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Decision 92-12-071 December 16, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cellular Resellers Association, Inc., Complainant, v. GTE Mobilnet of California Limited Partnership (U-3002-C), Defendant.	ORIGINAL Case 90-12-012 (Filed December 5, 1990)

ORDER REJECTING APPLICATION FOR REHEARING OF DECISION 92-09-047

Cellular Resellers Association, Inc. (CRA) filed an Application for Rehearing of D.92-09-047, which had been issued on September 2, 1992. This matter involved a complaint brought by CRA against GTE Mobilnet of California Limited Partnership (Mobilnet) alleging that Mobilnet entered into an arrangement with the Printing Industries of Northern California (PIN) to provide wholesale cellular service to PIN members instead of volume user cellular services as required by D.90-06-025, 36 CPUC 2d 464, and D.90-10-047, 38 CPUC 2d 39, (decision denying rehearing and modification of D.90-06-025) (generic cellular decision). This Decision found the following facts to be true. The generic cellular decision required facilities-based carriers to implement a volume user tariff only if a "sufficient demand" existed. The volume user tariff was not intended to be effective immediately or to be effective if a demand for such service did not exist. The generic cellular decision did not establish a specific time period to establish a volume user tariff. Meanwhile, Mobilnet entered into a wholesale agreement with PIN

because PIN met the wholesale tariff requirements. D.91-01-033, 39 CPUC 2d 338, issued in January 1991, required facilities-based carriers to submit any volume user tariffs by March 1, 1991, and to conform to a volume user tariff by May 1, 1991. Mobilnet's activation of PIN subscribers requesting service after February 22, 1991, under the volume user tariff, complied with the May 1, 1991, mandatory volume user tariff date. Mobilnet's transition of PIN members activated prior to February 22, 1991, from the wholesale tariff to the volume user tariff by May 1, 1991, complied with the May 1, 1991, mandatory volume user tariff date. Because of confusion on the part of Mobilnet about when its Advice letters 60 and 61 were effective, there was a technical violation of Mobilnet's wholesale tariffs during the December 19, 1990, to May 1, 1991, time period.

On October 5, 1992 CRA filed an Application for Rehearing of D.92-09-047 alleging that the correct interpretation of the generic cellular decision is that a volume user tariff should have been implemented as soon as the facilities-based carrier determined that sufficient demand existed within a metropolitan statistical area. CRA takes the position that D.91-01-033, supra, did not immunize Mobilnet from abiding by the requirements of the generic cellular decision until the May 1, 1991 deadline. CRA further alleges that the issuance of D.92-09-047 was in violation of PU Code Section 311 and Rule 77 of the Rules of Practice and Procedure. PU Code Section 311 requires that a proposed decision of an administrative law judge be issued in all Commission proceedings except those initiated by a "customer or subscriber complaint". Rule 77 reiterates verbatim the contested provisions of Section 311.

In its Application for Rehearing CRA reargues the major issue raised in its complaint case. That case centered around the question of whether, in our generic cellular decision, we set out a defined compliance schedule for implementation of a volume user tariff. In the generic cellular decision we required facilities-based carriers to implement a volume user tariff only

if a "sufficient demand" existed. The volume user tariff was not intended to be effective immediately or to be effective if a demand for such service did not exist. We did not establish a specific time period to establish a volume user tariff in the generic cellular decision. Shortly after that decision was issued, in D. 90-12-038, 38 CPUC 2d 411, an investigation into the operations, rates, and practices of U.S. West Cellular of California, Inc., we ordered U.S. West to file by March 1, 1991 an advice letter that incorporated the generic cellular decision volume user tariff provisions. To conform to the time table set forth in that case, we then issued D.91-01-033, supra, which required all facilities-based carriers to submit any volume user tariffs by March 1, 1991, and to conform to a volume user tariff by May 1, 1991. In D.91-01-033 we found that:

> "The volume tariff provisions required by D.90-06-025 became effective June 6, 1990. However, only a few facilities-based carriers have filed a volume tariff incorporating these provisions. In requiring U.S. West to submit an advice letter with volume tariff provisions discussed in D.90-06-025, we reiterated our intent to enhance effective competition with lower prices to end-users and expanded innovative services. U.S. West's March 1, 1991 filing date was selected so that a level playing field would exist for all facilities-based carriers that wish to offer and provide, or continue to offer and provide, multiple unit volume discounted rates. D.90-12-038 supplemented D.90-06-025 by requiring all facilities-based carriers to file similar tariffs by March 1, 1991. Therefore, all facilities-based cellular carriers that wish to offer and provide, or wish to continue to offer and provide, multiple unit volume discounted rates through other than certificated resellers should conform to D.90-06-025 by March 1, 1991."

Therefore, CRA's interpretation of D.92-09-047 is incorrect. Nothing in the generic cellular decision indicated that carriers should suspend wholesale tariffs or that a deadline

was established by which facilities-based carriers were required to file volume user tariffs. It was only when D. 91-01-033 was issued that we established a specific time period for the facilities-based carriers to implement a volume user tariff. Given this fact, CRA's claim lacks merit and is rejected.

CRA's argument that D.92-09-047 was issued in violation of PU Code 311 is also erroneous. In 1982 the Governor signed AB 2570 (Duffy) which amended PU Code Section 311(e) to state that:

> "...in any proceeding involving an electrical, gas, or telephone corporation... (t)he (ALJ) shall prepare and file an opinion... The opinion of the (ALJ) shall become the proposed decision and a part of the public record... The proposed decision of the (ALJ) shall be filed with the commission and served upon all parties..."

Section 311, as amended, makes an exception to the above requirement for proceedings involving electrical, gas, or telephone corporations that are initiated by customer complaints. The amended section states:

> "...the (ALJ) assigned to a proceeding involving an electrical, gas, or telephone corporation initiated by ratepayer or subscriber complaint need not prepare, file, and serve an opinion, unless the commission finds this is required in the public interest in a particular case."

As a result of this amendment to Section 311, in 1983 we issued Resolution ALJ 150 which states that:

> "Because most of our decisions in complaint cases either will not be of interest to the general public or will arise out of expedited complaint cases, we believe it would be appropriate for us to exercise the authority granted in Section 311, as amended by AB 2570 (Duffy 1982), to specify that in complaint proceedings involving electrical, gas, or telephone corporations, the ALJ need not file

> his (her) opinion with the Commission nor serve it on all parties. When an ALJ believes his (her) opinion is of sufficient import to justify filing and service, and the Commission concurs, his (her) opinion will be filed and served."

We then resolved in Resolution ALJ 150 that:

> "The administrative law judge assigned to a proceeding involving an electrical, gas, or telephone corporation initiated by ratepayer or subscriber complaint need not file and serve an opinion, unless the Commission finds that action to be required in the public interest in a particular case."

Given these authorities, the issue before us becomes: Is an association like CRA, that is made up of both customers and competitors of Mobilnet, a "customer" under Section 311(e)? We interpreted the intent of Section 311(e) to be the following in Resolution ALJ 150:

> "We believe that in granting us this authority the Legislature understood that for the most part our decisions in complaint proceedings are not as interesting to the general public as our decisions in major rate proceedings where all ratepayers are affected. Thus, while our complaint decisions may be vital to the interests of the complainant and defendant, they do not provoke the interest of the general public in the great majority of cases."

Given the above it is appropriate to treat CRA as a "customer or subscriber" for purposes of Section 311(e). First, the resolution of this complaint is only of interest to the complainant and its members and the defendant and does not have a broader interest to the general public. The policy issues raised in this case have been resolved in prior Commission decisions and are merely being reapplied in the instant matter. Second, CRA is an association of certificated retail cellular providers and in

that capacity represents in this complaint case both customers and competitors of Mobilnet. Given the inextricably linked interest of CRA's members, it is difficult to determine what "hat" CRA is wearing in this proceeding. CRA may itself be somewhat confused since it failed to object for over a year when it was clear that we had not issued a proposed decision within 90 days after the matter had been submitted for final decision as required by Section 311. Because CRA represents both customers as well as competitors of Mobilnet, this particular complaint for purposes of determining whether Section 311 requirements are applicable has the substantive quality of a customer complaint, and therefore no proposed decision is required. Finally, CRA has presented no evidence that it or its members have been harmed as a result of the absence of a proposed decision in this proceeding. Even if we were to find that Section 311 error existed, that error would be harmless. Therefore, we find that CRA's contention lacks merit and is rejected.

We have reviewed each and every allegation of the Application for Rehearing and believe that no grounds for rehearing are set forth. Having fully considered the issues raised by CRA, the Application for Rehearing is denied.

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WHEREFORE, IT IS ORDERED that:

1. CRA's Application for Rehearing of D.92-09-047 is denied.

This order is effective today.

Dated December 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