cellular and Los Angeles SMSA Limited Partnership is denied except as provided for in this order.
4. Celluphone, Inc.'s motion to file comments is granted under Rule 53 of the Commission's Rules of Practice and Procedure.

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12. Pack Cell's motion to dismiss this complaint against it should be granted.

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14. PacTel/LASMSA's motion to dismiss this complaint should be denied except that portion which requests dismissal of this complaint as to Pack Cell and CMPC.

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1. Cellular Mobile Phone Company's motion to dismiss is granted.

2. Pack Cell's motion to dismiss is granted.

3. The motion to dismiss of PacTel Cellular and Los Angeles SMSA Limited Partnership is denied except as provided for in this order.

4. Celluphone, Inc.'s motion to file comments is granted under Rule 53 of the Commission's Rules of Practice and Procedure.

I.88-11-040, C.88-11-036 ALJ/KIM/jt

5. Case 88-11-036 shall remain open to determine whether PacTel Cellular or Los Angeles SMSA Limited Partnership violated Public Utilities Code §§ 702 and 532.

This order is effective today.

Dated _____, at San Francisco, California.

I.88-11-040, C.88-11-036 ALJ/KIM/jt *

5. Case 88-11-036 shall remain open to determine whether Pactel Cellular or Los Angeles SMSA Limited Partnership violated Public Utilities Code §§ 702 and 532.

This order is effective today.

Dated _____, at San Francisco, California.