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Decision 92-09-082 September 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of GTE California Incorporated (U 1002 C), a corporation, for Authority to File a Tariff Schedule for Services for Interconnecting Radiotelephone Utilities.	ORIGINAL Application 92-06-012 (Filed June 8, 1992)

O P I N I O N

In this decision, we consider a request for review by GTE California Incorporated (GTEC) of an administrative law judge's (ALJ) ruling denying a motion for confidential treatment of a cost study. The ruling was made in an application proceeding arising out of Decision (D.) 92-01-016, in which we directed GTEC and Pacific Bell to file proposed tariffs for interconnection service for certificated radio telephone utilities (RTUs).

It is with great reluctance that we have decided to consider this request for review,[1] because our general policy, stated many times, disfavors interlocutory appeals from ALJ rulings. However, we have decided to consider this one in order to maintain consistency of rulings between proceedings, and because it demonstrates the need to restate the standards that should govern motions for confidential treatment of data in our proceedings.

On the merits, we conclude that the ALJ was correct in denying the motion before him, because GTEC did not meet its burden

1 The pleading filed by GTEC on July 29, 1992 was entitled "Petition of GTE California Incorporated for Review of Administrative Law Judge's Ruling." Our Rules of Practice and Procedure do not provide for such a pleading, which should more appropriately have been titled a "request for review" of the ruling. We will refer to GTEC's pleading in the rest of this decision as if it had been so titled.

of demonstrating why the cost study should be treated as confidential. However, because GTEC's appeal has belatedly laid out a reasonable case for confidential treatment of part of its cost study, and because this data was treated as confidential in another proceeding, we have decided to grant GTEC some of the relief it requests.

If GTEC makes the complete cost study available to all parties in Application (A.) 92-06-012 who sign the modified confidentiality agreement we describe below, then it can keep confidential two classes of data that were also received under seal in Phase III of Investigation (I.) 87-11-033. As to the other material in the study, however, we simply cannot tell from the face of the data whether it concerns an existing or potential competitive service -- and is, therefore, deserving of confidential treatment -- or a monopoly service -- in which case it must as a general matter be open to public inspection. As to those portions of the study where the proper treatment is unclear, we remand to the ALJ with instructions to hold an evidentiary hearing if he deems it necessary.

In the meantime, we strongly urge GTEC to file with the ALJ a revised confidentiality motion that sets forth on a page-by-page basis why GTEC believes the data should be kept confidential, based on whether or not a competitive service is involved. We also place GTEC on notice that if it makes any further motions for confidentiality of the kind it made to the ALJ here, they will be summarily denied, no appeal will be entertained, and GTEC will be subject to sanctions.

Procedural Background

The motion that gave rise to the ruling at issue here was filed on June 8, 1992. It sought confidential treatment of the cost study that GTEC had filed along with its RTU interconnection tariff proposal pursuant to D.92-01-016. The motion was

exceedingly brief; it is quoted in its entirety in the footnote.[2] The motion was directly opposed by Paging Network of San Francisco, Inc. and Paging Network of Los Angeles, Inc., and indirectly by the Allied Radiotelephone Utilities of California (Allied), which had served GTEC with a subpoena requesting documents that went well beyond the cost study.

The assigned ALJ denied the motion in a ruling dated July 23, 1992. He concluded that GTEC's "conclusory assertion" about the confidential and proprietary nature of the cost study was insufficient to meet GTEC's burden under such cases as Re Pacific Bell, 20 CPUC 2d 237, 252 (1986), which stated that confidential treatment should be granted to data only upon a showing that release of the data would lead to "imminent and direct harm of major consequence, not a showing that there may be a harm or that the harm is speculative and incidental." The ALJ also ordered GTEC to make its study "available to all parties immediately and without restriction," but granted GTEC a protective order to the extent Allied's subpoena sought documents beyond the cost study.

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2 The motion stated in full:

"GTE California Incorporated (GTEC), pursuant to the Commission's General Order 66-C, hereby moves to file its cost study under seal for purposes of its Application to Establish a Tariff Schedule for Services for Interconnecting Radiotelephone Utilities.

"GTEC makes this motion because the attached cost study is both confidential and proprietary in nature. Release of the document to GTEC's competitors would place GTEC at an unfair business disadvantage, and would cause irreparable harm to GTEC's operations."

GTEC's Appeal

GTEC seeks review of the ALJ's ruling on several grounds. First, it asserts that cost studies have "historically" been treated as confidential, and that there was no need for "exhaustive argument" in GTEC's confidentiality motion to establish this point. Second, GTEC argues that its study should be afforded confidential treatment because, consistent with Commission practice, it has offered to make the study available to all parties in the proceeding who sign "appropriate nondisclosure agreements." Third, GTEC argues that Pacific Bell, the only other local exchange company required to file an RTU interconnection proposal, has not been required to serve its cost study on all parties in its proceeding (A.92-06-009). Finally, GTEC "renews its request" for a protective order and argues in detail why portions of the cost study are proprietary, and why their release would likely cause GTEC to suffer competitive harm.

As we conclude below, GTEC has made a reasonable case for some of the relief it seeks. Before we discuss the merits of GTEC's arguments, however, we deem it necessary to discuss the adequacy of the motion below, as well as the character of GTEC's current nondisclosure agreement.

The Adequacy of GTEC's Confidentiality Motion

Although we believe that GTEC has made a case for limited modification of the ALJ's ruling, that conclusion is not based on GTEC's original motion. As is evident from footnote 2, GTEC's June 8 confidentiality motion was not only devoid of "exhaustive argument"; it failed to present any argument at all.

A barebones, conclusory pleading of the kind GTEC filed before the ALJ is plainly insufficient to meet the requirements of General Order (G.O.) 66-C, which places the burden in a confidentiality motion upon the party seeking confidential treatment. While it is true that our decisions do not require confidentiality motions to be of any particular length, such

motions must obviously be long enough to apprise an ALJ who may not be familiar with related proceedings why confidential treatment is appropriate in the particular case. Thus, a well-drafted motion should indicate such things as whether the same data has been afforded confidential treatment in other proceedings, and should explain why the moving party is likely to suffer competitive harm if the data is released.

GTEC's motion to the ALJ obviously failed to make such a showing. The fact that GTEC has now presented such argument in its renewal of the request for a protective order, and that it admits not all of its cost study needs to be treated as confidential, is a de facto admission that its motion to the ALJ was inadequate. The ALJ's ruling denying the motion was, therefore, not erroneous.

The Adequacy of GTEC's Confidentiality Agreement

In addition to arguing that cost studies have "historically" been considered proprietary, GTEC argues that its confidentiality motion should have been granted because, in keeping with Commission practice, it has offered to make the cost study available to all parties in the proceeding who sign an "appropriate nondisclosure agreement."

While it is true that this Commission does not ordinarily second-guess the parties' confidentiality designations where data is made available subject to a nondisclosure agreement, that is not what GTEC has done here. It appears from the papers submitted by Allied and GTEC[3] that GTEC has refused to make its cost study

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3 Allied submitted a declaration along with an opposition to GTEC's request for review of the ALJ ruling on August 5, 1992. GTEC did not submit a reply to this declaration until nearly three weeks later, on August 24, 1992.

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available to David M. Wilson, the lead attorney for Allied, even though Mr. Wilson has signed GTEC's standard form of confidentiality agreement.

The justification GTEC has belatedly offered for its refusal is that Mr. Wilson is currently involved in contract negotiations with GTEC on behalf of Allied and other clients, and that "GTEC should not be compelled to divulge extremely sensitive cost information to someone who is negotiating with GTEC on behalf of the other clients in a non-legal capacity for similar service arrangements." GTEC suggests instead that Allied retain an independent consultant who, after signing a nondisclosure agreement, would be given access to the data. GTEC has also offered to make the confidential portions of the cost study available to David Simpson, another attorney for Allied who works in the same law firm as Mr. Wilson.

GTEC's behavior in this matter has been unacceptable. We can see no good reason why a party's chief counsel should be deprived of access to critical information merely because he or she is experienced in the industry. As we have in the past, we will assume that if the attorney agrees not to reveal the competitively-sensitive information to his or her client, that will ordinarily be sufficient to safeguard the legitimate expectations of the party

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Even though GTEC's reply (which is unaccompanied by a declaration) is seriously out-of-time, we have decided to consider it because of the important issue it raises about the proper scope of a nondisclosure agreement.

seeking confidentiality.[4] If there exist reasons to believe those expectations will not be realized, they can be presented. Accordingly, we will direct GTEC to revise its standard nondisclosure agreement promptly so as to make confidential data available to any attorney or consultant who has appeared in the proceeding, provided that (1) the attorney or consultant agrees not to disclose the data to his or her client, and (2) the attorney or consultant agrees that at the conclusion of the proceeding, any notes based on the data will either be destroyed or kept confidential.[5] Once Mr. Wilson has executed such a modified

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4 For example, in our decision establishing the New Regulatory Framework for local exchange carriers, we granted an appeal by Pacific Bell of an ALJ ruling that ordered one of Pacific's planning documents to be made public. In so doing, we noted that the attorney for the trade association seeking disclosure had full access to the document in the proceeding, and, therefore, that "broader access to this information by [the trade association's] officers and members would not be appropriate or necessary to facilitate [the association's] effective participation in I.87-11-033." D.89-10-031, 33 CPUC 2d 43, 214 (1989). We see no reason to depart from the assumption made in this decision that, under ordinary circumstances, an attorney can be trusted not to reveal confidential data from an adverse party to his or her client.

5 This change will bring GTEC's standard nondisclosure agreement into conformity with the approach used by most other parties in Commission proceedings. Under that approach, as long as an attorney or consultant agrees not to reveal data marked "confidential" to other persons (including clients), the data is made available to the attorney or consultant. This insures that the client does not see competitively-sensitive data, while at the same time enabling the attorney to obtain the assistance he or she needs in preparing the client's case.

The current form of GTEC's standard agreement is much more restrictive. It most nearly resembles "eyes only" agreements, under which extraordinarily sensitive data (such as business plans) are shown only to the attorneys in proceedings. Although such

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agreement, he may have access to the confidential portions of GTEC's cost study.[6]

The Merits of GTEC's Request for A Protective Order

We come, finally, to the merits of GTEC's request for confidential treatment of portions of its cost study.

While these arguments should have been presented to the ALJ, we conclude that GTEC has now made a reasonable case for affording confidential treatment to two categories of information that were also received under seal in Phase III of I.87-11-033. The two categories are: (1) "provisioning information" on GTEC's high capacity private line service (HICAP), and (2) the detail on usage-sensitive services in Volume 7 of the so-called "bottoms up"

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agreements are the rare exception rather than the rule, GTEC's standard agreement treats all confidential data -- even the most routine -- as if it enjoyed this extraordinary sensitivity. Moreover, as this case illustrates, GTEC apparently takes the position that it can veto the client's choice of attorney if the attorney has previously participated in negotiations with GTEC.

6 In the declaration he submitted in response to GTEC's request for review of the ALJ's ruling, Mr. Wilson states that over the years, "I have signed several non-disclosure agreements with various local exchange carriers, and have never revealed information subject to such agreements to competitors of these carriers."

While we find comfort in this representation, it stops short of saying that Mr. Wilson has never revealed confidential data to members of his client, Allied. As indicated in the text, we believe that GTEC is entitled to such a representation before it makes the confidential portion of its RTU interconnection tariff cost study available to Mr. Wilson.

cost study that was dated July 22, 1991.[7] Although these and other data form the basis for GTEC's RTU interconnection proposal -- a service as to which local exchange companies like GTEC face no competition -- this information would be useful to competitors, is held in confidence, and is, therefore, worthy of protection.

Without more information, however, the same cannot be said of other pages in the study that GTEC still wishes to keep confidential. Accordingly, we will remand the matter to the ALJ for further consideration. Based on any revised confidentiality motion that GTEC cares to submit, the ALJ should determine whether confidential treatment of the portions of the cost study not disposed of by this decision is appropriate. If the ALJ concludes in his discretion that an evidentiary hearing is necessary to resolve these issues, he may hold one. In preparation for this second round of motion practice before the ALJ, we strongly suggest that GTEC file an amended confidentiality motion that sets forth on a page-by-page basis why GTEC believes the data is competitively sensitive and should be kept confidential.

There remains one final matter. Even though GTEC has now made a reasonable case for confidential treatment of part of its cost study (and we have established a procedure for disposing of the rest of GTEC's confidentiality claims), the way in which GTEC has released the pages from the study as to which it is not

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7 So as to remove any doubt about just what information is covered by this description, we will instruct the Executive Director to serve GTEC under seal with a copy of the pages concerning HICAP and the "bottoms up" cost study as to which we believe GTEC has met its burden of establishing a prima facie case for confidential treatment.

claiming confidentiality[8] has the potential to confuse readers about what portions of the study are and are not in the public record. Accordingly, we will direct GTEC to re-serve these pages without any stamp or other notation suggesting that they are to be treated as confidential.

Conclusion

This is a decision that should not have been necessary. If GTEC had presented the ALJ with a motion that made a reasonable case for confidentiality, and that sought confidential treatment only of those parts of the cost study that are truly sensitive, we have no doubt it would have been granted and that would have been the end of the matter. Moreover, were it not for the fact that portions of the same study have been received under seal in I.87-11-033, we would have been strongly disinclined to consider GTEC's request for review. We trust that the advice and admonitions set forth above will make it unnecessary to consider similar requests from GTEC in the future.

Findings of Fact

1. On June 8, 1992, GTEC filed a motion under G.O. 66-C seeking confidential treatment of the cost study accompanying the application in this proceeding.

2. The motion was phrased in conclusory terms and sought confidential treatment of the entire cost study.

3. On July 23, 1992, the assigned ALJ issued a ruling denying the motion and directing GTEC to make the study "available to all parties immediately and without restriction."

4. On or about June 29, 1992, David M. Wilson, an attorney for Allied Radio Telephone Utilities of California, executed and

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8 In general, the pages made public by GTEC (which are attached to its request for review) furnish an overview of its costing methodology. The actual costs are set forth on accompanying worksheets that GTEC asserts should be kept confidential.

returned to GTEC a copy of the latter's standard nondisclosure agreement in connection with OIR 88-02-015, the proceeding out of which this application arose.

5. Despite his having signed said nondisclosure agreement, GTEC has refused to make available to Mr. Wilson the cost study filed with the application.

6. On July 30, 1992, GTEC filed with the Commission a request for review of the aforesaid ALJ ruling of July 23, 1992.

7. Attached to said request were pages from the cost study that GTEC concedes can be made public without its suffering competitive harm.

8. Of those portions of the cost study that GTEC still wishes to keep confidential, two -- provisioning information on GTEC's HICAP service and detail on usage-sensitive services in the "bottoms up" cost study -- were received under seal in Phase III of I.87-11-033.

Conclusions of Law

1. The motion for confidential treatment of its cost study filed by GTEC on June 8, 1992 failed to meet the requirements of G.O. 66-C for confidentiality motions.

2. Based upon said motion, the ALJ's order of July 23, 1992 denying GTEC's motion was not erroneous.

3. GTEC's current nondisclosure agreement is overbroad in that it denies access to confidential information sought by certain attorneys and consultants who have appeared in CPUC proceedings, even if (a) the attorneys or consultants agree not to reveal the information to their clients during the proceeding, and (b) the attorneys or consultants agree that at the conclusion of the proceeding, they will either destroy any notes based upon the information or keep such notes confidential.

4. GTEC's nondisclosure agreement should be revised to correct the deficiencies identified in Conclusion of Law 3.

5. Notwithstanding Conclusion of Law 4, GTEC should have the right to demonstrate in any proceeding that there are grounds to believe that an attorney or consultant willing to sign a nondisclosure agreement incorporating provisions modeled on Conclusion of Law 3 cannot be trusted to keep such an agreement.

6. GTEC's request for review of the ALJ's July 23, 1992 ruling in this proceeding makes an adequate showing of why two elements of the cost study in this proceeding -- provisioning information on GTEC's HICAP service, and the detail on usage-sensitive services in Volume 7 of the "bottoms up" cost study prepared in Phase III of I.87-11-033 -- should be kept confidential under G.O. 66-C.

7. The ALJ's ruling of July 23, 1992 should be modified to allow confidential treatment of the two classes of data identified in Conclusion of Law 6.

8. As to the remaining portions of the cost study that GTEC wishes to keep confidential, this matter should be remanded to the ALJ so that he can consider a revised confidentiality motion from GTEC, or in his discretion hold an evidentiary hearing.

O R D E R

IT IS ORDERED that:

1. The Administrative Law Judge's (ALJ) ruling of July 23, 1992 in this proceeding is modified to permit two portions of the cost study filed by GTE California Incorporated (GTEC) to be received under seal pursuant to General Order (G.O.) 66-C: (a) provisioning information on GTEC's high capacity private line service, and (b) the detail on usage-sensitive services taken from Volume 7 of the "bottoms up" cost study prepared in Phase III of Investigation (I.) 87-11-033 and dated July 22, 1991. The Executive Director shall serve GTEC under seal with copies of the pages that embody these two portions of the cost study.

2. Within 14 days after the effective date of this Order, GTEC shall modify its standard form of nondisclosure agreement so as to permit access to confidential or proprietary data received under seal pursuant to G.O. 66-C by any attorney or consultant who has appeared in a GTEC proceeding and who promises in writing (a) not to reveal such confidential or proprietary data to his or her client, and (b) at the conclusion of the proceeding, to destroy any notes based upon such data or to keep such notes confidential.

3. Notwithstanding Ordering Paragraph 2, GTEC shall have the right to demonstrate in any proceeding that an attorney or consultant willing to sign a nondisclosure agreement incorporating the provisions of Ordering Paragraph 2 cannot be trusted to keep such an agreement.

4. Upon execution by David M. Wilson, Esq. of a nondisclosure agreement revised in accordance with Ordering Paragraph 2, GTEC shall grant access to Mr. Wilson to the confidential and proprietary data received under seal and identified in Ordering Paragraph 1.

5. The assigned ALJ shall decide, based on any revised motion GTEC cares to submit, whether the other portions of the cost study that GTEC still wishes to keep confidential should be received under seal pursuant to G.O. 66-C. GTEC shall submit any such revised motion within 14 days of the effective date of this order.

6. Within 21 days after the effective date of this decision, GTEC shall file and serve on all parties, copies of the pages in its cost study for which it is not seeking confidential treatment that do not contain any stamp or other marking which might reasonably give the impression that GTEC considers such pages to be confidential or proprietary.

7. Except as set forth above, GTEC's request for review of the ALJ's July 23, 1992 ruling in this proceeding is denied.

This order is effective today.

Dated September 16, 1992, at San Francisco, California.

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

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

NEAL J. SHULMAN, Executive Director