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Decision 92 02 076 FEB 20 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application of U.S.West Cellular of California, Inc. for rehearing of Resolutions T-14607 and T-14608	Application No. 91-10-002 (Filed October 7, 1991)
Application of GTE Mobilnet of California and GTE Mobilnet of Santa Barbara for rehearing of Resolutions T-14607 and T-14608	Application No. 91-10-012 (Filed October 11, 1991)
Application of L.A. Cellular Telephone Company for rehearing of Resolutions T-14607 and T-14608	Application No. 91-10-018 (Filed October 17, 1991)
Application of McCaw Cellular Communications, Inc. for rehearing of Resolutions T-14607 and T-14608	Application No. 91-10-049 (Filed October 28, 1991)

ORDER CONSOLIDATING AND DENYING APPLICATIONS FOR REHEARING, DISMISSING MOTION TO STRIKE, AND MODIFYING AND CLARIFYING D.90-06-025 AS MODIFIED BY D.90-10-047

In Decision (D.) 90-06-025 (the original decision), we established a regulatory framework for the operation of cellular telecommunications companies in California. Upon applications for rehearing, we modified the original decision in D.90-10-047 (the modified decision).[1] Among other things, the modified decision provided that, if a carrier or reseller filed a rate reduction tariff which would have an impact of no more than 10% of the average customer bill, the tariff would be temporary in nature but would be effective on the date filed. D.90-06-025, p. 54 and Ordering Paragraph 8.b, as modified by D.90-10-047, Ordering Paragraph 2 (e), p. 4.

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1 Later petitions for modification and applications for rehearing were filed, and more modifications were issued, but they are not of concern in the present applications.

In June and July of 1991, U. S. West Cellular of California, Inc. (USW) filed its advice letters Nos. 48 and 49, characterizing the proposed offers therein as appropriate to the temporary tariff basis provided for in the modified decision. These advice letters were dealt with in Resolutions T-14607 and T-14608, both of which were signed on September 25, 1991 and mailed the following day.

Advice letter 48 proposed a "cash back" offer whereby new customers would receive checks or credits in the amount of $400 to accounts which they opened in the third quarter of 1991, provided they maintain those accounts for 36 months. In addition, resellers signing up new customers and/or new lines would receive credits for each after the 120th day of the new service. USW's filing asserted that the proposed offer qualified for the temporary tariff option provided for in our earlier decisions, possibly believing that we only meant to restrict the temporary tariff option to proposed offers which could result in reductions in the aggregate, rather than to those concerned only with rate reductions. The Cellular Resellers' Association (CRA) filed a protest to the advice letter.

Advice letter 49, in its turn, proposed (1) revisions to the service plans which would result in some increases and some decreases in usage rates; (2) a new annual service plan with rate reductions in the 101-180 minutes of use category; and (3) a change in wholesale annual contract service to reduce monthly access charges to maintain margin requirements as required by D.90-06-025. The Cellular Resellers' Association (CRA) and San Diego Cellular Communications, Inc. (SDCC) filed protests to the advice letter.

In Resolution T-14607 we found that a temporary tariff filing is not the appropriate vehicle for a proposed offer such as that made in advice letter 48 under the procedures set forth in Ordering Paragraph 15 of D.90-06-025, because the proposed changes would reduce the current margins between wholesale and retail rates. Resolution T-14607, Findings Nos. 1, 3, and 5, p.

6. In Resolution T-14608 we found the temporary tariff procedure equally inappropriate for the offering proposed in advice letter 49, for the same reasons. Resolution T-14608, Finding No. 1. This Resolution also noted the alternative procedures provided for in D.90-06-025. *Id.*, Finding No. 3.

In both Resolutions, accordingly, we suspended the respective advice letters. Applications for rehearing were filed by USW, McCaw Cellular Communications of California (McCaw), GTE Mobilnet of California and GTE Mobilnet of Santa Barbara (collectively, GTE), and LA Cellular Telephone Co. (LA Cellular). The California Resellers' Association (CRA) filed an opposition to all four filings, and McCaw filed a Motion to Strike part of CRA's opposition. All of these filings have raised procedural issues which we will address prior to discussing the substantive questions raised in the applications.

I. Standing

The advice letters and Resolutions pertained to USW only. None of the applicants for rehearing filed protests against USW's proposed offers; thus none of them may be considered a "party to the action" within the meaning of Public Utilities Code § 1731.[2] However, several of these applicants have alleged that the Resolutions at issue have made changes in prior decisions affecting all carriers. To the extent that this allegation is true, the applicants are "other [parties] pecuniarily interested in the public utility affected," and may apply for rehearing in their own rights.

While the applicants' arguments have not convinced us that the Resolutions actually changed the modified decision, we see that the Resolutions made clarifications and interpretations

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2 Unless otherwise indicated, all statutory references herein are to the California Public Utilities Code.

of our previous decisions which should have been made to the industry as a whole, and which were thus not appropriate to a Resolution responding to an advice letter filing by one carrier only. Accordingly, we will modify the Resolutions herein and direct that this Order be sent to the entire service list of I.88-11-040.

II. The Motion to Strike

CRA alleges in its opposition that McCaw's application, filed October 28, was late and should not, therefore, be considered. McCaw argues in its motion to strike that its application was timely. We dismiss McCaw's motion on the grounds that it is moot.

Responses to applications for rehearing are within the discretion of the responding party, under Rule 86.2 of our Rules of Practice and Procedure. However, it is rarely necessary to respond to an allegation of untimeliness. A party filing an application for rehearing represents by implication that it believes its filing to be timely. Barring the accidental or disastrous destruction of our records, we can ordinarily resolve timeliness issues without assistance.

Further, McCaw's filing, though labeled an application for rehearing, includes only an adoption by reference of USW's application and a list of modifications which McCaw asks us to make. As McCaw makes no independent allegations of error, the application for rehearing portion of its filing adds nothing but moral support to USW's application. As for the petition for modification portion of the filing, there is no time limit for such petitions, and timeliness accordingly is not an applicable question. We therefore dismiss the motion to strike as moot.

III. The Applications for Rehearing

In both Resolutions we found a temporary tariff filing an inappropriate vehicle for the proposed offerings (see above),

and suggested that regular advice letter filings or formal applications would better conform to the requirements of the original decision. In both Resolutions, we suspended the advice letters. For the reasons set out below, we deny the applications for rehearing, so as to preserve USW's right to choose whether it will withdraw the advice letters and address the issues involved in a regular advice letter proceeding, or proceed with the suspended advice letters in a formal application hearing.

The applications raise issues which should be addressed now, in order to narrow the scope of the filing USW chooses and to clarify the modified decision to other members of the industry. The following discussion clears away some misreadings and misunderstandings on both procedural and substantive issues. To underline the discussion, we will make specific modifications and clarifications to both Resolutions as well as to the original and modified decisions.

A) USW's Application

USW alleges that we erred in both Resolutions by "incorrectly applying Commission guidelines set forth in Decision 90-06-025 to the facts presented; and ... modifying Decision 90-06-025 without giving interested parties notice and an opportunity to be heard, in violation of California Public Utilities Code Section 1708." USW application, p. 2. [3]

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3 USW's application states two initial grounds for rehearing on page 2. It then provides a separate section entitled "specifications of error" in which it lists six allegations of error. The body of the application then presents us with four sections of argument, only some of which have clear ties to the allegations. The application is thus technically in violation of the requirements of specificity in Rule 86.1. Applying Rule 87 at our discretion in this instance, we accord consideration to

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Under the heading "Specifications of Error," the application alleges that: (1) Resolution T-14608 "improperly determines that [USW] has proposed a rate increase;" (2) Resolution T-14608 "improperly determines that a cellular carrier may not make assumptions in filing advice letters;" (3) Resolution T-14607 erred in concluding that USW's proposed "rebate" of $400 is a gift under D.90-06-025; (4) Resolution T-14607 "fails to prescribe appropriate treatment for new customers who subscribed to service while Advice Letter No. 48 held temporary tariff status;" (5) both Resolutions create "a rule for evaluating the impact of a temporary tariff filing on the margin between retail and wholesale rates that is unworkable and that materially modifies D.90-06-025 without notice to interested parties or an opportunity to be heard;" and (6) Resolution T-14607 modifies Ordering Paragraph 16.b of D.90-06-025 "to create dollar limitations on 'gifts' without giving interested parties notice or an opportunity to be heard." USW's application, pp. 2 - 3.

1. Improper determination of rate increase.

USW's application does not discuss the first allegation after the "specifications of error" section. It is unclear from any part of the application what part of Resolution T-14608 USW challenges, or what it believes was improper. Presumably USW

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the application in the interest of clarifying matters for the industry. However, the parties are reminded that the purpose of an application for rehearing is to alert us to errors so that we may correct them. Rule 86.1. The clearer the statement of the applicant's allegations and the less vague the citations to the decision or record, the more expeditious our procedures become. This becomes especially important in cases such as this one, in which there are several filings on the same Resolutions.

takes issue with the analysis on page 2 of Resolution T-14608, which compared the pre-advice letter 49 rates and the new ones proposed and showed that the proposed offer would raise some rates and lower others.

On page 7, Resolution T-14608 states:

> Advice Letter No. 49 incorporated rate reductions and rate increases in some elements, which places the filing in a contentious situation. This is not allowed under temporary tariff authority. Any series of increases and decreases in a new plan which could result in an increase to customers should comply with Ordering Paragraph 9 of D.90-06-025.

Given the rate changes demonstrated on page 2, this conclusion is completely proper and warrants no action on our part.

2. Improper determination that a carrier may not make assumptions

USW's application contains no reference to this "specification" of error after the initial allegation. Nothing in Resolution T-14608 is recognizable as possible support for this allegation. Therefore, even applying Rule 87, we are unable to consider this allegation.

3. Characterization of "rebate" as "gift"

We found in Resolution T-14607 that advice letter No. 48 violated Ordering Paragraph 16.b of D.90-06-025, as modified by D.90-10-047, "by providing a rebate of greater than nominal value." Resolution T-14607, finding No. 6, p. 6. USW alleges that this finding is error because the rebate is really a rate reduction and not a gift of service.

Ordering Paragraph 16.b prohibited cellular service providers from providing "either directly or indirectly, any gift of any article or service of more than nominal value ... to any customer or potential customer in connection with the provision

of cellular telephone service." D.90-10-047, Ordering Paragraph 2.j, p. 5, modifying Ordering Paragraph 16.b of D.90-06-025. (Emphasis added.)

USW's advice letter No. 48 proposed a "cash back" payment of $400 for new lines under its cellular service, to be paid only after 36 continuous months of service. USW argues that the rebate is not a gift because (1) the Commission "clearly had in mind tangible items or services ... that are not a part of the service itself," (USW's application, p. 16) and (2) the $400 "represents a rate reduction to [USW]'s long-term customers." *Id.*, p. 17.

The first argument is not convincing. We believe it to be within our authority to interpret our own intent in the modified decision, and the proposed "cash back" offer is exactly what we had in mind, both in Ordering Paragraph 16.b and in Paragraph 16.c (prohibiting gifts of service conditioned on subscription to the carrier's service). We do not know what USW means by "tangible service," which appears to be a self-contradictory term. We do know that, when a customer receives a rebate (or "cash back," which USW appears to think is different from a rebate) of payment for services, to that extent the services become free, a gift to the subscriber.

USW's second argument is no more persuasive. If USW wanted to propose a rate reduction, it could easily have done so without calling it a "cash back offer." However, cellular rates are linked to usage, and this "rebate" is not. It is linked only to the initiation of a new line of service and its maintenance for a minimum of 36 months. The $400 is to be paid as a flat fee, not at all proportional to the customer's bill. But even if it were, the proposed offer would not be appropriate under temporary tariff filing because it amounts, in this case, to more than 10% of the average customer billing.

We believe that the proposed $400 rebate is, if not a gift of service under Ordering Paragraph 16.b, certainly a USW-financed service under 16.c, and as USW proposed to offer it only

to new customers, or to old customers ordering new lines, it is clearly conditioned on subscription to USW's service. This allegation need not be considered in hearing.

4. Failure to provide for new customers

USW alleges error in that "Resolution T-14607 fails to prescribe appropriate treatment for new customers who subscribed to service while Advice Letter No. 48 held temporary tariff status" (USW application, P. 3).[4] The allegation assumes, despite the specific finding of Resolution T-14607 that a temporary tariff filing is inappropriate for the proposed offer, that the rebate plan actually held the status of a temporary tariff as soon as it was filed. But, as USW itself admits, the Commission's question is, in essence, "whether the temporary tariff was indeed effective prior to its suspension." USW application, p. 19.

USW says that it was, relying on a quotation from the body of D.90-06-025 stating that "any tariff filing which does not decrease a carrier's average customer bill by more than a nominal percentage, ten percent, should be identified as a temporary tariff and *effective on the date filed.*" D.90-06-025, p. 53, quoted at p. 20 of the application (emphasis USW's). The quoted language, incorporated in Ordering Paragraph 8.b of D.90-06-025, was modified in Ordering Paragraphs 2.e and 2.f of D.90-10-047. Although the language USW prefers is substantially similar to the version in the modified decision, USW places the emphasis on the wrong words. All versions specify that the temporary tariff identification is available only to those filings which propose rate *reductions*, and only when those

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4 Although USW nominally alleges that this is legal error, its "argument" only "seeks clarification of the Commission's use of the term 'suspended' in this context." USW application, p. 19.

reductions will have an impact of less than ten percent of the carrier's average customer bill.[5]

It was because it failed to meet the definition of an appropriate temporary tariff filing that we suspended the advice letter in Resolution T-14607. Advice letter No. 48 mixed rate reductions with rate increases (see discussion above), and added a gift of service in excess of the nominal value restriction of D.90-06-025 as modified by D.90-10-047. It did not meet the threshold requirements of a temporary tariff as outlined in the Commission's decisions. Therefore, it could not have become effective on the date filed. In any event, we created the temporary tariff procedure to allow carriers to make small, simple, and non-controversial rate reductions without the administrative costs of full-blown applications or advice letters; we did not intend to guarantee that we would approve any proposed offer without examining it, provided the carrier labeled it a temporary tariff filing.

USW's application at p. 19 says that the company "signed up a substantial number of new customers" between June 21 and September 25 on the assumption that the Commission would approve the advice letter in question. USW wants to know whether it "is required to inform such customers that they will receive no rebate." It argues that "[t]o deny these customers this rate reduction is clearly not in the consumer's best interest," and that "to place carriers at risk of [removing] new customers from a promotional program *months* after signing up, merely because the Commission's staff has been unable to act on the tariff filing in a timely manner, will strongly discourage carriers from employing the temporary tariff filing as a competitive tool." *Ibid.*

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5 "Average customer bill" is defined in D.90-10-047, Ordering Paragraph 2.e, p. 4.

We believe we made ourselves clear in D.90-06-025 to begin with; carriers should refrain from making promises which they have not yet been granted the authority to make. Nor have we officially denied the proposed offer yet. In Resolution T-14607 we merely suspended the advice letter, rather than denying it, and clearly stated that the temporary tariff procedure was not the appropriate vehicle for this kind of proposed offer. The rebate is not officially disapproved until USW has followed the appropriate procedure and received its answer. However, it is clear that, as the proposed "cash-back" offer exceeds the nominal value limit of D.90-06-025 and D.90-10-047, we would almost certainly not approve it under the regular advice letter procedure, either. It remains USW's choice whether it will file a formal application for authority to make this offer, if it believes it can show that the public interest would be served by granting it an exception, or abandon its plan.

Further, USW has no cause to complain of delays in the process. USW has brought these delays on itself by filing proposed offers under the temporary tariff procedure which that process was not meant to encompass. We recognize that the cellular industry is a relatively new one and that the carriers are not completely conversant yet with all of our procedures. We will therefore put all carriers on notice that we do not make a practice of approving tariff changes without looking at their appropriateness for the procedure, or for the interests of the ratepayers, or for the industry.

5. Finding No. 5/Ordering Paragraph 2.

In Ordering Paragraph 15 of D.90-06-025 we said:

> 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 USOA[6] 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. (D.90-06-025, p. 110, cited at p. 5 of Resolution T-14607.)

The Resolution then pointed out that "Until recently the Commission has not been faced with controversial advice letters involving reductions in margin. That is primarily because the facilities-based carriers always adjusted their wholesale rate elements by the same amount as the adjustments in their retail rate elements." *Ibid.* In issuing D.90-06-025 we had not anticipated that carriers would depart from previous practice.

Finding No. 4 of both Resolutions interpreted Ordering Paragraph 15 to mean that "In the interim until the USOA is in place, it is not permissible to make rate changes that reduce the current margins between wholesale and retail rates under temporary tariff authority or regular advice letter." Resolution T-14607 added Finding No. 5, requiring all carriers to conform to previous practice until the USOA could be put in place. In adopting both Resolutions, we approved these interpretations as consistent with D.90-06-025.[7]

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6 The Uniform System Of Accounting, which we have directed to be developed in later phases of the Investigation.

7 See our D.90-10-044 on the City of Alturas' application for rehearing of D.90-07-019 in the *Application of Pacific Power Light*, mimeo. There we noted the applicant's apparent belief that our decision had been the opinion of only the Administrative Law Judge and not ours. We said: "Let there be no mistake: A Commission decision is a Commission decision. We do not sign and issue decisions with which we are not in agreement. If the words of any decision are entirely those of the Administrative Law

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USW's application alleges that these Findings violate § 1708 because they "modify" the previous decisions without notice and opportunity to be heard. We believe the findings to be consistent with both D.90-06-025 and D.90-10-047, as well as with common practice in the industry. However, it is clear that USW was not familiar enough with those practices to realize that we would expect filings prior to the USOA to comply with them. Accordingly, we clarify those findings today and will serve copies of this order on all parties to Investigation (I.) 88-11-040 to ensure that the entire industry is aware of our intent.

6. Nominal value.

Resolution T-14607 recognized that USW's filing showed a failure to grasp our intent in limiting gifts of articles or services (or equipment price concessions financed in whole or part by the provider as an inducement to subscribe) to "nominal value." D.90-06-025, Ordering Paragraphs 16.b and 16.c, p. 110, modified by D.90-10-047, Ordering Paragraphs 2.i, 2.j, and 2.k, p. 5. Resolution T-14607 attempted to clarify this misreading by asking the Administrative Law Judge in Phase III of the Cellular proceeding to define "nominal value" in dollars, and by providing that:

> Until then, we will put the industry on notice that the following rules shall apply to each individual advice letter filed:

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Judge, that is an indication that we agree with those words and have seen no reason to alter any of them." The same is true of our Resolutions; though our Advisory and Compliance Division may analyze the submissions and make recommendations to us, we do not approve them without change unless we are in agreement.

1. The provision of gift, cash, or any article shall not exceed a retail value of $25.

2. The provision of credit to an account for service (e.g., free air time usage, waivers, promotions or special service offerings) shall not exceed $100.

Resolution T-14607, p. 6.

Here again, the Resolution interpreted the earlier decisions rather than modifying them. It was not necessary to ask the Administrative Law Judge to set a dollar cap. We might simply have adopted the figures named as within our intent rather than leaving it to the ALJ to propose others. However, for the purpose of putting the industry on notice of these precise dollar limits, we agree that an advice letter filing is not sufficient. As this order is to be served on all parties to I.88-11-040, that problem will be solved herein.

Nonetheless, we do not think this was error despite the limited distribution of the Resolutions. These limits did not modify D.90-06-025; if anything, they are more generous than we had intended. Given the examples in the modified decision,[8] the figure of $25 is well above the level set by D.90-06-025 as modified by D.90-10-047. For cash gifts, $100 could be more than many people would consider a "nominal" amount. However, it is not so much more as to exceed our authority to interpret our own decisions.

Resolution T-14607 did not, as USW alleges, "create dollar limitations on 'gifts' without giving interested parties notice or an opportunity to be heard. It did not create such

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8 Modified Ordering Paragraph 16.b listed "pens, key chains, maps, [and] calendars" as potential permissible gifts. D.90-10-047, Ordering Paragraph 2.j, p. 5.

limitations at all; we created them in D.90-06-025 and D.90-10-047, and those provisions were not the subject of any application for rehearing. Resolution T-14607 merely interpreted the limits we created.

Therefore, we affirm the limits as set forth in the Resolution and clarify the modified decision to reflect them. We also hereby delete the request to the Administrative Law Judge presiding over Phase III, as further proposals are not required.

B) GTE's application

GTE's combined application "adopts and incorporates by reference" the filing made by USW, and we therefore make no individualized response to this portion of the application. However, GTE further alleges that Resolution T-14608 unlawfully delegated our authority to CACD when it allowed the Division to reject temporary tariff filings which fail to meet the threshold requirements for that procedure. GTE application, p. 3, referring to Resolution T-14608, Finding No. 5, p. 8.[9]

GTE claims that Finding No. 5 violates § 455, saying that "the real world effect of the challenged action is to authorize CACD to 'suspend' an advice letter filing *after* it has become effective." Section 455 provides that we may institute public hearings for any schedule filing "not increasing or resulting in an increase in any rate" on our own initiative or in response to a complaint. The statute also provides that "[t]he period of suspension of such rate, classification, contract, practice, or rule shall not extend beyond 120 days beyond the time when it would otherwise go into effect unless the commission extends the period of suspension for a further period not

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9 The application cites Finding No. 3, but reference to the Resolution shows that this citation must be a typographical error.

exceeding six months." Under § 455, if an advice letter filing is not so suspended, it "shall become effective on the expiration of 30 days from the time of filing thereof with the commission or such lesser time as the commission may grant, subject to the power of the commission, after a hearing had on its own motion or upon complaint, to alter or modify [it]."

GTE contends that the language "such lesser time" in the last sentence applies to the temporary tariff filing. "Under the authority granted by the Commission in [D.90-06-025], a cellular carrier's rate reduction filing which will not impact a carrier's average customer bill by more than 10 percent shall be classified as a temporary tariff and made effective on the date filed." GTE application, p. 4, citing D.90-06-025, Ordering Paragraph 8.b.[10]

However, the advice letters at issue did not meet the threshold requirements for temporary tariff filings under the modified decision. Therefore, GTE's contention is not persuasive.

GTE's application acknowledges CACD's competence and authority to "reject an advice letter *before it becomes effective* for failure to comply with technical and formatting requirements set forth in General Order 96-A." GTE application, p. 4. However, GTE argues, we distinguished between rejection and suspension of tariff filings in *Arik Sharabi v. Lorrie's Travel and Tours* (1983) 11 Cal.P.U.C. 2d 1020, citing fn 1 at 1034.

> There, we said:
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> The difference between a tariff filing being rejected versus being suspended is that rejection is for clear cut and procedural reasons and suspension is for controversial substantive reasons. Our staff can reject proposed filings for noncompliance under the

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10 As noted previously, this Ordering Paragraph was modified in D.90-10-047, Ordering Paragraph 2.e; however, the modification only added a definition of the term "average customer bill."

> applicable G.O. However, if a filing fits under the parameters of the G.O., but has questionable deficiencies, it must be suspended for investigation by a formal Commission order under PU Code § 455.

The two Resolutions at issue did so suspend the advice letter filings for their "questionable deficiencies." GTE argues, however, that the authority granted in Finding No. 5 "is certainly more than procedural in nature and requires CACD to exercise substantive judgments regarding the effect of the filing on existing retail margins." GTE application, pp. 4 - 5.

Our modified decision made it clear that the temporary tariff procedure was available only to advice letter filings that met certain qualifications, among them that the proposed offer should not reduce the margin between wholesale and retail rates. The question of the effect on the margin is one which CACD can determine by simple factual and arithmetical analysis of the filing. It requires CACD to make quantitative judgments, not substantive ones. Therefore, we think it is within our authority to order CACD to suspend advice letter filings under the temporary tariff procedure on this specific ground.

Further, § 455 merely provides that we may hold a hearing when we find it appropriate. It does not require our formal vote on whether or not the advice letter requires it. In the case of temporary tariff filings, ordering CACD to review them for compliance with procedural requirements is a delegation of ministerial authority, which GTE concedes is permissible.

We note further GTE's concession that CACD may reject such filings outright for procedural deficiencies, as our Docket Office can reject more formal filings. As GTE has adopted USW's entire application for rehearing, in which the carrier seeks more, not less, formal process for its filings, we are at a loss as to why GTE in its own application seeks less. We have chosen to suspend such filings for hearing rather than to reject them outright, so as to allow the carriers an extra measure of

procedural protection. We conclude that this choice is within our authority.

C) LA Cellular's application

LA Cellular submits that the Resolutions changed D.90-06-025's and D.90-10-047's provisions and "threaten the underlying goals of these decisions;" that Resolution T-14607 "contradicts the plain meaning of Section 532 of the Public Utilities Code" in its discussions of gifts and rebates; and that the Commission may not authorize CACD to suspend temporary tariff filings. LA Cellular application, pp. 1 - 2.

We have already discussed the contention that the Resolutions modified our previous decisions and will not repeat ourselves here. We have also discussed our authority to authorize CACD to suspend inappropriate temporary tariff filings rather than reject them outright. We will accordingly address only the allegation that the Resolutions violated § 532.

LA Cellular asserts, quite correctly, that this provision "protects utility customers from discrimination as a result of being charged non-tariffed rates," adding that "it has never been interpreted to bar duly tariffed rate reductions for defined customer groups which bring recognizable savings to the utility." LA Cellular application, p. 5. The application continues, taking the apparent position that the $400 rebate offer in advice letter No. 48 was both "duly tariffed" and a "rate [reduction] ... in exchange for customer longevity." *Ibid.* For the reasons discussed above, the characterization of this flat $400 offering as a rate reduction is unconvincing, and the assumption that USW "duly tariffed" the offering merely by filing under the temporary tariff procedure is simply incorrect.

LA Cellular continues with an argument parallel to USW's, saying that Resolution T-14607 "threatens [the] service providers' ability to fulfill promises made to thousands of customers." We must point out that our modified decision was not intended to give carriers *carte blanche* for any filing they label

a "temporary tariff" filing. If carriers choose to act on the assumption that we will approve anything so labeled, whether or not it is in compliance with the provisions of the modified decision, they will bear the responsibility for that choice.

D) McCaw's application

McCaw's application for rehearing, like USW's, alleges that the Resolutions violated § 1708 by changing D.90-06-025 without giving parties notice and opportunity to be heard. However, McCaw does not specifically allege error or discuss USW's allegations; it merely states that it "wholeheartedly supports" USW's application. It is therefore unnecessary to discuss the application for rehearing part of McCaw's filing, as USW's allegations have already been considered.

The rest of McCaw's application is actually a petition for modification of the Resolutions. McCaw asks for deletions or modifications of (1) Finding No. 4 in both Resolutions; (2) Finding No. 5 in Resolution T-14607; (3) Ordering Paragraph No. 4 in Resolution T-14608; (4) Finding No. 6 in Resolution T-14608 insofar as it affects regular advice letter filings; and (5) our limitation on gifts of cash or service. We have considered McCaw's filing as well as those in the applications for rehearing in our discussions above. The only issues we have not addressed today are the second and fourth.

McCaw contends that Finding No. 5 of T-14607 violates Ordering Paragraph 8 of D.90-06-025, establishing temporary tariff procedures for rate decreases of up to 10% of average customer bill. "The text of the decision," says McCaw, "indicates that an average's customer bill may be calculated, when necessary to justify a large one-time price reduction, ... as the amount the customer is expected to pay over the life of his service from the utility." McCaw's application, pp. 8 - 9, citing D.90-06-025 at 54.

This approach contains several fallacies. First, the life-of-service calculation on p. 54 of D.90-06-025 is an example

of what conditions must apply if a utility waived activation fees, which cover the entire life of the customer's service. Extending that example to other types of rate changes would be highly inappropriate. Second, McCaw's charge is that the Resolutions contravene Ordering Paragraph 8, not the text on p. 54, of D.90-06-025. Therefore, confusing though it may be, the language on p. 54 has not been placed at issue in this filing for rehearing.

Third, Ordering Paragraph 8 does not itself provide a specific definition of "average customer bill." Upon applications for rehearing of D.90-06-025, we found it necessary to clarify our intent; in D.90-10-047, Ordering Paragraph 2.e, we modified Ordering Paragraph 8.b, defining "average customer bill" as "the average monthly bill of all the carrier's or reseller's customers for at least the last month for which figures are available." D.90-10-047, p. 4. This definition does not include the language on p. 54, which we now see should have been modified or deleted in D.90-10-047 to correspond to Ordering Paragraph 2.e.

We will accordingly modify the modified decision today. However, we recognize that the providers have not all understood the original and modified decisions on this issue in the way we intended. Therefore, we will consider a specific, limited alteration to the 10% limit, subject to the requirements of Public Utilities Code § 1708. If any provider believes that the public interest would be served if we allow promotions under temporary tariffs which exceed 10% of the average customer bill, but still amount to less than the $100 nominal value limit, the provider may file a motion for hearing of the question in I.88-11-040, serving all parties. The Administrative Law Judge assigned to the case will evaluate the pleadings and decide whether or not a hearing is necessary on the subject, before making his recommendation for our decision.

Finally, McCaw asks that we delete Finding No. 6 in Resolution T-14608 to the extent that it affects regular advice

letters. That Finding says: "No rate increases in any form should be allowed under temporary tariff status or regular advice letter until the USOA is in place." Resolution T-14608, p. 8. We intended this Finding to limit regular advice letters only to the extent of compliance with Ordering Paragraph 9 of D.90-06-025, as modified by D.90-10-047, but unfortunately we did not catch the ministerial error before signing the Resolution. Today we modify the Finding to clarify our intent.

Therefore, IT IS ORDERED THAT:

1. McCaw's motion to strike portions of CRA's opposition to the applications for rehearing is denied.

2. The applications for rehearing of Resolutions T-14607 and T-14608 filed by USW, GTE, LA Cellular, and McCaw are hereby denied.

3. Resolution T-14607 is hereby modified as follows:

a. On page 6, the language beginning with the words "To eliminate the problem" and ending "shall not exceed $100" is deleted and the following language is substituted in its place:

> However, the amount proposed is clearly beyond the provisions of D.90-06-025 as modified by D.90-10-047.

b. The second sentence of Finding No. 3 is modified to read:

> The term 'rate changes' as used in D.90-06-025 and D.90-10-047 includes rules, regulations, and other provisions necessary to offer service to end users.

c. Finding No. 4 is modified to read:

> Until the USOA is in place, D.90-06-025 as modified by D.90-10-047 does not permit rate changes that reduce the current margins between wholesale and retail rates either under the temporary tariff authority or regular advice letter procedures.

d. Finding No. 5 is modified to read:

Consistent with prior practice and the Commission's intent as expressed in Ordering Paragraph 15 of D.90-06-025, any reduction in a retail rate element should be accompanied by an equal reduction to the same wholesale rate element until the USOA is in place.

e. Finding No. 7 is deleted as unnecessary.

f. Ordering Paragraph No. 2 is modified to read:

Until the USOA is in place, a reduction in any retail rate element must be accompanied by an equal reduction to the same wholesale rate element, in order to comply with Ordering Paragraph 15.

g. Ordering Paragraph No. 3 is modified to read:

Until the USOA is in place, D.90-06-025 as modified by D.90-10-047 forbids any carrier to offer any gift of cash or article, the retail value of which exceeds $25, or any credit to account through free air time usage, waivers, promotions, or special service offerings exceeding $100.

4. Resolution T-14608 is hereby modified as follows:

a. The last sentence of Finding No. 3 is modified to read:

Consistent with prior practice and the Commission's intent as expressed in Ordering Paragraph 15 of D.90-06-025, any reduction in a retail rate element should be accompanied by an equal reduction to the same wholesale rate element until the USOA is in place.

b. Finding No. 4 is modified to read:

Until the USOA is in place, D.90-06-025 as modified by D.90-10-047 does not permit rate changes that reduce the current margins between wholesale and retail rates either under the temporary tariff authority or regular advice letter procedures.

c. Finding No. 5 is modified to read:

> Under the Public Utilities Code and the Commission's General Order 96-A, CACD may reject any temporary tariff filing which does not comply with margin requirements or any other procedural or definitional requirements for such filings as set forth in D.90-06-025 as modified by D.90-10-047.

d. Finding No. 6 is hereby modified to read:

> Except as provided for in Ordering Paragraph 9 of D.90-06-025 as modified by D.90-10-047, no rate increases in any form should be allowed under temporary tariff procedures.

e. Ordering Paragraph No. 4 is deleted.

5. D.90-06-025 is hereby modified by deleting the last two sentences from the first full paragraph on p. 54 and adding the following sentence in its place:

> The average customer bill for purposes of a temporary tariff filing is defined as the average monthly bill of all the carrier's or reseller's customers for at least the last month for which figures are available.

6. We hereby put the cellular telecommunications industry on notice that the expression "nominal value" as used in Ordering Paragraphs 16.b and 16.c of D.90-06-025 as modified by Ordering Paragraphs 2.j and 2.k of D.90-10-047, means:

a. In the case of gifts of cash or articles, not more than a retail value of $25.

b. In the case of a credit to an account for service (e.g., free air time usage, waivers, promotions or special service offerings), not more than $100.

7. Under the Public Utilities Code and our General Order 96-A, CACD may reject any temporary tariff filing which does not comply with marginal requirements or any other procedural or

definitional requirements for such filings as set forth in D.90-06-025 as modified by D.90-10-047. We hereby put carriers and resellers on notice that we shall expect CACD to do so.

8. Any provider who believes that the public interest would be served if we allow promotions under temporary tariffs which exceed 10% of the average customer bill, but still amount to less than the $100 nominal value limit, the provider may, within 30 days of the effective date of this order, file a motion for hearing of the question in I.88-11-040, serving all parties. The Administrative Law Judge assigned to the case will evaluate the pleadings and decide whether or not a hearing is necessary on the subject, before making his recommendation for our decision.

9. The Process Office shall serve notice of this decision on all parties on the service list of I.88-11-040.

This order shall be effective today.

Dated February 20, 1992 at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
NORMAN D. SHUMWAY
Commissioners

Commissioner Patricia M. Eckert being necessarily absent, did not participate.

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

NEAL J. SHULMAN, Executive Director

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