

Decision 90 06 061 JUN 20 1990

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Vortel Communications, Inc.)
(U-5134-C),)

Complainant,)

vs.)

Advanced Communications Technology,)
Inc., Larry D. Gaddis, Rodney)
Allen, Eric Emstrum, Timothy Swift,)
Joel Rodgers, Lisa Mast, plus Does)
1 through 20, et al.,)

Defendants.)

Case 90-02-031
(Filed February 13, 1990)

O P I N I O N

Background

On February 13, 1990 Vortel Communications, Inc. (Vortel) (complainant) (U-5134-C), a certificated reseller of intrastate interLATA and interstate telephone services, filed a complaint and request for a cease and desist order against Advanced Communications Technology, Inc. (ACT) and six of its agents (defendants) claiming that ACT and defendants operated as a noncertificated long distance carrier of telecommunications services. Vortel also seeks an order from this Commission directing ACT to notify all of its customers, within five days, that it has been operating in violation of this Commission's Rules and Regulations and therefore cannot bill and collect for services rendered, and to pay all costs incurred by customers changing to another long distance carrier.

Vortel further requests that this Commission order ACT to notify prospective customers, suppliers, and other organizations that it is not certified to offer intrastate long distance service in California and thus is canceling all services currently being

provided. Vortel also asks that ACT and defendants individually and severally be prohibited from offering or providing California intrastate long distance telecommunications services for a period of two years and/or obtaining authority from this Commission for such service during that time.

Lastly, Vortel asks that ACT and defendants be prohibited from acting as agents of another telecommunications provider, giving information to any other telecommunications provider about any current or prospective customer of ACT, and such other and further relief as the Commission deems just and proper.

In view of the then apparent urgency of the request for an immediate cease and desist order, the assigned administrative law judge (ALJ) on February 23, 1990 issued a ruling shortening the time to file answers to the complaint to March 5, 1990 and scheduled an evidentiary hearing on the issues set forth in the complaint for March 12, 1990.

On March 5, 1990 defendants filed an answer to the complaint stating that ACT was a Nevada corporation qualified to do business in California, and generally denied the allegations of the complaint except that Larry D. Gaddis, who had previously worked for Vortel, was and has been a corporate officer of ACT since February 26, 1990,¹ and has acted in a management capacity for ACT's California operations.

As part of its affirmative defense, ACT contended that Vortel did not seek informal resolution of this matter, that defendants sought such informal resolution on March 1, 1990, but Vortel refused. ACT then asserted that it had been offering long distance telephone service under its own name in the good faith belief that it was operating as an agent for a certified interexchange carrier (IEC). ACT then admitted that the filing of

1 This complaint was filed on February 13, 1990.

the complaint herein caused defendants to examine their agency relationship more closely, leading to the discovery of certain defects which they immediately sought to remedy.

ACT also responded that it planned to continue to act as an agent of an IEC until its own application (Application (A.) 90-02-071, filed February 27, 1990) for a certificate of public convenience and necessity (CPCN) is granted.

ACT then argued that the complaint was not an effort to serve the public good, as purported, but was merely part of a continuing "internal corporate legal battle between VORTEL COMMUNICATIONS, INC. and Defendant LARRY D. GADDIS, who was the founding shareholder of VORTEL." ACT asserts that Gaddis was ousted from Vortel in September 1989 by exercise of a voting trust agreement by which another shareholder of Vortel obtained control of Vortel "without PUC approval in March of 1988."

ACT then requested that the Commission order Vortel to meet with ACT and the Commission staff to informally resolve this complaint, and to deny any and all other relief sought by Vortel.

ACT's answer to the complaint was signed by Gaddis and the five other individuals separately named as defendants in this matter.

The Hearing Record

A hearing was held in Santa Rosa, California, during the morning of March 12, 1990 at which time testimony was received from two witnesses, John Lerch on behalf of complainant (Vortel) and Gaddis for defendant (ACT). Twelve exhibits were identified and ten exhibits were received in evidence.

Lerch, president and chief executive officer of Vortel, appeared for complainant and in his opening statement asserted that ACT:

1. Is selling and providing long distance services in California,

2. Does not have a CPCN, nor does it have a tariff on file, in disregard of Commission authority,
3. Is using Vortel brochures, Vortel forms, and ex-employees to steal Vortel customers, and
4. By these illegal, unethical, and deceptive business practices, ACT is causing immediate, substantial, and irreparable harm to Vortel.

Lerch then pointed to statements and admissions made in ACT's answer to the complaint in support of his opening statement. He then argued that Article 12 of the California Constitution requires this Commission to regulate utilities operating in California. He then cited Public Utilities (PU) Code §§ 216(b) and 216(c) as clearly placing ACT under the jurisdiction of this Commission. He also alluded to §§ 701, 728, 729, and 1001 of the PU Code requiring that a utility have a CPCN and approved tariff schedules on file with this Commission before offering services to the public.

Lerch then asked to be sworn and subsequently he introduced various exhibits and testified that numerous of Vortel's former customers are now using ACT's services. He further testified that he had identified \$11,369 worth of business that ACT has taken away from Vortel as of March 12, 1990.

Lerch noted that Vortel's expenses for services of telecommunication's facilities providers continued at a significant level and thus Vortel was being harmed by the existence of ACT and its operations as a noncertificated carrier. Lerch also introduced various of Vortel's sales brochures and applications for service together with similar documents used by ACT to demonstrate the similarity of the two sets of materials except for the names, Vortel Communications and Advanced Communications Technology.

Lerch also noted that various of his "existing customers" had called to inquire about Vortel's Chapter 11 bankruptcy status. Counsel for ACT was quick to point out that some of this testimony was hearsay about Vortel and much of it was not clearly on point of the instant complaint, and thus was irrelevant.

On cross-examination Lerch stated that he was the president and chief executive officer of Vortel and had held that position since November of 1989. He also testified that Vortel uses agents for its service and that he currently had one agent² that represented Vortel. As to tariff changes, Vortel had filed one revision to the original tariff which had been filed under Advice Letter 1 of its predecessor REBL Communications, Inc. (REBL).³

After completing his testimony, Lerch called Gaddis to testify on the operations of ACT. Lerch asked Gaddis to identify the applications for service and sales brochures used by ACT in its business activities. Gaddis responded that he developed those documents in May of 1987 prior to REBL's receipt of its CPCN. He explained that he was the founder of REBL which later became Vortel.

Relative to the operations of ACT, Gaddis stated that he began preparation of an application for a CPCN in December 1989 and believed that it was in the process of being filed.⁴

2 Lerch later identified Vortel's agent as Gilroy Telephone located in Gilroy, California.

3 REBL Communications (U-5134-C) was granted a CPCN as a reseller of telephone services by Decision (D.) 87-11-025 dated November 13, 1987.

4 Although Gaddis was not fully aware of the filing date as he testified on March 12, 1990, the application (A.90-02-071) had already been filed on February 27, 1990.

He explained that ACT had begun operations on or about January 10, 1990, as an agent for another certificated carrier in California reselling "their products to customers throughout Northern California." Gaddis further explained that ACT was acting as an agent for West Coast Telecommunications, Inc. (West Coast) (U-5195-C) of Santa Barbara, California, and that ACT was providing those services under West Coast's rates and charges. He asserted that those rates and charges were posted in ACT's Santa Rosa office since the day that office was opened on January 6 or 7, 1990.

Gaddis then testified in defense of ACT that he was the vice president and one of the directors of ACT, and that he reported directly to Gerald G. Smith, chief executive officer and sole stockholder of ACT, a Nevada corporation which also does business in California.⁵

Gaddis then provided a two-page letter from West Coast, dated November 22, 1989 (Exhibit (Exh.) K) which offered ACT an agency agreement for the sale of West Coast's telecommunications services in northern California. Gaddis also provided a copy of the "Agency Agreement" (Exh. L) executed March 10, 1990, which was based largely on the access and termination charges and rates contained in an earlier draft agency agreement tendered by West Coast to ACT in late November or early December 1989 and was dated December 20, 1989.

Gaddis admitted that he had not signed the agreement in December 1989, but based on discussions with Richard Frockt, president of West Coast, believed that he was operating in good faith as an agent of West Coast. He also stated that when he began operating in January 1990 as an agent of West Coast, he did so with

⁵ In A.90-02-071 ACT appended a "Certificate of Qualification" from the Secretary of State of California dated February 26, 1990 authorizing it to do business in California, as a foreign (Nevada) corporation.

the understanding that West Coast had effective tariffs on file with the Commission. He and ACT's counsel then noted for the record that they recently learned that West Coast did not file Advice Letter 1 with its original tariffs until March 1, 1990.⁶

Gaddis was then asked by his attorney if he recognized any of ACT's customers, on a list provided by Lerch, as being those previously served by Vortel. He responded that he recognized one (Merrill Zimmershead) but did not specifically know he was a Vortel customer beforehand.

He was also asked in terms of seeking new customers, which customers were being considered by ACT. Gaddis responded that any business customer of another telephone company doing between \$250 and \$5,000 per month in business telecommunications volume would be specifically designated and targeted as a potential customer of ACT.

In a series of questions from the assigned ALJ regarding West Coast's tariff schedules, Gaddis responded that he was now aware that the tariffs he had been operating under were not filed until March 1, 1990. (Transcript (Tr.) p. 51.)

As to his Agency Agreement with West Coast, he responded as follows to the ALJ:

- *Q What was your impression of the rates and charges that you were offering at the time you first began selling West Coast services in January?
- *A That they were filed. We had talked back and forth through November and that the billing - they were doing the billing for

⁶ A review of the CACD Telecommunications Branch tariff files revealed that West Coast received its CPCN as a telecommunications reseller by D.90-01-009 dated January 9, 1990 and filed its Advice Letter 1 and original tariff schedules on March 1, 1990. Those tariffs became effective one day later, on March 2, 1990.

us so we assumed that they had filed the rates that were agreed upon.

*Q And you continue to operate today on the very same rates and charges that you were operating on in January, is that correct?

*A Yes. They haven't changed.

*Q And those that were subsequently filed, do you have a copy in your offices of the tariffs that were filed on March 1?

*A They are exactly the same ones that were filed. We have a copy of the new tariffs. In addition, we have copies of the rates that we were selling beforehand which were exactly the same. They're displayed in a book in our front office as well as in a form in the front office. They've always been there.

*Q And those rates and charges, the tariff sheets for those rates and charges indicate the approved date by the Commission?

*A Yes, they do.

*Q So, you have the official versions of those in your offices?

*A We do now, yes.

*ALJ AMAROLI: Thank you."

(Tr. pp. 52-53.)

Counsel for ACT then renewed an earlier motion to dismiss the named employees of ACT (defendants) other than Gaddis since they all reported to Gaddis. Vortel did not object to the motion, and it was granted.

In his closing statement, counsel for ACT stated that ACT became aware of the lack of filed tariffs by West Coast as a result of this complaint but that ACT did in fact only charge the same rates and charges as those that eventually appeared in West Coast's

approved tariffs. He argued that ACT was competing with Vortel in the marketplace for customers and if Vortel felt that that was unfair competition, Vortel was free to seek remedies in civil court rather than before the Commission.

He then added that it was not ACT's intent "to hide anything from the PUC," and "It is not its intent to operate without a certificate." In this particular instance, West Coast did the billing for ACT and thus ACT believed it was operating in good faith as an agent for West Coast.

ACT further argued that in a current Commission rulemaking proceeding, R.85-08-042, the Commission was seeking comments from parties on what to do with persons who operate and provide telecommunications utility services without certificates. Here, he asserted, we have an entity that wants to comply, has filed a certificate application, and is now lawfully representing another certificated carrier. Accordingly, he argued that the relief sought by complainant not be granted.

Lerch followed with a closing argument for Vortel stating that:

"ACT is by their own admission and evidence out there representing itself as a long distance carrier. Now, all of a sudden we find out that ACT is merely an agent of West Coast. The brochure does not say that, nor are the salesmen instructed to disclose that information.

"There is no difference in the agency agreements and the supplier agreements basically that ACT has presented here today, and the supplier agreements and agency agreements that exist, and Vortel has in place and are required to be in place because we are out offering long distance telecommunications services as a certified carrier.

"They are operating exactly as a certified carrier, but they have no certificate and they have no tariff." (Tr. pp. 58-59.)

Discussion

ACT's operations have recently been brought into conformance by executing a written "Agency Agreement" with West Coast on March 10, 1990, two days prior to the public hearing in this complaint, and by West Coast's filing of tariffs on March 1, 1990 which became effective on March 2, 1990, on one-day notice as authorized by D.90-01-009.

However, it is clear on the record evidence that ACT did operate as a reseller of telecommunications services for the period of January 10, 1990 until March 2, 1990 without authority of any filed tariffs and until March 9, 1990 without benefit of an approved and executed written "Agency Agreement" with West Coast.

This unlawful activity could easily have been avoided by West Coast's timely filing of its tariffs on January 9, 1990, instead of waiting until March 1, 1990 to do so, and by ACT awaiting the availability of copies of West Coast's approved tariffs in its Santa Rosa office prior to soliciting business. This entire relationship appears to have been undertaken in a sloppy manner.

For West Coast to engage in the offering of an Agency Agreement in late November 1989 when it did not yet have its CPCN and filed tariffs is an act of misfeasance. Similarly, ACT was negligent in applying West Coast's rates and charges without having available a copy of West Coast's filed and effective tariff.

Gaddis was not without knowledge concerning the need for filed and effective tariffs to operate as a reseller of intrastate telecommunications services in California. In fact, he was the employee who, in January 1988, prepared and filed the original tariffs for REBL, the predecessor of the complainant (Vortel) in this proceeding.

While there is no record evidence that any of these actions were done with willful intent, it is clear that all corrective actions, albeit promptly taken, occurred subsequent to

the filing of Vortel's complaint on February 13, 1990. The infractions were corrected before the public hearing in this proceeding as follows:

1. On February 26, 1990 ACT obtained a "Certificate of Qualification" from the Secretary of State of the State of California authorizing it to transact business in California as a foreign Nevada corporation;
2. West Coast's Advice Letter 1 and associated tariff schedules were filed March 1, 1990 and became effective on March 2, 1990; and
3. The "Agency Agreement" between ACT and West Coast was executed on March 10, 1990.

The main concern here is clear, that, ACT and West Coast conducted utility operations, together or severally, in an unlawful manner, in violation of PU Code § 489 during the period January 10 through March 1, 1990, since West Coast's original tariff schedules first became effective on March 2, 1990.

The possible violation of PU Code § 1001 is less clear in view of the ongoing discussions of the "Agency Agreement" between ACT and West Coast which began in late November 1989. Nonetheless, West Coast did not receive its CPCN until January 9, 1990, so at least prior to that date, it should not have been offering an Agency Agreement to any prospective agents, which it did in written form on December 20, 1989 or earlier (Exh. M).

Customarily, in instances such as this; we would seek to assess appropriate penalties against the utility involved as well as its agents. However, West Coast, the utility involved, is not named as a defendant in this proceeding, nor did it appear at the evidentiary hearing.

Accordingly, we will assess an appropriate penalty against defendant ACT for all of the unlawful operations evidenced in this proceeding and leave ACT to request a fair proportion of that amount from West Coast. In the event that West Coast refuses

to deal cooperatively with ACT, then ACT is free to seek similar remedies in civil court.

In view of the prompt effort by ACT to bring its operation into compliance, we will limit the penalty for its prior unlawful operation to a modest amount of \$1,000⁷ in the range set forth for PU Code § 2107, and/or as may be extended to agents or persons under PU Code §§ 2110 and 2111.

While the Commission is authorized to levy penalties directly upon common carrier transportation companies, it must instead seek to recover such penalties, and associated costs, against utilities, generally, by means of a lawsuit "in the name of the people of the State of California, in the superior court in and for the county, or the city and county in which the cause or some part thereof arose..." as set forth in PU Code § 2104. Therefore, we will first afford a reasonable period of time for ACT to pay the penalty sought, and in the event that it does not, we will, by this same order, direct our General Counsel to seek recovery of this penalty amount, together with costs of such recovery, through the civil actions envisioned in PU Code § 2104.

Complainant asks that we, among other things, order ACT to cancel all services being provided and inform its customers that it cannot bill and collect for services rendered. If we were to strictly adopt that request for a telecommunications reseller, we would bring economic harm to the local exchange telephone companies and the IECs who provided the circuits to handle the services being used and we would also reward customers of ACT by waiving the bills for services they used. Such an action could encourage those

⁷ This \$1,000 penalty represents the sum of a minimum \$500 penalty associated with the unlawful operations of West Coast in violation of PU Code § 489 as provided for in PU Code § 2107 and a similar minimum \$500 penalty for ACT's unlawful operations described above.

customers to "seek out" another noncertificated carrier in search of further no-cost service.

We will instead seek compliance, such as that ultimately undertaken by ACT, with an appropriate penalty for prior noncompliance. In this case if voluntary compliance was not offered by ACT, a higher penalty would be appropriate and reasonable.

Lastly, we observe that the time, effort, and expense to all parties associated with this complaint could have been avoided had West Coast timely filed its tariff schedules for resale of interLATA telecommunications services in January 1990, prior to offering an Agency Agreement to ACT.

Findings of Fact

1. Complainant, Vortel, is a duly certificated reseller of intrastate interLATA and interstate telecommunications services in California, operating with statewide authority under a CPCN first granted by D.87-11-025 on November 13, 1987 to its predecessor, REBL.

2. Defendant, ACT, at the time this complaint was filed (February 13, 1990) was engaged in the business of reselling certain intrastate interLATA and interstate telecommunications services without certificated authority, without a written agency agreement with another certificated California telecommunications utility, and without a certificate of qualification from the Secretary of State to do business as a corporation in California. ACT had commenced this business activity on or before January 10, 1990.

3. Gaddis, as ACT's Vice President and Director, was previously a management employee of Vortel's predecessor (REBL) and was responsible for filing the original tariff schedules for that utility in January 1988, pursuant to D.87-11-025. From that experience Gaddis was fully aware of the need for filed and

effective tariffs as a pre-condition to reselling intrastate telecommunications service in California.

4. ACT, on March 10, 1990, executed a written "Agency Agreement" to operate as an agent for West Coast in Northern California.

5. West Coast filed its original tariff schedules for the offering of intrastate interLATA telecommunications services on March 1, 1990, and those tariffs became effective on March 2, 1990.

6. West Coast could not lawfully offer an Agency Agreement for the sale of its telecommunications services until its tariffs were filed and effective on March 2, 1990.

7. The sales of intrastate telecommunications services by ACT as an agent for West Coast prior to March 2, 1990 were unlawful under PU Code §§ 489 and 2107 due to misfeasance by West Coast and PU Code §§ 2110 and 2111 by neglect of ACT.

8. West Coast and ACT cooperatively took the necessary steps to bring their operations into compliance, following the filing of this complaint, and before the public hearing of same; therefore, the reduced penalties set forth in PU Code §§ 2107, 2110, and 2111 may be applied.

9. PU Code § 2104 sets forth the procedure whereby the penalties discussed in this order may be recovered through further civil action if they are not voluntarily paid by ACT.

Conclusions of Law

1. ACT, for its negligent operation, under the control of its knowledgeable Vice President and Director (Larry D. Gaddis), should be required to pay a penalty within the range set forth in PU Code §§ 2110 and/or 2111.

2. ACT's efforts in bringing its intrastate telecommunications reseller agency operations into compliance promptly after this complaint was filed on February 13, 1990 and before it was heard on March 12, 1990, should warrant the

consideration of a reduction of the penalty set forth in Conclusion of Law 1 above to a modest amount of \$1,000 as discussed earlier.

3. In the event that the penalty amount described in Conclusion of Law 2 above is not voluntarily paid within 45 days after the effective date of this order, then the Commission's General Counsel should be directed to seek recovery of same, together with all necessary costs of recovery, as provided for in PU Code § 2104.

4. The penalty for unlawful operations as described above should be recovered, and any and all other relief sought in this complaint should be denied.

5. This order should be made effective today to allow contemporaneous authorization of a CPCN to ACT pursuant to its A.90-02-071.

ORDER

IT IS ORDERED that:

1. Advanced Communications Technology, Inc. (ACT) for its part in rendering unlawful intrastate utility operations without benefit of a certificate of public convenience and necessity under PU Code § 1001 and/or violation of any or all of PU Code §§ 489, 2107, 2110, and/or 2111 during all or a part of the period of January 10 through March 1, 1990 shall be directed to pay a penalty assessment of \$1,000 to this Commission within 30 days after the effective date of this order.

2. The Commission's General Counsel is hereby directed to determine 45 days from today if payment has voluntarily been made, as required by Ordering Paragraph 1 above, and in the event that this payment has not been made, shall commence a lawsuit against ACT in the Superior Court of the County of Sonoma to recover the \$1,000 penalty assessment, plus all costs of recovery, from ACT as may be appropriate under the provisions of PU Code § 2104.

3. This complaint is granted to the extent set forth above and is denied in all other respects.

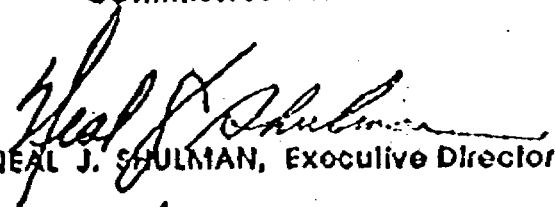
This order is effective today.

Dated JUN 20 1990, at San Francisco, California.

FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

President G. Mitchell Wilk,
being necessarily absent, did
not participate.

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


NEAL J. SHULMAN, Executive Director