

JUN 21 1991

Decision 91-06-054 June 19, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities. (Petition for Modification filed February 13, 1991)

And Related Matters. Application 87-02-017 (Filed February 6, 1987)
Case 86-12-023 (Filed December 12, 1986)

(For appearances see Decision 90-06-025)

OPINION MODIFYING DECISION 90-06-025

Requests

Los Angeles Cellular Telephone Company (LA Cellular) filed a petition for modification (petition) of Decision (D.) 90-06-025's Ordering Paragraph 18 on February 13, 1991. The ordering paragraph, as modified by D.90-10-047, requires facilities-based carriers to implement a "volume-user" tariff for their customers if sufficient demand exists within a Metropolitan Statistical Area (MSA). The volume user tariff rate must be set at least five percent (5%) higher than the carrier's wholesale rate. To qualify for the volume user tariff, the entity, whether it be a for-profit or not-for-profit entity, must: serve as the master customer; guarantee payment for all usage by its end-users (members or individual subscribers); and not apply any additional charges to its members for such services. The five percent margin must not affect any rate offered by a carrier to a government agency.

LA Cellular wants the ordering paragraph modified so that facilities-based cellular carriers may provide billing and collecting services to individual subscribers of the volume user customer under the following conditions:

- a. The charge for such services must be separately tariffed at a rate which is sufficient to recover the incremental costs to the carrier providing such services.
- b. The tariffed rates and conditions for volume user cellular services, other than billing and collecting services, must comply with the restrictions identified in Ordering Paragraph 18 of D.90-06-025 and with the various consumer protection measures identified in the decision.

In addition, LA Cellular wants the D.90-06-025 volume user constraints applicable to facilities-based carriers also to apply to cellular resellers. Two such constraints specifically identified by LA Cellular are that the volume user (master customer) guarantee the accounts of its individual subscribers, and that there be a minimum five percent spread between wholesale and discounted retail rates.

Response

GTE Mobilnet of California Limited Partnership and GTE Mobilnet of Santa Barbara Limited Partnership (GTE Mobilnet), the Cellular Resellers Association, Inc. (CRA), Mission Bell Telecommunications Corporation (Mission Bell), McCaw Cellular Communications, Inc. (McCaw), Celluphone, Inc., and PacTel Cellular filed responses to LA Cellular's petition.

GTE Mobilnet takes no position with respect to LA Cellular's petition to allow facilities-based carriers to provide individual billing and collecting services to the volume user's subscribers. However, it supports LA Cellular's proposal to subject resellers to the same volume user constraints as the facilities-based carriers.

Although CRA, Mission Bell, Celluphone, Inc., and PacTel Cellular oppose LA Cellular's petition, they concur with LA Cellular and GTE Mobilnet that the volume user restraints applicable to the facilities-based carriers should apply equally to the cellular resellers.

McCaw, a facilities-based carrier, supports LA Cellular's request to eliminate the prohibition of billing and collection of services to the volume user's individual subscribers and concurs with all respondents that the volume user constraints applicable to facilities-based carriers should apply equally to retail carriers.

Motion

LA Cellular filed a response to CRA's comments on March 7, 1991 and to PacTel Cellular and Celluphone's comments on March 22, 1991. In turn, CRA filed a motion to strike LA Cellular's response to CRA's comments on March 15, 1991. No party filed an opposition to LA Cellular's response to PacTel Cellular and Celluphone's comments.

CRA asserts that Rule 43 of the Commission's Rules of Practice and Procedure (Rules) does not provide for the filing of a reply to an opposition to a petition. Therefore, LA Cellular's response to CRA's comments should be stricken. CRA further asserts that LA Cellular should be "admonished" for its failure to adhere to the Rules.

LA Cellular filed a response requesting that CRA's motion be denied, on March 22, 1991. LA Cellular asserts that § 1005 of the California Code of Civil Procedure explicitly authorizes the filing of a reply brief by the moving party. Similarly, Rule 14(a) of the California Rules of Court, which governs appeals and petitions to appellate courts, allows for the filing of a reply brief by the moving party. Although Rule 43 is silent on the right to file a reply brief, LA Cellular asserts that one can not reasonably interpret Rule 43 to mean that it is precluded from replying to CRA's comments. Further, LA Cellular asserts that if

CRA's logic is withheld, CRA is precluded from filing its own motion to strike.

LA Cellular goes on to explain that CRA's Rule 43 interpretation is contrary to the Commission's long-standing policy favoring inclusion, instead of exclusion, of relevant material. LA Cellular cites 1 Cal. R.R.C. 700 (1912) in which the Commission stated that the "Commission desires the fullest light on all cases before it . . ." and will not exclude testimony or evidence where relevant.

More importantly, Rule 43 does not preclude anyone from filing a reply to an opposition to a petition. The cited rule sets forth only the procedures necessary for a party to file a petition. Therefore, if we are to rely solely on Rule 43, as suggested by CRA, there is no reason to strike LA Cellular's response to CRA's comments.

Discussion of the Petition

LA Cellular asserts that the prohibition of facilities-based carriers from providing billing and collecting services to the volume users' individual subscribers threatens the Commission's goal of reducing cellular rates for those cellular services that allow facilities-based carriers to realize economies of scale.

Uniform Restrictions

LA Cellular explains that the facilities-based carriers are being handicapped in competing for the volume user business because the ban on billing and collecting services is not applicable to cellular resellers. LA Cellular asserts that cellular resellers and their agents are currently offering billing and collecting services to the individual subscribers of volume users; however, it offered no evidence to substantiate this claim.

Until we established volume user billing and collecting restrictions on the facilities-based carriers, these very same carriers set their volume user tariff rates equal to or slightly less

higher than their resellers tariff rate. This nominal rate spread between the volume user and resale tariffs occurred because the facilities-based carriers' volume user rates were designed to permit economies of scale to those users that are in a position to purchase a block of cellular service numbers without needing the services required to serve an individual cellular customer, such as making individual credit checks, billing, collecting, recovering bad debts, and marketing. However, because resellers must incur costs associated with these individualized services to compete for volume users, the nominal margin between the facilities-based carriers volume user tariff and reseller tariff was not high enough to permit the reseller to compete effectively for the volume user market.

D.90-06-025 recognized that facilities-based carriers enjoy economies of scale from volume usage, and concluded that a form of wholesale rate should be afforded to those corporate or other legal entities, irrespective of characteristics, affinity, or professional affiliation, which contribute to volume usage and offer cellular service to a restricted group of end-users. To give the resellers a fair chance to compete, the facilities-based carriers are required to establish a rate spread between services provided to volume users and to resellers, to refrain from providing individualized billing and collecting services to their volume users, and to implement consumer protection provisions.

Now, LA Cellular asserts that it is the facilities-based carriers that are precluded from competing for a substantial part of the cellular market. In response to this assertion, resellers and CRA explain that they do not consider resellers to be exempt from the volume user restrictions specifically imposed on the facilities-based carriers by D.90-06-025. In fact, CRA asserts that its resale members are not violating any of these restrictions, and they do not oppose a Commission order specifically imposing the volume user restrictions on resellers.

Since there is no opposition to the extension of volume user restrictions to the resellers, and since such restrictions will encourage competition in the volume user market, the volume user restrictions identified in D.90-06-025 and modified by D.90-10-047 will be applied equally to resellers.

Billing and Collecting Services

Although the volume user classification provides the benefit of group discounts to a substantial part of the user public by eliminating the distinction between profit making and non-profit organizations, LA Cellular believes that any effective discount program must afford the volume user or master customer a convenient means to bill its officers, employees, and members for the services consumed by them. For many organizations like bar associations, medical associations, and automobile clubs, the absence of an effective billing and collecting capability renders a volume user service impractical.

LA Cellular believes that this ban on billing and collecting services prevents volume user groups from receiving volume user services because there is no means for the volume users to recover their postage or handling charges from the individual users. Additionally, Internal Revenue Code Section 503(c) effectively prevents non-profit groups from using general funds for the private benefit of individual members.

McCaw, concurring with LA Cellular, believes that billing and collecting services should be available to any customers wanting such services. To do otherwise totally disregards the potential needs of a high volume user and artificially limits the range of services that cellular carriers can provide.

Celluphone concurs with LA Cellular that the absence of an effective billing and collecting capability will render volume user services impractical to organizations like bar associations, medical associations, and automobile clubs. However, Celluphone asserts that discounts for volume services should be offered to such

only the true volume users that provide economies of scale to the cellular carrier. Although LA Cellular alludes to such economies of scale, it does not attempt to substantiate what economies of scale are attainable if billing and collecting services are extended to volume users and subscribers.

Similarly, CRA asserts that LA Cellular's proposal will not result in any economies of scale. It will merely enable a multitude of individual end user customers to receive volume user service rates, individualized billing and collecting services, individual credit checking, and individual customer service. In other words, other than the volume user's subscriber obtaining discounted cellular service, there will be no difference between the individual subscriber obtaining cellular service through a master customer and the public at large obtaining cellular service directly from a cellular carrier.

The volume user tariff was established in recognition that carriers, in return for receiving economies of scale from volume users through volume usage, lower bad debt losses, lower marketing, billing and collecting costs, and a lower customer turnover rate, should share the achieved economies of scale with the volume users. We also took a pro-active policy approach by enabling carriers to offer volume users the ability to share in the economies of scale benefits, conditioned upon the volume users' willingness to assume certain responsibilities, such as credit guarantee, billing and collecting, and consumer protection services. This approach is intended to permit a substantial expansion of discretionary cellular services at reasonably lower rates.

However, LA Cellular substantiates in its petition that unless carriers are allowed to provide end user billing and collecting services to their volume customers, the volume customer market will be restricted to only those entities that are able to

perform such services without recovering the associated out-of-pocket costs.

LA Cellular's reply to PacTel's and Celluphone's responses explains that economies of scale are not restricted to the billing and collecting functions. Economies of scale can be obtained from marketing advantages because the volume user has a strong incentive to promote the carrier's service in order to obtain the maximum discount for its members. Economies of scale also include benefits of the financial guarantees provided by both for-profit and not-for-profit entities. LA Cellular believes that billing and collecting services have no impact whatsoever on these economies.

The volume user tariff is not intended to prevent entities from benefiting in economies of scale that they can bring to cellular carriers. Consistent with our policy of encouraging lower cellular rates to the end users, we will modify D.90-06-025 and allow facilities-based carriers and resellers to provide their own billing and collecting services, including credit checks, to their individual subscribers of volume users on a tariffed basis.

LA Cellular requests that carrier charges for billing and collecting services be separately tariffed at a rate sufficient to recover the "incremental costs" to the carrier providing such services. Although LA Cellular did not define incremental cost, such cost is generally considered to be the additional cost incurred to provide an expansion of a service currently being provided. For example, incremental billing cost consists of the cost incurred to process and mail an additional bill, and it excludes all fixed costs such as equipment and software program costs.

Although LA Cellular did not present any data on the number of public-at-large customers obtaining direct cellular service and the number of volume user individual subscribers or potential subscribers, we can reasonably expect that the number of

volume user subscribers substantially exceeds the number of public at large customers.

The Commission, like CRA, is concerned that incremental billing and collecting services will narrow, if not eliminate, the difference between an individual subscriber obtaining cellular service through a master customer and the public at large obtaining cellular service directly from a cellular carrier. As the service gap narrows between an individual service customer and a volume user service customer, it makes little sense to continue a two class (individual service and volume user service) tariff system.

To maintain a distinction between public-at-large service and individual subscribers of volume user service, and to allocate the appropriate cost to the predominant cost-causer, facilities-based carriers and resellers that want to provide volume user billing and collecting services should establish tariff rates reflecting direct costs.¹ Incremental cost should not be adopted for volume users billing and collecting services. The adoption of direct cost for billing and collecting services should not be considered a change in Commission policy on requiring carriers to account for their resale operations on an incremental cost basis. The implementation of this policy will be addressed in the second phase of this investigation.

The volume user restrictions identified in Ordering Paragraph 18 of D.90-06-025, such as the master customer guaranteeing payment for all usage, should remain in effect. Further, the following consumer safeguards identified in D.90-06-025 should remain in effect:

¹ Direct cost consists of the cost incurred to process, mail, and collect bills. It includes hardware and software costs associated with the billing and collecting process and excludes allocation costs from other departments and overheads such as administrative cost allocations.

a. The volume user shall notify its individual subscribers of the volume user at the commencement of service with subsequent reminder notices at least twice each calendar year that:

1. The volume user is not a public utility.
2. The Commission will not resolve disputes between the volume user and 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 user tariff from a utility and service may be discontinued if the volume user does not pay all bills which it guarantees as a master customer.
5. The volume user is not permitted to mark up the service billed by the utility or charge special cellular service fees of any kind.

Findings of Fact

1. The volume user constraints identified in D.90-06-025 apply specifically to facilities-based carriers. The decision is silent on whether the volume user constraints apply equally to resellers.
2. Rule 43 does not preclude any party from filing a response to a protest.
3. It is the Commission's policy to accept testimony, evidence, and information that is relevant to an issue before it.
4. The volume user classification provides the benefit of group discounts to a substantial part of the user public by eliminating the distinction between profit making and non-profit organizations.
5. Carriers can obtain economies of scale from volume users.

6. Organizations obtaining volume user services are precluded from recovering any billing and collecting costs from their individual subscribers.

7. The volume user tariff is not intended to prevent entities and not-for-profit groups from benefiting from economies of scale that they can bring to cellular carriers.

8. Incremental billing and collecting services may narrow, if not eliminate, the difference between an individual subscriber obtaining cellular service through a master customer and the public at large obtaining cellular service directly from a cellular carrier.

9. Tariff rates reflecting direct billing and collecting cost will spread such cost to the cost-causers on an equitable basis.

10. Consumer safeguard measures adopted in D.90-06-025 are not in dispute.

Conclusions of Law

1. CRA's motion to strike LA Cellular's response to CRA's reply should be denied.

2. Volume user restrictions imposed on facilities-based carriers should be imposed equally on resellers of cellular services.

3. Consumer safeguard measures applicable to volume user services identified in D.90-06-025 should remain in effect.

4. Facilities-based carriers and resellers should be authorized to provide billing and collecting services to the volume users' individual subscribers on a direct cost basis.

INTERIM ORDER

IT IS ORDERED that:

1. Cellular Resellers Association, Inc.'s (CRA) motion to strike Los Angeles Cellular Telephone Company's (LA Cellular) appeal in response to CRA's reply is denied.

2. Ordering Paragraph 18 of Decision (D.) 90-06-025, as modified by D.90-10-047, authorizing only facilities-based cellular carriers to implement a volume user tariff shall be modified to allow cellular resellers to also provide volume user service, as shown in Appendix A.

3. Ordering Paragraph 18 of D.90-06-025, as modified by D.90-10-047, shall also be modified to authorize facilities-based cellular carriers and resellers of cellular service to provide billing and collecting services to the volume users' individual subscribers and to any carrier or reseller on a tariff basis so long that the tariff charges are based on the cellular service provider direct cost for providing such services. Any facilities-based carrier or reseller that submits a tariff filing for volume users' billing and collecting services shall substantiate to the Commission's Advisory and Compliance Division Director, prior to

implementation, that its proposed tariff rates reflect the cellular service provider's direct cost to provide such services, as shown in Appendix A.

This order becomes effective 30 days from today.

Dated June 19, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
G. MITCHELL WILK
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

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


NEAL J. SHULMAN, Executive Director

ps

APPENDIX A

Page 1

DECISION (D.) 90-06-025 ORDERING PARAGRAPHS
REVISED PURSUANT TO D.90-10-047 and D.91-06-054

INTERIM ORDER

IT IS ORDERED that:

1. Cellular service shall be classified as a discretionary service and shall not be considered a universal basic service until such time that the cost of cellular service approaches that of conventional wireline service and until it becomes a direct competitor to conventional landline service.

2. Cellular utilities are authorized to provide, at the wholesale level, nondiscriminatory enhanced services on a detariffed basis.

3. Cellular carriers shall not disconnect any cellular services solely for nonpayment of enhanced service charges and shall notify their customers receiving bills for enhanced services of this rule when the customer receives its first such bill.

4. Cellular carriers shall track all enhanced service complaints as to the number and nature of complaint. All complaints shall be made available to CACD upon request.

5. LECs shall not enter into a billing arrangement with cellular carriers to bill cellular rates to landline customers initiating a call to a cellular customer at this time.

6. A carrier should share with other carriers some portion of the revenues it receives as a result of roaming by customers of the other carriers through negotiated roaming arrangements, taking into account individual carrier's costs and expected benefit to the carrier in whose territory the end user roams.

APPENDIX A

Page 2

7. Cellular Resellers Association, Inc.'s motion to file Attachment D to its Phase II comments is granted.

8.¹ Cellular utilities tariff requirements shall be modified as follows, pursuant to GO 96-A(XV):

a. The facilities-based carrier's 40-day tariff notice is reduced to 30 days.

b. A cellular carrier's or reseller's rate reduction tariff filing which will not have an impact on a carrier's average customer bill (i.e., the average monthly bill of all the carrier's or reseller's customers for at least the last month for which figures are available) which is greater than 10 percent (as defined by the carrier's or reseller's annual filing as provided herein) of the average customer bill, whether it be a facilities-based carrier or a reseller, shall be classified as a temporary tariff and made effective on the date filed.

(1) Absent any protest to the tariff filing within the statutory 20-day protest period, the temporary status of the tariff shall expire and it shall be classified as a permanent tariff pursuant to the terms of the tariff provisions.

(2) If a protest is filed, the tariff shall remain a temporary tariff until the protest has been resolved or by order of the Commission; if, within six months of the filing of the temporary tariff, no resolution takes place and the Commission does not act, the protest shall be deemed denied and

1 Revised in accordance with D.90-10-047.

APPENDIX A

Page 3008

the tariff shall be classified as a permanent tariff pursuant to the terms of the tariff provisions.

9.² A cellular carrier or reseller seeking an increase in rates shall substantiate its request in an advice letter filing and shall provide:

- a. Market studies based specifically on data within its respective MSA.
- b. Actual return on investment data for its prior 3 calendar years.
- c. Projected return on investment based on its proposed rates.
- d. Explanation of any major change (50 basis points) in the projected return on investment over the prior 3-year recorded average.
- e. Cost-support data as requested by the Commission staff.

10. Interconnection arrangements between cellular carriers and LECs shall be offered on a nondiscriminatory basis and shall not be tariffed. LECs shall offer to cellular carriers, on a nondiscriminatory basis, standard terms and conditions which include options for various serving arrangements and pricing structures, and shall negotiate cellular interconnection agreements based on these standard terms and conditions.

11. The local exchange companies shall substantiate their cost to provide interconnection to a cellular carrier upon request of the cellular carrier.

APPENDIX A
Page 4

12. LECs shall not provide "mutual compensation" to the cellular carriers at this time.

13. A cellular carrier shall pay access charges for the use of the LEC access facilities it orders pursuant to a nondiscriminatory interconnection agreement with the LEC, and shall not pay for NTS costs associated with the local loop.

14.³ A retail cellular carrier not associated with either a facilities-based cellular carrier or an entity applying for a facilities-based carrier permit before the FCC shall be classified a nondominant carrier, and shall obtain the same benefits as other nondominant telecommunications carriers, except that it shall be subject to the requirements of temporary tariff filing as established herein, rather than the five-day effective date of tariffs filed by other nondominant carriers.

15. There shall be no mandatory margin between the wholesale and retail rates of facilities-based carriers. However, individual facilities-based carriers shall not deviate from the current mandatory retail margin until cost-allocation methods are adopted and implemented as part of the cellular USA unless they can demonstrate through an advice letter filing that the retail operation will continue to operate on a break-even or better basis with proposed rate changes that impact the mandatory retail margin.

3 Revised in accordance with D.90-10-047.

APPENDIX A
Page 5

16.⁴ Cellular carriers or resellers shall adopt the following guidelines regarding agent arrangements:

- 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 cellular telephone service at any rate other than such provider's tariffed rate. No such provider may permit any agent or dealer or other person or entity subject to its control to pay for all or any portion of the cellular service which it provides to any customer.
- 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.

4 Revised in accordance with D:90-10-047-00-00-00

APPENDIX A

Page 6

17. Commission rates that cellular carriers pay to its agents shall not be restricted.

18.⁵ Facilities-based carriers and resellers shall implement a "volume-user" tariff for their customers if sufficient demand exists within a MSA. The volume user tariff rate shall be set at least five percent (5%) higher than the carrier's wholesale rate. To qualify for the volume user tariff the entity must serve as the master customer, guarantee payment for all usage by its members, and not apply any additional charges to its members for such services. The five percent margin shall not affect any rate offered by a carrier to a government agency. The facilities-based carriers and resellers may provide collecting and billing services for volume users' individual subscribers and to any carrier or reseller on a direct cost basis. Any carrier or reseller that submits a tariff filing for billing and collecting services for volume users' individual subscribers shall substantiate to the Commission's Advisory and Compliance Division, prior to implementation, that the proposed tariff rates reflect the carrier's/reseller's fully allocated cost to provide such services.

19. Cellular carriers who want to block cellular telephone instrument ESNs shall tariff their blocking procedures and requirements for releasing the ESN blocks consistent with the guidelines identified in this opinion.

20. C.86-12-023 is closed.

21. Within 90 days of the effective date of this decision, all certificated carriers shall file amended tariffs to reflect the policies regarding customer deposits identified in this opinion.

5 Revised in accordance with D.90-10-047 and D.91-06-054.

APPENDIX A
Page 7

22.⁶ Facilities-based carriers and resellers shall implement consumer protection provisions in their respective volume user tariffs for volume users who do not use the service for their own personal use. The tariffs shall state that the volume user shall notify their individual subscribers that:

- a. The volume user is not a public utility.
- b. The Commission will not resolve disputes between the volume user and individual subscribers.
- c. Small claims court and other similar forums are available to resolve disputes if necessary.
- d. The service is provided under a volume user tariff from a utility and all service may be discontinued if the volume user does not pay all bills for which it guarantees as a master customer.
- e. The volume user is not permitted to markup the service billed by the utility or charge special cellular service fees of any kind.
- f. Notice of these restrictions shall be provided to individual subscribers of the volume user at the commencement of service. Subsequent reminder notices shall be provided at least twice a calendar year.

⁶ Revised in accordance with D.91-06-054.

APPENDIX A

Page 8

23. This investigation is kept open to address, through either workshops, or evidentiary hearings:

- a. A streamlined certification process for RSA and other facilities-based carriers.
- b. The ability of cellular resellers to perform switching functions currently provided by the cellular carriers and the unbundling of the wholesale tariff rate element.
- c. Whether or not a facilities-based carrier's affiliate should be prohibited from reselling in markets where the facilities-based carrier provides retail services.
- d. Duopoly carriers' reporting requirements that will enable us to assess and monitor on a twice-yearly basis cellular capacity utilization, capacity expansion, development of cellular services in rural areas, and prices charged for cellular services.
- e. Modify the USOAs to include cost-allocation methods for a carriers's wholesale and retail operations.

(END OF APPENDIX A)