

NOV. 26 1990

Decision 90-11-062 November 21, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation )  
 on the Commission's own motion of )  
 tariffs of Twentieth Century Cellular, )  
 Inc. (U-4071-C), to offer cellular )  
 mobile radiotelephone service under a )  
 program providing for rebates, at the )  
 customer's option and company's )  
 discretion, as service credits or as )  
 a voucher for services or equipment )  
 provided by the company's agent, Leo's )  
 Stereo, filed under Advice Letters )  
 Nos. 21, 22, 23, 24, 25, and 26. )

**ORIGINAL**

I.90-08-062  
(Filed August 29, 1990)

OPINION

Summary of Decision

This Order Instituting Investigation (OII) was issued on August 29, 1990, to examine tariffs filed by Twentieth Century Cellular, Inc. (Twentieth Century) that offer cellular mobile radiotelephone service under a plan providing for \$100 in service credits or rebate for service or equipment purchased from the company's agent, Leo's Stereo. The tariffed plan was filed July 17, 1990, under Advice Letters 21, 22, 23, 24, 25, and 26.

On September 7, 1990, Twentieth Century moved to dismiss this OII pursuant to Rule 56 of the Commission's Rules of Practice and Procedure (Rule or Rules), arguing that under then-operative provisions of Decision (D.) 90-06-025, the discount program was permissible. At a prehearing conference on September 27, 1990, the parties agreed that responses to Twentieth Century's motion to dismiss would be filed by October 22, 1990. Evidentiary hearing dates were set for November 19 and 20, 1990. The parties agreed that the Commission's consideration on October 12, 1990, of applications for rehearing of D.90-06-025 could affect issues in this OII.

Responses in opposition to Twentieth Century's motion to disniss have now been filed by the Commission Advisory and Compliance Division (CACD) and by Cellular Dynamics Telephone Company of Los Angeles, Inc. (Cellular Dynamics), which on August 9, 1990, had filed a protest to the Twentieth Century advice letters.

For the reasons discussed more fully below, we will grant the motion to dismiss this OII because we believe that there is merit in Twentieth Century's argument that the ordering paragraphs of D.90-06-025, prior to modification, permitted the actions taken. However, because the language of those ordering paragraphs was modified by the Commission on October 12, 1990, that conclusion is no longer applicable. Accordingly, by companion order accompanying this decision, we are instituting a new investigation intended to determine whether Twentieth Century's tariffs now should be suspended based upon existing law.

Background

The Commission adopted D.90-06-025 effective June 6, 1990 (Commissioner Duda dissenting). The decision is a lengthy one. It reflects results of a comprehensive review of the cellular regulatory framework in California, adopting more liberal tariff procedures and pricing flexibility. As relevant to this proceeding, the decision also dealt with a longstanding prohibition on the "bundling" of regulated cellular services with discounts on unregulated cellular equipment. Such practices have been deemed to violate Public Utilities (PU) Code § 532, which prohibits rebates that undercut utilities' filed tariffs. (See, e.g., D.89-07-019.)

In stating this principle, Ordering Paragraph 16 and subparagraphs 16(b) and 16(c) of D.90-06-025 provided:

"16. Cellular carriers shall adopt the following guidelines regarding agent arrangements:"

\* \* \*

"(b) Unless authorization has been sought and obtained through an advice letter filing in accordance with the provisions of GO 96-A, no provider of cellular telephone service may provide, either directly or indirectly, any gift of any article or service of more than nominal value (e.g., permitted gifts could be pens, key chains, maps, calendars) to any customer or potential customer in connection with the provision of cellular telephone service.

"(c) Unless authorization has been sought and obtained through an advice letter filing in accordance with the provisions of GO 96-A, no provider of cellular telephone service may provide, cause to be provided, or permit any agent or dealer or other person or entity subject to its control to provide to any customer or potential customer any equipment price concession or any article or service other than nominal value which is paid for or financed in whole or in part by the service provider and which is offered on the condition that such customer or potential customer subscribes to the provider's cellular telephone service." (Emphasis added.)

On July 16, 1990, Twentieth Century filed Advice Letters 23 through 26 to offer a non-cash rebate of \$100 to any new subscriber who agreed to accept service for a minimum period of one year. The rebate can be used either in the form of a credit to be applied by Twentieth Century against air time charges, or in the form of a \$100 voucher for service or equipment provided by

Twentieth Century's agent, and corporate parent, Leo's Stereo. The voucher can only be applied against service or equipment obtained from Leo's Stereo, and if the customer discontinues Twentieth Century cellular service within a year, the customer becomes liable to the company for the entire amount of the rebate.

On October 12, 1990, the Commission issued D.90-10-047, denying applications for rehearing of D.90-06-025 but modifying certain provisions of the latter to clarify the Commission's intent. Among the modifications was a change in Ordering Paragraphs 16(b) and 16(c) to delete the introductory phrases underscored above. As a result, Ordering Paragraphs 16(b) and 16(c) now provide:

"(b) No provider of cellular telephone service may provide, either directly or indirectly, any gift of any article or service of more than nominal value (e.g., permitted gifts could be pens, key chains, maps, calendars) to any customer or potential customer in connection with the provision of cellular telephone service.

"(c) No provider of cellular telephone service may provide, cause to be provided, or permit any agent or dealer or other person or entity subject to its control to provide to any customer or potential customer any equipment price concession or any article or service of other than nominal value which is paid for or financed in whole or in part by the service provider and which is offered on the condition that such customer or potential customer subscribes to the provider's cellular telephone service."

Motion to Dismiss

Twentieth Century moves to dismiss this investigation and the protest of Cellular Dynamics on the basis that -- at the time of its tariff filings on July 16, 1990 -- Ordering Paragraphs 16(b) and 16(c) did not prohibit bundling of regulated service and

unregulated equipment or service discounts if done pursuant to a valid tariff filing.

In opposition to the motion to dismiss, Cellular Dynamics argues that there can be no question that the rebate program offered by Twentieth Century is an "equipment price concession... offered on the condition that such customer or potential customer subscribes to the provider's cellular telephone service." Cellular Dynamics states:

". . . Twentieth Century can hardly argue with a straight face that the intent of this rebate program is anything other than to persuade customers to purchase a phone from Leo's, and then activate service with Twentieth Century. This is particularly obvious in light of the fact that the voucher cannot be used to make a purchase at Leo's at any time; it can only be used in connection with a purchase made at the time of activation. If Twentieth Century's intent was merely to attract customers to its service, it could have waived the activation fee for new subscribers, as have many other carriers and resellers. Instead, it chose to offer this rebate. There can thus be little doubt that the intent of this tariff and its practical effect in the vast majority of cases, will be to allow those who activate service with Twentieth Century to purchase a phone at Leo's for \$100.00 less than those who do not wish to activate service [with this provider]." (Emphasis in original.)

CACD, in its opposition to the motion to dismiss, points out that the Commission has dealt with the underlying issue here in D.89-07-019. That case involved an agent's practice of selling discounted cellular equipment so that end users would agree to purchase cellular service from a specific carrier. The Commission concluded that cellular equipment discounts, contingent upon the purchase of regulated cellular services, violated PU Code § 532 and established principles of jurisprudence regarding restraint of trade activities. Section 532 of the PU Code states:

"Except as in this article otherwise provided, no 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, rentals, and charge applicable thereto as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity, or service, charge, demand, collect or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such 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, applicable to each such product, commodity, or service when separately furnished or rendered, 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. The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

CACD does not address Twentieth Century's argument that Ordering Paragraphs 16(b) and 16(c) of D.90-06-025, prior to modification, permitted the type of discount at issue here if accomplished through a valid tariff filing. Cellular Dynamics argues that "although Ordering Paragraphs 16(b) and 16(c) ...raised a question as to whether cellular utilities could engage in tariffed bundling, the discussion in that Decision made it clear that the Commission did not intend to grant such authority." Cellular Dynamics notes that the discussion section of D.90-06-025 specifically reaffirms the principles set forth in D.89-07-019,

including the guidelines now in place, a result of the modifications ordered in D.90-10-047, that prohibit bundling without qualification.

Finally, Cellular Dynamics argues that, even if the original ordering paragraphs could be interpreted to grant tariffed bundling authority, they would be null and void because they conflict with the provisions of PU Code § 532, set forth above.

Discussion

We are compelled to grant dismissal. Twentieth Century sought and obtained through advice letter filings, made pursuant to GO 96-A, authorization to implement its tariffed bundling promotion. At the time of its filings, Ordering Paragraphs 16(b) and 16(c), read literally, permitted the procedure that the company followed.

Similarly, we cannot agree that the ordering paragraphs in effect as of June 6, 1990, were invalid because they conflicted with PU Code § 532. Even if a conflict were deemed to exist, that section provides an exception where a particular procedure is authorized by Commission rule or order.

Whether Twentieth Century's tariff now is in conflict with the modified ordering paragraphs D.90-06-025 and with other law is another question. Presumably, that question will be decided in the OII that accompanies this order. The point is that at the time of the protest, and at the time of the issuance of the OII in this proceeding, the practice complained of was authorized by then-existing ordering paragraphs D.90-06-025.

Findings of Fact

1. On July 17, 1990, Twentieth Century filed Advice Letters 21-26 offering new cellular service customers rebates of \$100 as service credits or as a voucher for services or equipment purchased from the company's agent, Leo's Stereo.

2. On August 9, 1990, Cellular Dynamics filed a protest to the Twentieth Century's advice letters.

3. On August 29, 1990, the Commission instituted this OII to investigate the tariff filings of Twentieth Century.

4. On September 7, 1990, Twentieth Century moved to dismiss the protest and OII on the basis that its tariff filing was permissible under Ordering Paragraphs 16(b) and 16(c) of the Commission's decision in D.90-06-025, I.88-11-040, investigating regulation of cellular radiotelephone utilities. D.90-06-025 became effective on June 6, 1990.

5. On October 12, 1990, in D.90-10-047, the Commission modified Ordering Paragraphs 16(b) and 16(c) of D.90-06-025.

6. A prehearing conference in this matter was conducted on September 27, 1990. As a result of this conference, responses to Twentieth Century's motion to dismiss were ordered by October 22, 1990, and an evidentiary hearing was set for November 19 and 20, 1990.

#### Conclusions of Law

1. Ordering Paragraphs 16(b) and 16(c) of D.90-06-025 prohibited, among other things, the bundling of regulated cellular service with nonregulated service or products, unless authorization had been sought and obtained through an advice letter filing in accordance with the provisions of GO 96-A.

2. Twentieth Century sought and obtained authorization through advice letter filings, in accordance with GO 96-A, to offer its rebate program, including a discount on products of its agent, Leo's Stereo, tied to a commitment for one year of cellular service offered by Twentieth Century.

3. Ordering Paragraphs 16(b) and 16(c) of D.90-06-025 were modified on October 12, 1990, and the provision for advice letter authorization for bundling regulated service with nonregulated products, among other things, was deleted.

4. At the time of Twentieth Century's advice letter filings, the procedure it followed in offering its rebate program was



permissible under then-existing provisions of Ordering Paragraphs 16(b) and 16(c) of D.90-06-025.

O R D E R

IT IS ORDERED that:

1. The motion to dismiss filed by Twentieth Century Cellular, Inc. (Twentieth Century) is granted.
2. Dismissal of this investigation is without prejudice to the filing of a subsequent Order Instituting Investigation with respect to the current validity of Twentieth Century tariffs.
3. Twentieth Century tariffs filed under Advice Letters 21, 22, 23, 24, 25, and 26, shall remain in effect pending further order of the Commission.
4. Evidentiary hearings in this matter set for November 19 and 20, 1990 are cancelled.

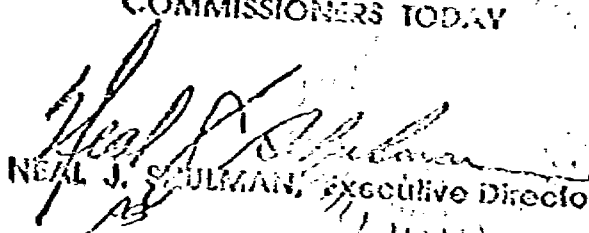
This order is effective today.

Dated November 21, 1990, at San Francisco, California.

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

Commissioner Frederick R. Duda,  
being necessarily absent, did  
not participate.

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

  
NEAL J. SAULMAN, Executive Director