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Decision 95-10-019 December 6, 1995

to long distance carriers and that the pattern of conduct may be continuing and adverse to the public interest." (Order at p. 5.)

In Ordering Paragraph 5 of the Order, the Commission ordered Cherry to submit no more Primary Interexchange Carrier (PIC) changes to local exchange carriers (LECs) within California effective five days after service of the Order. The Commission

also directed that upon request from Cherry, a limited hearing would be held for the purpose of determining if there is cause to modify or vacate Ordering Paragraph 5. The Commission's Order also directed that a Prehearing Conference (PHC) be scheduled.

On October 24, the assigned Administrative Law Judge issued a ruling setting the PHC for November 6, 1995 and indicating that, upon request from Cherry, the limited hearing on Ordering Paragraph 5 would be held immediately after the PHC.

Subsequently, Cherry notified the assigned Administrative Law Judge that Cherry was switching counsel and that the new counsel was unavailable on November 6, 1995, and that the company wished to have a limited hearing. The PHC and limited hearing were reset for November 8, 1995.

At the PHC, the parties agreed to a schedule for the remainder of the proceeding. The adopted schedule is shown in Attachment 1 to this decision.

INTERIM OPINION

The Commission also ordered Cherry to refrain from filing lawsuits in any other forum outside California against California customers for matters arising out of the provision of utility service in California. (Order at Paragraph 4.) Pending resolution of this matter, Cherry has agreed to voluntarily cease filing such actions. Petition by Respondent Cherry Communications, Inc. to Stay, Suspend, or Vacate Ordering Paragraph 5 of the Commission's Order Instituting I.95-10-007 and Request for Mediation or Other Alternative Dispute Resolution Procedures (Cherry Petition) at Note 1. Cherry's request for alternative dispute resolution procedures was addressed at the PHC and is reflected in the schedule adopted at the PHC.

Immediately following the PHC on November 8, 1995, and continuing through November 9, 1995, a hearing was held on the limited issue of whether there was cause to modify or suspend Ordering Paragraph 5 of the Commission's Order. Based on the evidence presented at that hearing and contained in Cherry's Petition, and the parties' responses to it, this order disposes of Cherry's Petition.

On November 17, 1995, the assigned Administrative Law Judge sent a letter via facsimile to the active parties proposing an abbreviated schedule for the parties' comments and replies to comments on the Proposed Decision which would enable early Commission consideration of this matter. The letter sought the active parties' stipulation, as required by Section 311 of the Public Utility Code, to an abbreviated schedule. The parties stipulated with comments on the Proposed Decision due on or before December 1, 1995 at noon, and reply comments due on or before December 5, 1995 at noon. Cherry and Staff filed opening comments on December 1, 1995.

Evidence Presented at the November 8 and 9, 1995 Hearing  
Cherry Communications, Inc.

1. David Giangreco, President, Cherry Communications, Inc.

The first topic Mr. Giangreco addressed was the accuracy of Staff's characterizations of Pacific Bell's (Pacific) reports purporting to indicate that Cherry had "slammed" up to 5,571 customers. To demonstrate that Cherry had not slammed all customers shown in Pacific's report, Mr. Giangreco selected the month of August 1995 and began by pointing out that Pacific's own records showed that Cherry had substantiated over 536 of the 1,424 disputes reported, leaving 888 unexplained. Mr. Giangreco

then went on to offer into evidence a marked up version of Pacific's report with check marks by most of the names.

Cherry uses both employees and independent contractors. As used in this Decision, "sales representative" includes both.

(Exh. 29) The check marks indicated names for which Cherry had located Letters of Authorization (LOA) in the last two days (most of the 888 names). Mr. Giangreco testified that Cherry had found 586 LOAs in its files. Thus, he concluded, the Pacific data did not reflect actual sales by Cherry.

Mr. Giangreco also presented detailed testimony describing the verification process his company uses. As a background, Mr. Giangreco noted that Cherry does virtually no advertising. All of its sales are conducted by door-to-door sales representatives who are paid on a commission only basis. (The commission is based on the size of the customer's last long distance phone bill.) When a sales representative makes a sale, the representative calls Cherry from the customer's phone and gives the pertinent information. Cherry's verifiers then call the customer back and speak directly to the customer to verify the information.

Mr. Giangreco presented samples of the computer records kept by the company which showed instances where the verifier had found that the sales representative misrepresented him/herself as being a Pacific employee and where the verifier had determined that the customer was not, in fact, the subscriber for the identified line. (Exh. 8, 9.) Mr. Giangreco also provided a list of employees whose employment had been terminated by Cherry due to unacceptable practices. (Exh. 10.)

Mr. Giangreco described the impact of the Commission's Ordering Paragraph 5, prohibiting carrier-initiated PIC changes, as ultimately forcing Cherry to close its offices in California.

ASA disputes reported, leaving 888 unexplained. Mr. Giangreco

Mr. Giangreco presented a box which he stated contained the LOAs. The contents of the box were not offered into evidence. (Tr. 49-54.)

Cherry uses both employees and independent contractors. As used in this Decision, "sales representative" includes both.

He also pointed out that Cherry's rates are very attractive on a competitive basis, and that the Commission's order prevents California customers from taking advantage of these rates.

Mr. Giangreco acknowledged that Cherry has had some enforcement problems in the past in other states and with the Federal Communications Commission, but that by working with the regulators Cherry has been able to arrive at mutually agreeable arrangements which allow it to remain in business. Cherry is particularly displeased by the lack of communications from Staff prior to issuance of the order. Cherry contends that the first indication that there was a problem in California was upon being served with the Order, which, in its estimation, forced it to stop doing business.

Mr. Giangreco also admitted that his company targets customers with large long distance bills. This group includes recent immigrants, who frequently place international calls. For this reason, many of Cherry's customers are of Hispanic or Vietnamese descent. Cherry provides LOAs in either English or Spanish.

In sum, Mr. Giangreco's testimony challenged the accuracy of the information upon which Staff's declarations are based, described Cherry's verification program, delineated the hardship that the Commission's order places on both Cherry and its customers, and relayed Cherry's surprise at the OFI but its willingness to work with Staff to resolve the issues.

2. Neil Hartigan, Regulatory Compliance Consultant

Mr. Hartigan has had a long employment history in a variety of government and private regulatory positions. Mr. Hartigan's firm has advised Cherry on its verification program for the past three years. Mr. Hartigan noted that verification is important because with commissions there's an incentive to cheat, or potentially there could be an incentive to cheat."

(Tr. 712) Mr. Hartigan echoed Mr. Giangreco's dismay that Staff had not contacted Cherry to informally resolve this matter.

Mr. Hartigan presented a two-page document entitled "Cherry Communications, Inc., Proposal For Enhanced Internal Compliance Program" (Exh. 3). This document set out several enhancements to its national verification program which Cherry intends to immediately implement in California.

**Sandy McGreevy, Regulatory Group Manager for Access and Third-Party Billing Issues**

Ms. McGreevy presented testimony on how Pacific receives and records PIC dispute information. She specifically described the PIC dispute report which formed the basis for portions of Staff's testimony.

Ms. McGreevy explained that Pacific carefully screens customer complaints to ensure that only allegations of unauthorized service switches are captured in the PIC report. Pacific notifies the carrier of the customer's allegation and gives the carrier 45 days to present some type of documentation supporting the switch. If the carrier presents documentation, which Pacific does not further investigate, then the carrier is not charged \$20.05. Absent such substantiation, the carrier is charged \$20.05 per customer unauthorized switch complaint.

Pacific prepares a monthly Subscription Management Report which reflects the number of carrier-initiated PIC changes and disputes received against each carrier. Ms. McGreevy's data shows that Cherry serves approximately .17% of the subscribed lines in Pacific territory. Cherry, however, accounts for 2.07% of all carrier-initiated PIC changes, and 4.34% of all disputes. Thus, Cherry's PIC dispute rate is more than twice its share of all carrier-initiated PICs.

... or potentially there could be an incentive to cheat.

CPUC Enforcement Staff

1. Fred Patterson sponsored his previously filed declarations and was available for cross-examination. His declarations recount his investigation. Mr. Patterson interviewed authorities in other states that have filed enforcement actions against Cherry. In each case, a similar pattern emerged after receiving a large number of complaints against Cherry, the regulators would take action and then Cherry would negotiate a settlement, perhaps paying a fine, and remain in business. Mr. Patterson also interviewed customers who had complained to Pacific. Each of the customers indicated that they did not intend to switch their service to Cherry.

2. Stormy Maddux

Ms. Maddux sponsored her previously filed declarations and was available for cross-examination. Her declarations describe her investigation which focused on the records obtained from GTE California Incorporated (GTE). The records show that Cherry provides service to relatively few customers (approximately 6,000 as of August 1995) in GTE's service area. In her supplemental declaration, Ms. Maddux recounted her interviews with several people that had been approached by a Cherry rep who claimed to be from Pacific. Ms. Maddux also interviewed former U.S. Congressman Bob Wilson and his wife, Margaret Erickson, who reported that they had been slammed by Cherry.

3. Hossein Salaami

Mr. Salaami sponsored his previously filed declarations and was available for cross-examination. Mr. Salaami's testimony centered on Jere Green of Jere's Interiors, who alleged she had been slammed by Cherry. The signature on the Cherry LOA does not match Ms. Green's. Mr. Salaami also interviewed Judith Rupe of



Due process obligations are also imposed on the Commission by the California and U.S. Constitutions. Assuming that Cherry's interest in filing carrier-initiated PIC changes is a property interest, then deprivation of such an interest by the Commission would impose due process requirements. These requirements allow the Commission to issue an order without prior notice and hearing where it has an important interest in the matter and where there is sufficient assurance that the order is not baseless or unwarranted. (*FDIC v. Mallen*, 486 U.S. 230, 240 100 L.Ed.2d 265; 108 S.Ct. 1780 (1988)). Here, the Commission has important interests in protecting the public from unauthorized long distance service switches as well as in protecting the competitive market for long distance service from unfair competitors. The Commission received detailed declarations from its Staff with supporting documents. Thus, the Commission acted in accord with Supreme Court due process requirements in deciding to prohibit Cherry from filing carrier-initiated PIC changes.

The Commission's process also comports with that set out by the California Supreme Court in *Sokol v. PUC*, (1966) 65 Cal.2d 247, 256, 53 Cal.Rptr. 673, 418 P.2d 265. Applying this standard, the Commission, through its enforcement staff, may act against a regulated entity without prior notice and opportunity to be heard if an impartial tribunal, the Commission, finds probable cause to act and the regulated entity is allowed a prompt hearing following the Commission's action. In this case, the Commission reviewed Staff's allegations, found cause and afforded Cherry a prompt hearing.

In Cherry's reply to responses to its Petition, Cherry offers information for the first time suggesting errors in the Commission's decision. The Commission also must grant Cherry a prompt hearing after the deprivation. Here, Cherry has not questioned the promptness of the hearing and, indeed, sought and received a two-day delay.

Discussion

Cherry exclusively uses door-to-door sales representatives who are paid on a commission-only basis. The sales orders obtained by these sales representatives are verified by telephone by Cherry's verification staff in Illinois. Nevertheless, while this verification program has been in place, Cherry's dispute rates, as reported by Pacific, have dramatically and disproportionately increased. Cherry challenges the accuracy of Pacific's report by demonstrating that it has on file LOAs that relate to the customers listed on the report. Interviews with customers have repeatedly shown allegations that the Cherry sales representatives misrepresented themselves and the nature of the document customers are urged to sign. Documents have also been produced which show inconsistent customer signatures leading to allegations of forgery. Cherry has not offered any evidence refuting the facts that over 5,000 customers contacted Pacific and alleged that they had been slammed and requested to be returned to their previous carrier. The alleged misrepresentations, coupled with the requests to leave Cherry, undermine the reliability of the purported LOAs. Cherry produced Pacific's records and witness accounts indicate that Cherry sales reps have used unlawful tactics. Cherry has the burden of showing cause why ordering Paragraph 5 should be modified or vacated; it has not met such burden. Cherry's practices are troubling as they are in and of themselves, are aggravated by the type of customers Cherry targets. As a preliminary matter, Cherry is in the business of

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\* In Cherry's reply to responses to its Petition, Cherry offers information for the first time suggesting errors in Pacific's compilation. Cherry, however, has not sought to have the information admitted as evidential. For this reason, Staff's motion to strike it is premature and therefore denied. The hearing and

selling long distance telephone services. It is commercially reasonable for Cherry to seek out customers which are likely to use large amounts of its services. One such group is recent immigrants. The Commission does not directly challenge Cherry's business plan.

The Commission, however, is responsible for ensuring that the public is protected from unscrupulous practices by certificated resellers. The Commission's responsibility is particularly acute where, as here, unsophisticated customers are targeted by firms using aggressive and allegedly duplicitous door-to-door sales tactics. 21 CPUC 2d 1821 (1986) Part 6.

In sum, the PIC disputes report by Pacific shows a troubling increase in disputes with Cherry's carrier-initiated PIC changes which Cherry has not successfully explained. Cherry's target customers include a large proportion of generally unsophisticated consumers. For these two reasons, the Commission finds that the public interest requires that the carrier-initiated PIC change prohibition established in the Commission's Order remain in effect pending resolution of this docket. Cherry's petition is denied.

During the pendency of this proceeding, Cherry may continue to provide long distance service in California to its existing customers. Cherry may also add new customers but must do so through alternative means. As was presented during the hearing, upon request from a customer, Pacific and presumably other LECs, will switch customers from one long distance service to another in this manner. Cherry may continue soliciting and adding new customers.

Findings of fact: Cherry exclusively uses door-to-door sales representatives who are paid on a commission only basis.

2. Cherry's sale orders are verified via telephone by Cherry's verification staff in Illinois.

3. During the time Cherry's verification program has been in place, Cherry's dispute rates, as reported by Pacific, have not dramatically and disproportionately increased. 4. Interviews with Cherry customers by Commission Staff and Pacific have repeatedly shown allegations that the Cherry sales representatives misrepresent themselves and the nature of the document customers are urged to sign.

5. The reported misrepresentations and the undisputed requests to leave Cherry, undermine the reliability of the purported LOAs Cherry produced.

6. Pacific's PIC dispute records and witness accounts allege that Cherry sales representatives have used unlawful tactics.

7. Cherry has not met its burden of proof which PIC changes which Cherry is in the business of selling long distance telephone service.

8. Upon request from a customer, Pacific will switch customers from one long distance carrier to another.

Conclusions of Law

1. Cherry bears the burden of proof on the issues resolved in this decision, and has failed to meet that burden.

2. It is commercially reasonable for Cherry to seek out customers which are likely to use large amounts of its services. One such group is recent immigrants.

3. The Commission is responsible for ensuring that the public is protected from unscrupulous practices by certificated resellers. The Commission's responsibility is particularly acute where unsophisticated customers are targeted by firms using aggressive and allegedly duplicitous door-to-door sales tactics.

4. The public interest requires that the carrier-initiated PIC change prohibition established in the Commission's Order remain in effect pending resolution of this docket.

Cherry's verification staff in Illinois.

5. Cherry's authorization to provide long distance service in California to its existing customers is unaffected by this decision.

6. Cherry's authorization to add new customers through means other than carrier-initiated PIC changes is unaffected by this decision.

7. The Motion of the Safety and Enforcement Division To Strike Portions of Cherry Communications Inc.'s Reply Comments is premature because the information has not been moved into the record.

INTERIM ORDER

Therefore, IT IS ORDERED that:

1. The Petition by Respondent Cherry Communications Inc. (Cherry), to Stay, Suspend, or Vacate Ordering Paragraph 5 of the Commission's Order Instituting Investigation 95-10-007 and Request for Mediation or Other Alternative Dispute Resolution Procedure, filed November 3, 1995, is denied, insofar as it requests changes to Ordering Paragraph 5.

2. The Motion of the Safety and Enforcement Division to Strike Portions of Cherry's Reply Comments is denied.

This order is effective today.

Dated December 6, 1995, at San Francisco, California.

DANIEL Wm. FESSLER  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH I. NEPPER  
Commissioners

**Adopted Schedule**

November 8, 1995	PHC and Limited Hearing.
November 9, 1995	Discovery begins.
November 16, 1995 9:00 a.m.	Parties' response to Cherry's Petition due, available for pick up at legal receptionist on 5th Floor.
November 17, 1995	Cherry's reply to Parties' response(s) due.
November 22, 1995	Cherry response to Commission questions due.
December 6, 1995	Last day to submit discovery requests. Must fax with hard copy follow-up.
December 19, 1995	Last day to respond to discovery requests.
January 10, 1996	Settlement report.
January 16, 1996	Cherry testimony due, including testimony on whether a bond or some other collateral should be required to assure funding to guarantee compliance with any orders issued in this proceeding.
January 29, 1996	Staff and other parties' testimony due.
February 5, 1996	Cherry rebuttal due.
February 7, 1996	Parties' Estimate of Cross-examination.
February 13-16, 1996	Hearings.
February 23, 1996	Concurrent Briefs.