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Decision 90-12-038 December 6, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Investigation on the Commission's own motion into the operations, rates and practices of U.S. West Cellular of California, Inc.	I.90-01-013 (Filed January 9, 1990)

Jackson, Tufts, Cole & Black, by William H. Booth and Evelyn K. Elsesser, Attorneys at Law, for U.S. West Cellular of California, Inc., respondent.
Peter A. Casciato, Attorney at Law, for Cellular Resellers Association, Inc.; Armour, Goodin, Schlotz and MacBride, by James D. Squeri, Attorney at Law, for Mobilnet; Kingston Cole, Attorney at Law, for Kingston Cole and Associates; Michael V. Rosenthal, for PacTel Cellular; and Spike Schultheis, for Mission Bell Telecommunications; interested parties.
Peter Arth, Jr., Attorney at Law, for the Commission Advisory and Compliance Division, and Ravi Kumra, for the Commission Division of Ratepayer Advocates.

I N D E X

O P I N I O N

Comments on the Proposed Decision of the Administrative Law Judge (ALJ)

As provided by Public Utilities (PU) Code § 311, the Proposed Decision of ALJ John B. Weiss was served on the parties to this proceeding. Both U.S. West Cellular of California, Inc. (U.S. West) and Cellular Resellers Association, Inc. (CRA) submitted comments and reply comments.

U.S. West's Comments

U.S. West's comments dealt with the procedural schedule under which its existing multiple unit tariff must be revised, the treatment of existing multiple unit discount customers, and concerns that the Rule 1 violations are being ascribed to U.S. West's then counsel

While the text of Decision (D.) 90-06-025, the generic investigation decision of the cellular industry, changes Commission policy to some degree on volume use, describing the changes to be required, the decision did not specify a time frame for the filing of conforming tariff revisions. U.S. West expressed concern that requiring it to conform within 60 days would serve to place it at a serious competitive disadvantage. Although any "regulatory interference" with U.S. West's existing tariffs is substantially the result of U.S. West's own actions, we find merit in that concern. Our intent in D.90-06-025 was to enhance effective competition to the end of lower prices to end-users and expanded, innovative services, and effective competition requires there be a level playing field for all participants. Accordingly, we have revised the time schedule for U.S. West to require it to submit a conforming tariff advice letter to require submission by March 1, 1991. We will also shortly issue a supplementary order to D.90-06-025 to add a requirement that all carriers file conforming tariff advice letters by that same March 1, 1991 date.

Our determination on a date certain for submission of a conforming tariff advice letter from U.S. West, which date will be subsequently made applicable to all carriers, will place all existing multiple unit customers on the same basis insofar as regulatory requirements affect rates. We remind U.S. West that carriers are free under our regulatory policies to initiate price decreases to retain customers whenever they wish. Our objective is to further competition to decrease rates to the customer end-users, not to unduly protect some groups by grandfathering.

We do not agree that the ALJ's proposed decision ascribes the Rule 1 violations to U.S. West's outside counsel at the time. The ALJ correctly concluded that the counsel was merely the agent and voice of U.S. West in articulating the utility's interpretations of Advice Letter 8-A and its stance, and the decision on close inspection states no more. It is significant that the order subjects U.S. West alone, and not its counsel, to the penalties set forth. The outside counsel was not a party to this proceeding, and there, therefore, was no opportunity or necessity to ascertain his advice to U.S. West or to determine his role in the misleading by U.S. West.

CRA's Comments

CRA would quibble with the ALJ's interpretation of what constituted eligibility to meet the U.S. West tariff requirement that eligible persons be engaged in the entity's "main line of business." It is this Commission's responsibility to interpret and determine what is required under a tariff. U.S. West's internal interpretations are not binding on the Commission. The Building Industry Association of San Diego's (BIA) main activity is the promotion of construction and land development. It involves no strain to conclude, as do we and our ALJ, that the association's members, builders, also involved in construction and land development are in the same "main line of business."

The captioned investigation, with the agreement of all parties, was submitted on April 5, 1990. CRA's inclusion in its opening brief after submission of a later April 18, 1990 U.S. West internal memorandum (the Schena memo which CRA's attorney somehow obtained) revealed entity names which U.S. West had been required to furnish in coded form under seal after considerable argument and compromise during the April 5, 1990 prehearing conference.

We adopt the decision of the ALJ except to change the time within which U.S. West must submit a conforming advice letter modifying its tariff.

Statement of Facts

U.S. West, the non-wireline-facilities based cellular carrier in the San Diego Statistical Metropolitan Service Area (SMSA),[1] has offered multiple unit cellular phone tariff discount service since beginning its operations. Its multiple phone tariffs establishing reduced access and usage fees for subscribers to 25 or more units were first approved by its Advice Letter 2 without objection from resellers. Later, also without reseller protest, by its Advice Letter 4, further reductions were provided and extended

1 By D.85-12-023 (Application (A.) 85-07-018) Gencom, Inc. was authorized to provide non-wireline cellular radiotelephone service in the San Diego SMSA. By D.86-05-077 (A.85-12-037) Gencom, Inc. was authorized to transfer its assets, customer base, and operating authority to New Vector Communications. On April 21, 1987 New Vector Communications advised the Commission of its name change to U.S. West.

to users of as few as two units. These rates were fashioned so that multiple unit users were charged less than full retail rates, but more than the "wholesale" rates that were available to resellers and bulk users.

CRA, an association composed of independent certificated resellers that are not licensed by the Federal Communications Commission or affiliated with either the wireline or non-wireline certificated wholesale/retail provider in San Diego, on September 12, 1988 filed Complaint (C.) 88-09-027 alleging that U.S. West was offering "illegal, anticompetitive, and misleading" sales promotions to the public. In addition, and as relevant to this proceeding, CRA also alleged that U.S. West was offering its corporate rates to "groups of unrelated individuals" in violation of its tariff. CRA asked for an immediate Cease and Desist Order with regard to the alleged practice in offering corporate rates.

On November 3, 1988, stating its desire to clarify the circumstances under which its multiple unit rates are made available to corporations and other legal entities, U.S. West filed Advice Letter 8. On November 15, 1988, Mission Bell Telecommunications Corporation (Mission Bell), a reseller customer of U.S. West, formally protested the Advice Letter as "vague and ill-defined." On November 16, 1988, CRA similarly protested the Advice Letter. In response to the request of Commission staff, U.S. West on November 18, 1988 filed a supplementary version (Advice Letter 8-A) of Advice Letter 8. By their responses, the protestants complained of open-ended offerings to individuals with minimal affiliations, and evidenced their concern for the ability of resellers to compete with broadly available offerings made under loose tariff interpretations from U.S. West, especially where no comparable discount is provided to resellers.

On December 19, 1988, counsel for U.S. West responded, contending that the protests were merely attempts to artificially maintain rates at a high level and block the beneficial effects of

free competition. But counsel also represented that U.S. West did not intend to make bulk rates available to members of just any affinity groups; that the associations must be one organized for "profit-making purposes."[2]

On February 9, 1989, U.S. West's counsel again wrote to reiterate the utility's position, asserting that non-profit associations or loose affinity groups would not qualify as a "corporation or other legal entity" under Advice Letter 8-A.

On March 8, 1989, the Commission adopted Resolution T-13052, agreeing with what it perceived to be U.S. West's position as articulated by U.S. West's counsel. The Commission found the terms, rates, and conditions proposed in Advice Letter 8-A appropriate and reasonable, and dismissed the protests of Mission Bell and CRA without prejudice. In its review and discussion of the relative arguments presented, the Commission noted U.S. West's willingness to give discounts through corporations and associations where the ultimate liability for payment rests with individual employees, officers, and members, and there is no back-up guarantee of payment from the corporation or association. The Commission, as is particularly relevant in this present proceeding, observed that the entity through which the discounted rates flow must be one legally organized for <u>profit-making</u> purposes, and that the individuals receiving the discounted rates must be directly involved in the business of the entity. The

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2 On January 11, 1989, CRA moved to consolidate C.88-09-027 with U.S. West's Advice Letters 8 and 8-A, a move opposed by U.S. West as unduly delaying the tariff changes requested by the Advice Letters. The ALJ in C.88-09-027, ALJ Malcolm, ruling that the issues in the complaint could be considered separately from the Advice Letters, denied the motion to consolidate in a March 1, 1989 ruling. Subsequently, pursuant to a settlement agreement between CRA and U.S. West, CRA asked for and on July 7, 1989 received dismissal of C.88-09-027.

Commission observed that U.S. West has found that lower market costs, roughly similar billing and collection costs, and less "churn" from these entities fully justified discounts to employees, officers, or eligible members even though the entity itself did not guarantee payment. The Commission also determined that resellers should not be entitled to an additional discount to serve this class; that where costs of service to an identified group of users are less, the savings ought to be passed through to the consumers and not to the reseller middleman.

Finally, in adopting Resolution T-13052, it was the Commission's stated perception that under Advice Letter 8-A: "Unaffiliated individuals, non-profit associations, or loose 'affinity groups' would not qualify as a 'corporation or other legal entity.'" The Commission also stated that if "any of the conditions, stipulations, rates, terms, or provisions imposed by U.S. West's Advice Letter 8-A are violated and offered to individuals, groups, or any other such entities that do not qualify for, and therefore should not receive the multiple unit discount," the violation would be brought to the attention of the Commission for investigation, and fines and other appropriate remedies may result.

On October 11, 1989, CRA requested an immediate investigation and enforcement proceedings against U.S. West, alleging that the utility was offering multiple unit tariff rates to members of non-profit affinity group, the BIA, in violation of Resolution T-13052 and its own tariff. In an unsuccessful effort to resolve the matter, a November 16, 1989 Commission Advisory and Compliance Division (CACD) workshop held with U.S. West, CRA, and PacTel Cellular produced no consensus. Thereupon, in that Resolution T-13052 provided for investigations in such event, the Commission on January 9, 1990 made its Order Instituting Investigation (I.90-01-013), directing public hearing to ascertain whether U.S. West had violated its tariff and Resolution T-13052

with respect to multiple unit discount rates, whether operating authority action and/or a fine should follow, whether a cease and desist order should issue, and whether any other action should be taken.

A duly noticed prehearing conference (PHC) was held on April 5, 1990 before ALJ John B. Weiss in San Francisco. The captioned parties participated.

U.S. West readily stipulated during the PHC that it was providing multiple unit discounts to members of some non-profit organizations in San Diego, including members of the BIA. It was U.S. West's view that its practice was in compliance with the strict language of its tariff; that its tariff does not distinguish as to the profit or non-profit nature of the legal entity - the requirement of the tariff being that the member or Eligible Person be engaged "on a for-profit basis," but there is no tariff requirement that the association or organization be a for-profit entity. U.S. West stated it had earlier acknowledged[3] to the Commission staff that there was an ambiguity between the language of Special Condition G.2. of U.S. West's California tariff (Schedule CPUC No. 3-T, Original Sheet 10) and language within the

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3 U.S. West pointed to the November 1, 1989 letter of its then counsel addressed to Kevin P. Coughlan in CACD, specifically to Footnote 1 of that letter on page 4 which states:

> "1/ This mistake in the body of the resolution concerning the plain meaning of the tariff's language may stem from correspondence from counsel for U S WEST responding to CRA's protest to its Advice Letter No. 8. In a December 19, 1988 letter to you, counsel for U S WEST mistakenly stated that the association must be organized for profit-making purposes. The characterization of the tariff was in error as there is no such requirement in the tariff. U S WEST apologizes for any confusion this characterization may have caused. The plain meaning of the tariff remains clear, however."

body of Resolution T-13052 which approved that tariff, with regard to the permissible scope for offers of multiple unit discounts. U.S. West further pointed out that on January 9, 1990 - the same day that I.90-01-013 was issued by the Commission - the utility had filed its Advice Letter 24, seeking thereby to make explicit its view on the perceived ambiguity.

For its part CRA sought consolidation of U.S. West's Advice Letter 24 into the present complaint proceeding, and asked time to conduct discovery to determine whether the data previously presented to CACD to support Advice Letters 8 and 8-A was the appropriate data; whether it really evidenced that the same marketing costs (billing and collection costs and churn rates) had been experienced by U.S. West in non-profit as well as for-profit group users. U.S. West opposed reopening and reevaluation of material provided over a year previously and since resolved by the Commission. Noting that the Commission was at a decision point in its major cellular radiotelephone utilities regulation investigation (I.88-11-040), U.S. West suggested it withdraw Advice Letter 24 to await guidance anticipated in that investigation decision; that it would be premature to proceed with Advice Letter 24 before the anticipated new ground rules were enunciated so that they could be incorporated into a revised Advice Letter.

Assuming an immediate withdrawal of Advice Letter 24 as suggested by U.S. West, and facing the uncertainties of impinging or duplicating I.88-11-040 with its impending decision, ALJ Weiss questioned the need to go to hearing on the present investigation. Rather, he proposed to determine in this proceeding how extensive were U.S. West's past offerings of these discounts to non-profit entities; and since the clear thrust of the language in the body of Resolution T-13052 was to prohibit such offerings, and U.S. West was willing to stipulate that it had done so, the Commission would order an immediate cease and desist as to additional offerings, thereby preserving the status quo pending a decision in the

I.88-11-040 generic proceeding, while grandfathering the then existent and innocent end-users who were receiving the discount. The ALJ would take briefings on the applicability and amount of possible fines.

In response to the ALJ's question whether it would be necessary to try the case if the investigation proceeded in that manner:

The CACD attorney, in the absence of Division of Ratepayer Advocates, and noting that the Commission directive in the present proceeding was to investigate potential tariff violations, stated that inasmuch as there had been a stipulation from U.S. West to the fact of the complained of discounts in the San Diego area, it did not appear necessary to proceed with an evidentiary hearing.

CRA's attorney stated that if U.S. West was willing to stipulate and identify all the groups in a verifiable manner the Bench could go forward and decide which sanction to issue in addition to a cease and desist order.

U.S. West, carefully emphasizing it had not stipulated to violation of its tariff, agreed that there was no need to try the case, stipulated that it had provided the discount plan to entities other than the BIA which could be characterized as non-profit associations, and agreed to provide the Commission with a list of these entities, but wanted such a list to be under protective order.

CRA objected to any protective order, pointing out that the extent of such discounts with their asserted harm to his clients went to the very issue of applicability of and extent of

fines that should be levied upon U.S. West.[4] CRA argued that the attorneys to the proceeding at least had to have access to the U.S. West list, so that they would be aware of the full extent and impact of such discounts.

The ALJ then ruled that within one week U.S. West would submit to the Commission and CRA's attorney, under the protective restrictions of PU Code § 583, a list of those non-profit associations through which U.S. West had provided multiple unit discounts to end-users, appending to each association name a corresponding identity number, together with a number reflecting the aggregate number of units furnished through that association. The list was to be restricted to staff and CRA's attorney and CRA's office personnel with a need to know. The information was to be used only in the captioned proceeding, and solely with regard to the briefings on possible sanctions. The information was not to be reproduced, and CRA's copy was to be returned to U.S. West after submission of CRA's briefs in the instant proceeding without any disclosure to others.

Subject to withdrawal of U.S. West's Advice Letter 24, submission by U.S. West under protective order of its list of associations and aggregate number of affected end-users, issuance by the Commission of a Cease and Desist Order, and the filing of briefs, the investigation was submitted for decision.

On April 5, 1990, U.S. West formally filed a withdrawal of its Advice Letter 24.

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4 Both Resolution T-13052 and I.90-01-013 included possible fines within their scope if violations of the Resolution or U.S. West's tariff had occurred.

On April 12, 1990, U.S. West under the confidentiality restraints of PU Code § 583 furnished the Commission and CRA's attorney confidential multiple unit discount data.[5]

On April 11, 1990, by D.90-04-030 the Commission issued its order to U.S. West to cease and desist from offering or providing multiple unit rate discounts thereafter where the aggregating entity is a non-profit entity. Those individuals receiving the discounts as of April 11, 1990 were "grandfathered" pending a decision in I.88-11-043.

Opening briefs from the Commission staff, CRA, and U.S. West were received on May 7, 1990.

Staff's Brief asserts that while the limitations are not expressly stated in U.S. West's tariff, Resolution T-13052 which authorized the Advice Letter filing to take effect makes it clear that these multiple unit discount rates were not to be made available to non-profit affinity groups, and that through the Resolution the limitations were incorporated into the tariff. And, assuming the Commission finds a violation of Resolution T-13052, staff recommends either a fine of $2,000 per each of the nine types of associations permitted the discount,[6] with the Commission's attorney to take action pursuant to PU Code § 2104 against U.S. West to levy the total $18,000 fine,[7] or alternatively, that a temporary $18,000 discount be prorated among U.S. West resellers in

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5 U.S. West's list showed nine non-profit affinity groupings as having provided multiple unit discounts to 2,611 end-users.

6 PU Code § 2107 provides, inter alia, that any public utility which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission is subject to a penalty of not less than $500 nor more than $2,000 for each offense.

7 PU Code § 2104 provides that Chapter 11 penalties be levied through actions brought in Superior Court by the Commission in the name of the people of the State of California.

amounts proportional to the number of U.S. West access numbers resold.

In addition, staff would freeze the rates received by ineligible end-users grandfathered under the April 11, 1990 Cease and Desist Order, and also allow CRA to recover intervenor fees and expenses pursuant to PU Code § 1801 et seq. up to the maximum amount of the fine. Another proposal of staff was made moot by the issuance of D.90-06-025 on June 6, 1990.

CRA's Brief noted U.S. West's stipulated violations of the Commission's intent that lay behind Resolution T-13052, argues that U.S. West engaged in a pattern of open deceit, that U.S. West's attorney by repeated misrepresentations to CACD that its offerings were limited to profit-making entities only, induced the Commission to issue Resolution T-13052 approving Advice Letter 8-A. CRA contends that this deceit pattern will continue unless the Commission imposes the maximum fine permitted under provisions of PU Code § 2107. CRA asserts that by imposing the maximum fine on U.S. West a message will be sent to all cellular providers that Commission resolutions and orders are not trivial pronouncements but rather clear statements of law that are not to be violated with impunity. Thus, CRA would impose the maximum $2,000 fine and apply it for each of the aggregate 2,611 units provided end-users in the nine association groups for a total fine of $5,222,000.

In addition, CRA asks that U.S. West be audited by independent outside auditors at U.S. West's expense to determine compliance with Resolution T-13052 and the April 11, 1990 Cease and Desist Order,[8] and that all end-users acquired in violation of

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8 By its brief CRA alleges ongoing flagrant violations of the April 11, 1990 Commission's Cease and Desist Order and Resolution T-13052. In support of its allegations CRA included in its brief new evidence in the form of a copy of an April 18, 1990 internal U.S. West memorandum to its agents from Schena, its Sales

(Footnote continues on next page)

the Resolution and the Cease and Desist Order be informed of the illegality of the offer and be afforded a 60-day transition period to transfer service to any other certificated cellular provider in San Diego. In the event U.S. West does not comply with the Commission's order in the present proceeding CRA asks that its retail cellular service authority be revoked.

U.S. West's Brief reviews the factual background of its Advice Letters 8 and 8-A multiple discount rates leading up to Resolution T-13052, stressing that the purpose of the Advice Letters was not to change its previous practice in extending such rates, but merely to respond to reseller accusations that the terms of its discount rates were not fully delineated in its then existing tariffs. It points out that Tariff Sheet 151-T permitted "any corporation or other legal entity" to qualify - that the offering was not limited to "for-profit" corporations or entities. The only distinction vis-a-vis for profit/non-profit was with regard to eligible persons - only the eligible persons of a legal entity--not the legal entity itself--were required to be engaged on a for-profit basis in the entity's main line of business, thus excluding members of "loose affinity groups." The language in the discussion portion of Resolution T-13052 limited the multiple unit discount to situations in which both the legal entity and eligible persons operate on a for-profit basis. Thus, the language used in

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(Footnote continued from previous page)

Manager, Agent Programs. This memorandum states that because its tariff supersedes the order, the order may be "circumvented" only if a "financial guarantee" letter (to be developed) is obtained. A copy of this memorandum found its way into the hands of CRA's attorney. In this internal memorandum U.S. West reveals the names of the non-profit entities which made up the list furnished by U.S. West at the direction of the ALJ under the confidential provisions of PU Code § 583. Unfortunately, in using the full memorandum CRA did not mask the names of the entities, a use under the circumstances legally unassailable but ethically distasteful.

the discussion portion of the Resolution is clearly at odds with the language of Advice Letter 8-A approved by the Resolution.

U.S. West's brief concedes that it cannot deny some responsibility for creation of the ambiguity. It drafted the language of the tariff sheet, and the Commission staff drafted the Resolution based on a letter sent to CACD by U.S. West's then attorney. But U.S. West also observes that neither CRA nor CACD took any steps to resolve the ambiguity during consideration of the Resolution by the Commission or after issuance of the Resolution. It asserts that when U.S. West was made aware of the ambiguity it filed an Advice Letter to remove it and clarify the tariff. Meanwhile, its employees who U.S. West states systematically rely on tariff schedules rather than Commission resolutions as primary sources of direction, proceeded, believing the discounts could be offered to non-profit associations.

U.S. West, citing a somewhat parallel violation proceeding, C.89-03-016,[9] submits that if the Commission finds a violation of Resolution T-13052, the circumstances surrounding the present matter may warrant the Cease and Desist Order as issued in D.90-04-030, but do not warrant imposition of sanctions.

Both CRA and U.S. West submitted reply briefs, and the matter was submitted on May 18, 1990.

CRA's Reply Brief reiterates its opening brief contentions that U.S. West's violations were "willful, recklessly negligent, and callously indifferent to the Commission's processes," and did not end with the Cease and Desist Order, so

9 Comtech Mobile Telephone Company et al. v Bay Area Cellular Telephone Company & San Jose Real Estate Board (D.89-05-024), where the Commission declined to impose sanctions but ordered Bay Area Cellular Telephone Company (BACTC) to cease and desist from further extension of discounts to San Jose Real Estate Board (SJREB) members until the generic cellular investigation (I.88-11-040) clarified the status of wholesale/retail customers. SJREB members already served were grandfathered.

that a maximum $2.5 million fine is necessary to send a clear message to all. CRA's brief also includes additional evidence in the form of a "Schena" U.S. West's internal memorandum dated May 15, 1990, which appears to have been issued to advise U.S. West's cellular agents that the April 11, 1990 Cease and Desist Order, while prohibiting discounts to members of non-profit entities under Section G.2 of Schedule 3-T, did not, under Section G.1 of the schedule, serve to prohibit discounts to non-profit entities if the entity agreed to guarantee payment of all accounts. CRA argues that given what it terms as U.S. West's attempts to disguise efforts to avoid compliance under both the Resolution and the Cease and Desist Order, it is doubtful if clearer evidence of willful misconduct could be found. CRA also includes new declaratory evidence from its President to the point that three CRA members believe they are losing approximately 50 subscriber units monthly as the result of U.S. West's ongoing violations. The declaration also quantifies claimed losses to date. CRA in this brief suggests as an alternative sanction that U.S. West be ordered to reduce its wholesale rates 30% per rate element for a three-year period.

U.S. West's Reply Brief reiterates its position that sanctions are inappropriate. While it acknowledges extending discounts to members of non-profit entities before the Cease and Desist Order, U.S. West denies that in doing so it violated its tariff language which had been approved by the Commission. It denies acting in bad faith, stating that after the Resolution ambiguity was raised in October of 1989, it candidly explained its practices and offered a new Advice Letter to clarify them.

In rebuttal to CRA's new evidence assertions on brief of violations of the Cease and Desist Order, it states there have been no violations, that "Absolutely no new orders have been accepted since April 11, 1990, either under Section G.1 or Section G.2 of the tariff." U.S. West offers its own new evidence to recite the steps it took upon issuance of the Cease and Desist Order to ensure

compliance; evidence in the form of affidavits from its Senior Counsel (Ford), Customer Support Manager (Kim), and Sales Manager (Schena), and copies of a series of internal memoranda including an April 17, 1990 Kim to San Diego Branch Management, an April 18, 1990 Schena to all agents, an April 26, 1990 Ford correction to Kim, and finally a May 11, 1990 Kim to Branch Management and Agents. The position finally enunciated being that while under discounts under Section G.2 must be limited to members of for-profit entities, discounts under Section G.1 provided payments were guaranteed by the entities, could be given without regard to the profit/non-profit status of the entity.[10]

U.S. West's reply brief also opposes staff's recommendation that CRA be permitted to recover its expenses, pointing out that while some CRA members are wholesale customers of U.S. West, these are not end-user customers and have an interest antithetical to the interest of end-users who want wider application of such discounts; that CRA failed to file the PU Code § 1804 mandatory request for finding of eligibility for compensation; and that is doubtful CRA could make the requisite showing of hardship. U.S. West also would not reward CRA's behavior in unnecessarily including in its brief the complete Schena's memorandum listing the non-profit entities by name, thus broadcasting these names although they were the subject of an ALJ confidentiality order.

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10 Underlying U.S. West's position in this proceeding is its belief that Section G.2 of its tariff is the sole focus of this entire controversy. Section G.2 provides that members of associations are eligible for discounts based on the total units aggregated under the association when the latter provides certain marketing assistance to U.S. West. Section G.1 is different and U.S. West does not regard it as having been at issue in this proceeding. Section G.1 provides that where an individual or entity agrees to be "separately liable for all tariff charges" for multiple units, such units are entitled to a multiple unit discount. U.S. West believes it unlikely that a non-profit entity would agree to guarantee payments for its customers.

U.S. West also submits that it is not in the public interest to take away the grandfathered discounts and force them onto other cellular providers; that such a windfall to CRA's members would not benefit the end-user customers.

On May 25, 1990, U.S. West filed a motion to strike portions of CRA's reply brief dealing with sanctions on the grounds that CRA asserts without citation illegal discounts to up to 30% of U.S. West's customer base; that CRA has alleged violations of the Commission's Cease and Desist Order without providing any substantiation for the charges. U.S. West asks that the declaration of the CRA President be stricken in that it relates to damages assertedly suffered and has no factual support. Finally, U.S. West asks that CRA's alternative to a fine, the proposal to order U.S. West to reduce its wholesale rates for a three-year period, be stricken as improper briefing.

On June 11, 1990, CRA filed its opposition to U.S. West's motion to strike. Therein CRA cites a December 19, 1990 U.S. West's supplied figure of 31% of customer base as foundation for its reply brief allegation. It points to the April 18, 1990 Schena's memorandum as bearing on Cease and Desist violations. CRA defends inclusion of its President's declaration of harm to its members as being responsive to Finding 4 of the Cease and Desist Order and asserts it is also responsive to staff's opening brief suggesting CRA recover intervenor fees, who further noting that the Commission relied upon like information in resolving the BACTC-SJREB case. Finally, it refers to staff's brief where staff recommended consideration of a discount rebate to CRA's members as an appropriate sanction.

We do not consider the recommendation staff included in its brief that CRA be permitted to recover expenses in this proceeding. PU Code § 1804 requires timely filing of requests for finding of eligibility for compensation. No such filing was made by CRA, obviating need for any further consideration on eligibility or the merits of an award.

In view of our determinations in this proceeding we do not find it necessary to rule on U.S. West's May 25, 1990 motion to strike portions of CRA's brief.

Discussion

The fundamental problem facing the Commission in this investigation lies in the ambiguity between the language of U.S. West's tariff reflected in Advice Letter 8-A as it pertains to qualification for multiple unit rates, and the far more restrictive perception of what that language intended, as was represented to and understood by the Commission when the Commission issued Resolution T-13052 authorizing the Advice Letter. In short, the Commission's Resolution was ambiguous and did not do what it was specifically intended to do.

It is U.S. West's position that its actions in offering multiple unit discounts to members of the BIA have been in full and strict legal compliance with the terms of its filed tariff as reflected by Advice Letter 8-A authorized by the Commission. In Advice Letter 8-A, U.S. West submitted three tariff sheets to revise earlier filed sheets. Two of these, Revised Cal. P.U.C. Sheets Nos. 151-T and 152-T, pertained to Retail Rates. Filed November 7, 1988, they were authorized by Resolution T-13052 to become effective March 8, 1989.

Part (b) of these Advice Letter 8-A revision sheets containing a section entitled "Services to Multiple Units," is applicable herein. Part (b) provides for reduced multiple unit rates when "Employees, officers, contract agents and members ('Eligible Person')" of any corporation or other legal entity "are engaged on a for-profit basis in the entity's main line of business."[11] (There are other requirements not at issue here.) But it must be noted that the requirement is that the member be

11 Advice Letter 8-A, Revised Cal. P.U.C. Sheets Nos. 151-T and 152-T relative to Services to Multiple Units, is reproduced herein as Appendix A.

engaged on a for-profit basis - there is no tariff stated requirement that the member's association or organization also be on a for-profit basis.

The present investigation was initiated based upon a complaint from CRA that U.S. West was violating both its multiple unit discount tariff as well as Resolution T-13052 by offering its multiple unit tariff to members of a non-profit affinity group, the BIA. The association members on a for-profit basis are in construction and land development. Their non-profit association's main activity is the promotion of construction and land development. The Advice Letter 8-A Revision Sheets, taken alone, permit discounts to for-profit members engaged in the main line of business of their association, even though that association is a non-profit entity. Therefore, U.S. West was not in violation of its tariff in offering these discounts unless Resolution T-13052, the Commission's decisional instrument authorizing the Advice Letter, in some manner added limiting language or changed the scope of the Advice Letter.

Without doubt there were clear statements in the Resolution setting forth the Commission's intent and understanding that the Advice Letter did not authorize multiple unit discounts to be made available to members of affinity groups like AAA, neighborhood associations, senior citizen groups, and similar community organizations. These statements clearly indicated that offerings would be "confined to for-profit entities, and to persons directly involved in the business of the entity," and also that the entity must be one "legally organized for profit-making purposes."

But at that point we fatally erred in drafting the Resolution. All these clear statements of intent, understanding, and limitation appear in the Background and Discussion portions of the Resolution; none was carried over into the Findings and Order

of the Resolution.[12] The order mentions none of the limitations; it merely authorizes the Advice Letter as submitted, and dismisses the protests.

Therefore, despite our intentions, all that Resolution T-13052 accomplished legally, apart from dismissal of the Mission Bell and CRA protests without prejudice, was to authorize Advice Letter 8-A to become effective on March 8, 1989.

Having concluded previously herein that U.S. West did not violate its tariff in offering multiple unit discounts to members of the BIA, and as the legal effect of Resolution T-13052 did not in any way change or limit that tariff as reflected by the Advice Letter approved, it follows that U.S. West cannot have violated Resolution T-13052. Accordingly, without violations of either its tariff or the Resolution, there is no basis for a cancellation, revocation, or suspension of U.S. West's operating authority, or for a fine to be imposed in that regard.

But this investigation cannot end there. Remaining for consideration is the fact that U.S. West, after filing Advice Letter 8 on November 3, 1988, and superseding it on November 18, 1988 with Advice Letter 8-A, in response to protests, had its attorney write to staff on December 19, 1988 and misrepresent the way the multiple unit discounts applied. As germane here, counsel stated:

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12 The ordering paragraph of Resolution T-13052 merely states as follows:

"IT IS ORDERED that:

"(1) Authority is granted to make U.S. West's Advice Letter No. 8-A effective on March 8, 1989.

"(2) The protests of Mission Bell and CRA are dismissed without prejudice.

"The effective date of this Resolution is today."

"(i) The corporation or association must be legally organized for profit making purposes, and

"It should be clear from the above that U.S. West does not intend to make bulk rates available to members of so-called affinity groups like AAA, neighborhood associations, senior citizen groups, and similar community organizations. Rather, the offering is confined to for-profit entities, and to persons directly involved in the business of the entity."

On February 9, 1989, again in response to CRA complaints, the U.S. West attorney wrote staff reiterating that pursuant to Advice Letter 8-A, non-profit associations or loose affinity groups would not qualify as a "corporation or other legal entity."[13]

Resolution T-13052 followed these letters on March 8, 1989. The discussion in the "Opinion" portion of the Resolution reflects the fact that staff, in drafting the Resolution, heavily relied upon the content of the two explanatory letters from U.S. West's attorney. Clearly staff intended to incorporate the

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13 The second full paragraph on page 2 of the attorney's February 9, 1989 letter states:

"What remains is a relatively simple question, which is whether Advice Letter 8A, as worded, permits service to be offered 'indiscriminately to unaffiliated groups.' The exact opposite is the case. The Advice Letter provides reduced rates to multiple units where (a) a single individual or entity has guaranteed the underlying bill, or (b) where a 'corporation or other legal entity' has fulfilled various requirements relating to promoting the utility's service. End users must be employees, officers or have a similar legal tie to the entity, and must be engaged in a for-profit basis in the entity's main line of business. Unaffiliated individuals would not qualify as a 'corporation or other legal entity'. Nor would a non-profit association or loose 'affinity group'."

explanatory language from the letters with regard to exclusion of non-profit entities, however ineffective and unartful the result. After issuance of the Resolution U.S. West took no steps to bring to staff's attention any "mistake" or inconsistency between the clearly intended effect of the Resolution and the actual language of the Advice Letter.

It was only many months later, and after CRA's October 11, 1989 request for Commission investigation and enforcement proceedings against U.S. West with regard to offerings to the BIA, a non-profit entity, that U.S. West's new attorney in a November 1, 1989 letter to staff characterized the inconsistency as a mere "mistake," derogating the Resolution, and asking that CRA's request be disregarded. The attorney admitted U.S. West had been providing multiple rate discounts to a non-profit association, despite the Resolution's discussion statements disallowing that, but defended its actions on the basis the utility was not violating its tariff. In a footnote in that November 1, 1989 letter, U.S. West apologized for any confusion its prior characterization in the December 19, 1988 letter may have caused, stating that its counsel's statement was mistaken. It also conceded that "this mistake in the body of the resolution" may have stemmed from its counsel's mistaken statement in the December 19, 1988 letter. But this exculpatory effort does not mention U.S. West's persistence in deluding the staff on the same matter in its February 9, 1989 letter wherein counsel reiterated its exclusionary statements.

This type of sharp dealing has no place in Commission practice and will not be countenanced. Rule 1 of this Commission's Rules of Practice and Procedure speaks to ethics, and provides in relevant part that by transacting business with the Commission, a party agrees "never to mislead the Commission or its staff by an artifice or false statement of fact or law." U.S. West, by its attorney's letters of December 19, 1988 and February 9, 1989, misled the Commission and its staff, leading to the approval of

Resolution T-13052 approving Advice Letter 8-A. U.S. West took full advantage of the "mistake" it had implanted, and by failing within a reasonable time after March 8, 1989 to bring this "mistake" and the resulting language ambiguity to the attention of the Commission, persisted in further sharp dealing to its competitive advantage and profit in the cellular marketplace.

Each of these three instances of sharp dealing - the two separate letters from U.S. West's counsel which engendered the Resolution approving Advice Letter 8-A, and the continued implementation of the provisions of the Advice Letter without bringing the "mistake" and resulting ambiguity to the attention of the Commission for corrective steps or modification - constitute separate and distinct violations of Rule 1 of our Rules of Practice and Procedure. Each is subject to imposition of a penalty.[14] In consideration of U.S. West's persistence in pressing the assertions of for-profit requirements for an aggregating entity, which "mistake" was incorporated into the Opinion language of Resolution T-13052, and its taking of every advantage of the "mistake" and resulting ambiguity in the marketplace while remaining silent after issuance of Resolution T-13052, we conclude that the maximum penalty of $2,000 permitted for each violation of Rule 1 requiring that parties never mislead the Commission by an

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14 PU Code § 2107 provides, in relevant part, that: "Any public utility...which fails or neglects to comply with any part or provision of any...rule...of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense." "Every violation...of any part of any...rule...of the Commission, by any corporation or person is a separate and distinct offense..." (PU Code § 2108.) "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility." (PU Code § 2109.)

artifice or false statement of fact or law is appropriate and should be imposed.

The General Counsel of the Commission will be ordered to bring and prosecute to final judgment an action to recover this $6,000 in the name of the people of the State of California in Superior Court in San Diego County, as provided by PU Code § 2104.

We next turn to the Cease and Desist Order instituted by D.90-04-030 issued on April 11, 1990. This order provided that U.S. West cease and desist effective that date from offering or providing multiple rate discounts to end-users where the aggregating entity is a non-profit entity. Customers receiving multiple unit discounts as of that date through association with non-profit entities were grandfathered to preserve the status quo until the issues would be addressed and resolved in I.88-11-040.

On June 6, 1990, the Commission issued its interim order, D.90-06-025 in I.88-11-040. In this interim order the Commission again recognized that facilities-based carriers enjoy economies of scale from volume usage, and concluded that a form of wholesale rates should be afforded to those corporate or other legal entities, irrespective of characteristics, affinity, or professional affiliation, who contribute to volume usage and offer cellular service to a restricted group of end-users. The Commission determined to end any distinctions that have developed between "bulk users" and "large users" in favor of a more pro-competitive policy of requiring carriers to offer only one tariff to be applicable to all corporate or other legal entity volume purchasers if there is a demand for such service within the SMSA.

To qualify for this volume tariff a corporate or other legally organized aggregating entity, without regard to for-profit, non-profit, affinity, or professional affiliation distinctions, must serve as the master customer for its employees, officers, contract agents, or members, bill and collect from these individual end-users, guarantee payment for all usage by its end-users, and

not apply any additional charges to these end-users for such service. The volume tariff rates must be set at least five percent (5%) above the rates the duopoly carriers charge resellers, thereby enhancing competition by providing resellers opportunity to compete for volume purchaser business. The 5% margin must not affect any rate offered by a carrier to a government agency. In addition, we require that these volume purchaser tariffs contain the following consumer protection provisions to apply when volume services are purchased by other than certificated resellers or carriers. The volume purchaser must notify individual subscribers that:

1. It is not a public utility.

2. The Commission will not resolve disputes between the volume purchaser and its individual subscribers.

3. Small Claims Court and other similar forums are available to resolve disputes if necessary.

4. The service is provided under a volume purchaser tariff from a utility and all service may be discontinued if the volume purchaser does not pay its bills.

5. The volume purchaser is not permitted to mark up the service billed by the utility or charge special cellular service fees of any kind.

Notice must be provided in writing to individual subscribers of the volume purchaser at the commencement of service, and an additional copy of this notice must be provided at least twice a year to each individual subscriber by the volume purchaser.

By March 1, 1991, U.S. West will be required to submit an Advice Letter modifying its tariffs, insofar as such pertain to all volume purchasers other than certificated resellers, to conform to the requirements of the last paragraph. Upon approval of its Advice Letter U.S. West will inform all volume purchasers of its modified tariff requirements. Those volume purchasers temporarily

grandfathered under the Cease and Desist Order of D.90-04-030 issued April 11, 1990, will be afforded 30 days' opportunity after the approval date to either retain U.S. West service under the modified tariff provisions or to transfer to any certificated reseller. Within 30 days of the date its Advice Letter is approved, all U.S. West volume purchaser service to other than certificated resellers will be required to conform to the requirements of the modified tariff.

The Cease and Desist Order of D.90-04-030 will be vacated 30 days after the date U.S. West's Advice Letter conforming its tariffs to the requirements herein is approved.

While counsel for CRA's action in revealing names in the Schena document do not rise to the gravity of the sharp dealing for which we fine U.S. West, it is of similar character and is not appreciated by the Commission.

We are aware that there are now petitions for clarification or modifications to D.90-06-025 before the Commission. We are also aware that the instant proceeding, while an investigation, has its scope, as indicated during the PHC held April 5, 1990, essentially limited to volume purchaser issues and asserted transgressions as these pertain to U.S. West. This proceeding is not a generic proceeding. Accordingly, any substantive clarification or modification of D.90-06-025 other than as such pertain to U.S. West must await proceedings in I.88-11-040.

The investigation instituted by I.90-01-013 should be closed.

Findings of Fact

1. U.S. West, the non-wireline-facilities based duopoly cellular carrier in the San Diego SMSA, operates under authority granted by this Commission in the exercise of our regulatory authority over this class of communication utilities.

2. The Commission has determined that large organizations who purchase volume cellular services for their own use involving an identified group of end-users enable duopoly carriers to achieve economies of scale, and the Commission accordingly has authorized duopoly carriers to implement forms of wholesale tariffs in order that such benefits of scale may be passed through to end-users.

3. Through previous successive Advice Letter filings, U.S. West has received authorization to include certain volume purchaser rates in its tariffs.

4. In 1988 CRA complained that U.S. West in violation of its tariffs was offering "illegal, anticompetitive and misleading" promotions by offering wholesale rates to "groups of unrelated individuals."

5. In an attempt to clarify the circumstances of its offerings in response to the complaints, U.S. West filed Advice Letter 8, superseded by Advice Letter 8-A.

6. CRA and a cellular reseller customer protested the U.S. West Advice Letter filing, asserting inability of resellers to compete, and charged U.S. West with open-ended offerings to individuals with minimal affiliation to the aggregating entity.

7. On December 19, 1988, U.S. West's counsel wrote denying the accusations, and stated therein that U.S. West did not make bulk rates available to members of just any affinity group - that the group must be one organized for "profit-making purposes."

8. On February 8, 1989, U.S. West's counsel again wrote the Commission, reiterating the utility's intention and position, asserting that non-profit associations or loose affinity groups

would not qualify under Advice Letter 8-A as a "corporate or legal entity."

9. On March 8 1989, in reliance upon U.S. West's assertions, the Commission issued Resolution T-13052 authorizing U.S. West to make Advice Letter 8-A effective.

10. In the Background and Discussion portions of Resolution T-13052, the "Opinion" part of the Resolution, the Commission detailed its intention that any aggregating entity through which discounted rates would flow under U.S. West's Advice Letter 8-A would have to be an entity organized for profit-making purposes, and clearly indicated the Commission's reliance upon U.S. West's assertions to that effect.

11. In the "Findings" part of Resolution T-13052, the Commission - without <u>further comment or limitation</u> - stated that the terms and conditions proposed in the Advice Letter were "appropriate and reasonable, and in the "Order" part of the Resolution, the Commission, while dismissing the protests, merely stated that authority was granted to make the Advice Letter effective on March 8, 1989, without modification.

12. The revised Cal. P.U.C. Sheets Nos. 151-T and 152-T approved through Advice Letter 8-A merely require that "The Eligible Persons are engaged on a for-profit basis in the entity's main line of business," with no requirement that the entity be a "for-profit" entity.

13. In offering and providing multiple unit tariff rates to non-profit aggregating entities, U.S. West followed the as-submitted provisions of its Advice Letter 8-A which were authorized to become effective by the order in Resolution T-13052.

14. On October 11, 1989, CRA requested investigation and enforcement proceedings against U.S. West, alleging that in offering multiple unit tariff rates to a non-profit affinity group, the BIA, U.S. West violated both Resolution T-13052 and its own tariff.

15. On January 9, 1990, U.S. West filed Advice Letter 24 by which it sought to remove the "ambiguity" between the language in the "Opinion" portion of Resolution T-13052 and its tariff, and to clarify its tariff.

16. On January 9, 1990, the Commission initiated I.90-01-013.

17. At a PHC held April 5, 1990 U.S. West readily stipulated that it had offered and provided multiple unit tariff rates to the building association as well as to other non-profit entities, but contended that these actions did not violate its tariff; that there were no tariff requirements that the aggregating entity be a non-profit entity; only that the Eligible Persons be engaged on a for-profit basis in the entities' main line of business.

18. As to Resolution T-13052, U.S. West concedes that the limiting language in the "Opinion" portion of the Resolution (with regard to the stated requirement that an aggregating entity should itself be organized for profit-making purposes) "may stem from correspondence from counsel for U.S. West...", but argues that counsel was mistaken, and while apologizing for any confusion this characterization may have caused, states that the plain meaning of the tariff remains clear and was followed.

19. In the PHC the parties acceded to the ALJ's proposal that further hearing would not be necessary: that in recognition of a pending decision in the generic investigation into regulation of cellular radiotelephone utilities, I.88-11-040, U.S. West would immediately withdraw Advice Letter 24; that a Cease and Desist Order would issue from the Commission for U.S. West to cease further offerings to non-profit entities while grandfathering then existing services, thereby preserving the status quo pending indication in the generic proceeding of Commission intentions; that U.S. West would furnish coded information indicating the extent of existing U.S. West's non-profit entity service with the understanding that following briefing on possible sanctions, fines must be imposed if violations were determined.

20. On April 11, 1990, by D.90-04-030 the Commission ordered U.S. West to cease and desist from offering or providing multiple rate discounts to end-users where the aggregating entity is a non-profit entity. End-users then receiving service were grandfathered pending resolution of the issue in I.88-11-040.

21. On April 12, 1990, in compliance with the ALJ's order, U.S. West submitted under seal coded information listing the aggregate number of cellular units categorized by types of non-profit organizations.

22. On April 5, 1990, U.S. West withdrew Advice Letter 24.

23. The repeated assertions of U.S. West to the Commission alleging a requirement in Advice Letter 8-A that aggregating entities to be eligible for multiple unit rates for cellular service had to be "for-profit" entities, were false statements which misled the Commission to issue Resolution T-13052 containing ambiguous language.

24. By failing to bring to the attention of the Commission the ambiguity between the language in Resolution T-13052 derived from its false statements, and Advice Letter 8-A, while taking competitive advantage and profit from the ambiguity, U.S. West continued for months after issuance of the Resolution to mislead the Commission.

25. Each communication by U.S. West to the Commission - the December 9, 1988 letter and the February 8, 1989

letter, and the fact of U.S. West's continual failure for months to bring the ambiguity language in Resolution T-13052 which it engendered to the attention of the Commission, constitute distinct and separate instances of U.S. West misleading the Commission in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

26. For each of its three violations of Rule 1 of the Commission's Rules of Practice and Procedure U.S. West should be subject to the maximum penalty permitted by PU Code § 2107.

27. By D.90-06-025, an interim decision issued June 6, 1990 in I.88-11-040, the Commission concluded that in the interest of developing a pro-competitive policy that offers the ability to make available margins from buying in bulk and reselling individually, a form of wholesale rates without distinction between "bulk users" and "large users" should be afforded to legal entities irrespective of characteristics, affinity, or professional affiliation, who contribute to volume usage and offer cellular service to a restricted group of end-users, and set forth qualifications for such volume tariffs.

28. U.S. West should be required by March 1, 1991 to submit an Advice Letter to modify its existing tariffs to conform to the single wholesale volume tariff qualifications set forth in D.90-06-025.

29. U.S. West should be required to inform all its present volume producers, including those "grandfathered" temporarily under the Cease and Desist Order of D.90-04-030, of a 30-day reconsideration window, after approval of its Advice Letter, during which purchasers may either retain U.S. West service under the modified tariff provisions or seek transfer to any certificated reseller or cancellation of service without penalty.

30. Within 30 days of the approval of a U.S. West's Advice Letter modifying its tariffs, all U.S. West volume purchaser

service to other than certificated resellers should conform to the modified tariffs.

31. The Cease and Desist Order of D.90-04-030 should vacate 30 days after U.S. West's Advice Letter conforming its tariffs is approved.

32. CRA filed no request for finding of eligibility for compensation for its role in this proceeding.

33. Motions not granted during this proceeding or on brief should be deemed denied by the ALJ.

34. The investigation initiated by I.90-01-013 should be closed.

Conclusions of Law

1. U.S. West is a cellular radiotelephone telecommunications public utility subject to the jurisdiction of this Commission.

2. Commission resolutions are Commission decisions with the same force and effect as any other Commission decision (Conclusion of Law 6, Stanislaus Food Products Co. v PG&E (1979) 2 CPUC 2d 304, 308, 310).

3. The ordering paragraph of Resolution T-13052 issued on March 8, 1989 authorized U.S. West's Advice Letter 8-A to be effective on that date and dismissed the protests, serving thereby only to make the tariff terms contained in the Advice Letter as originally submitted effective, and to effectuate the dismissal of the protests.

4. In offering and providing multiple unit tariff rates to non-profit aggregating entities, following Commission Resolution T-13052 approval of Advice Letter 8-A, U.S. West violated neither the Advice Letter nor Resolution T-13052.

5. The successive attempts of U.S. West to mislead the Commission and its staff by false statement on material facts inducing and leading to Resolution T-13052 authorizing U.S. West's Advice Letter 8-A were violations of Rule 1 of the Commission's Rules of Practice and Procedure.

6. The protracted delay by U.S. West in bringing the language ambiguity between Resolution T-13052 and Advice Letter 8-A to the attention of the Commission, while taking competitive advantage and profit from its delay, constituted an artifice further misleading the Commission in violation of Rule 1 of the Commission's Rules of Practice and Procedure.

7. PU Code § 2107 provides penalties for public utilities which violate any rule of the Commission.

8. U.S. West should modify its tariffs to meet the volume purchaser requirements of D.90-06-025, and should require all such purchasers, except certificated cellular resellers, to conform.

9. Volume purchasers under the cease and desist provisions of D.90-04-030 should have opportunity to transfer or cancel.

10. No filing having been made by CRA for a finding of eligibility for compensation, consideration of eligibility, or of an award of legal fees or costs, is unnecessary.

O R D E R

IT IS ORDERED that:

1. If U.S. West Cellular of California, Inc. (U.S. West) wishes to offer and provide, or continue to offer and provide, multiple unit volume discounted rates through other than certificated resellers, U.S. West by March 1, 1991 must submit to this Commission an Advice Letter filing proposing modification of its tariffs, insofar as these tariffs pertain to all volume purchasers other than certificated resellers. Such an Advice Letter filing must provide for offering and provision of multiple unit cellular service to any corporate or other legally organized aggregating entity without regard to such entity's profit or non-profit status, affinity, or professional affiliation distinctions. Such aggregating entity must contract to and serve as the master customer for its employees, officers, contract agents, or members,

bill and collect from these individual end-users, guarantee payment for all usage by its end-users, and not apply any additional charges to these end-users for these services. The volume tariff rates must be set at least five percent (5%) above the rates U.S. West charges certified resellers, but must not affect any rate offered to a governmental agency. In addition, these volume purchaser tariffs applicable to other than certificated resellers must contain the following consumer protection provisions requiring the volume purchaser to notify individual subscribers that:

a. The volume purchaser entity is not a public utility.

b. The Commission will not resolve disputes between the volume purchaser entity and its individual subscribers.

c. Individual subscribers must look to Small Claims Court and similar forums to resolve disputes.

d. The service is provided under a volume purchaser tariff from a utility and all services may be discontinued if the volume purchaser does not pay its bills to U.S. West.

e. The volume purchaser is not permitted to mark up the service billed by U.S. West or to charge special cellular service fees of any kind.

This notice must be provided by the volume purchaser entity in written form at the commencement of service to each individual subscriber, and additionally at least twice a year thereafter while served.

2. Upon acceptance or approval by the Commission of the Advice Letter proposing to modify tariffs required by Ordering Paragraph 1, U.S. West shall immediately inform all its volume purchaser entities, including those grandfathered under the cease and desist provisions of D.90-04-030, of these accepted or approved modified tariff requirements.

3. Volume purchaser entities temporarily grandfathered under the Cease and Desist Order provisions of D.90-04-030 will be afforded 30 days' opportunity after the effective date of the acceptance or approval of the modified tariff requirements to either retain U.S. West service under the modified tariff requirements set forth in Ordering Paragraph 1, or transfer to a certificated reseller without termination penalties or charges.

4. Within 30 days after the acceptance or approval by the Commission of U.S. West's Advice Letter modifying its tariffs to conform as set forth in Ordering Paragraph 1 herein, all U.S. West volume purchaser service to other than certificated resellers shall conform to the modified tariffs.

5. The cease and desist provisions of D.90-04-030 shall vacate 30 days after the effective date of the acceptance or approval of the Commission of U.S. West's Advice Letter.

6. U.S. West shall be subject to the maximum penalty of two thousand dollars ($2,000), as provided by PU Code § 2107, for each of its three failures to comply with the provisions of Rule 1 of the Commission's Rules of Practice and Procedure, for an aggregate penalty of six thousand dollars ($6,000).

7. Unless paid voluntarily within 45 days of the effective date of this order, the General Counsel of this Commission is ordered to bring and prosecute to final judgment an action to

recover this $6,000 in the name of the people of the State of California in Superior Court in San Diego County.

8. Cellular Resellers Associations, Inc. is awarded no compensation for its role in this proceeding.

9. I.90-01-013 is closed.

This order becomes effective 30 days from today.

Dated December 6, 1990, at San Francisco, California.

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

NEAL J. SHULMAN, Executive Director

pb

CELLULAR RADIO TELECOMMUNICATIONS SERVICE
(Continued)

SPECIAL CONDITIONS - RETAIL (Continued)

6. Privacy

The Company will provide new retail end users with a brief statement explaining that by its nature, cellular technology cannot always assure conversational privacy. These subscribers will also receive a sticker to be affixed to their mobile units requesting in substance that parties to cellular conversations be informed of the possibility that cellular conversations may not be completely private.

7. Services to Multiple Units (T)

The reduced rates for service to multiple units are available under the following circumstances:

a) Any individual or entity which agrees to be separately liable for all tariffed charges for two or more identified cellular units will be eligible for multiple unit rates.

b) Any corporation or other legal entity will qualify for multiple unit rates for cellular service delivered to units held by employees, officers, contract agents, and members ("Eligible Persons") where (i) the Eligible Persons are engaged on a for-profit basis in the entity's main line of business; and where (ii) the individuals or entities responsible for payment have complied with Carrier's tariffs regarding credit and deposits; and where (iii) the organization has verified the status of the employees, officers, contract agents, and eligible members receiving the benefits of multiple unit rates; and (iv) where the organization has agreed to:

- Publicly endorse Carrier as the organization's preferred source of cellular service in the San Diego CGSA; or to

- Provide advertising space in organizational mailers, bulletins, newsletters, and the like; or to

- Allow Carrier to introduce and describe its service at employee and/or membership meetings. (T)

CELLULAR RADIO TELECOMMUNICATIONS SERVICE
(Continued)

SPECIAL CONDITIONS - RETAIL (Continued)

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- Publicly endorse Carrier as the organization's preferred source of cellular service in the San Diego CGSA; or to

- Provide advertising space in organizational mailers, bulletins, newsletters, and the like; or to

- Allow Carrier to introduce and describe its service at employee and/or membership meetings. (T)

Issued by
Jennifer Pomerov
NAME
General Manager
TITLE

Advice Letter No. 8A
Decision No.

Date Filed NOV 07 1988
Effective MAR 08 1989
Resolution No. T-13052