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Decision 96-02-021 February 7, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own)
 motion into the operations,)
 practices, and conduct of Cherry)
 Payment Systems, Inc., as parent)
 company to Cherry Communications,)
 Inc., and James Elliott, Chairman of)
 the Board of Cherry Communications,)
 to determine whether they have)
 complied with the laws, rules,)
 regulations and applicable tariff)
 provisions governing the manner in)
 which California consumers are)
 switched from one long-distance)
 carrier to another, and other)
 requirements for long-distance)
 carriers.)

ORIGINAL

Investigation 95-10-007
(Filed October 18, 1995)

**ORDER TO SHOW CAUSE WHY CHERRY COMMUNICATIONS, INC.
 SHOULD NOT BE SUBJECT TO SANCTIONS FOR VIOLATING
 ORDERING PARAGRAPH 5 OF COMMISSION ORDER INSTITUTING
 INVESTIGATION 95-10-007**

Background

On October 18, 1995, the Commission issued an order directing Cherry Communications, Inc. (Cherry) to, among other things, "submit no more PIC changes to local exchange carriers within California." Order Instituting Investigation and Order to Show Cause Why Cherry Communications' Certificate of Public Convenience and Necessity Should Not Be Revoked, mimeo., at 7-8 (OII). This prohibition was effective five (5) days after

¹ A "PIC change" is a request transmitted by an interexchange carrier in writing or electronically to a local exchange carrier to change a customer's presubscribed (or primary) interexchange carrier.

service of the OII on Cherry's agent for service of process in California. Id. Such service was completed on October 24, 1995. Reference Exhibit 2, November 8 and 9, 1995, hearings. Based on the Commission's rule for computation of time, the prohibition became effective on October 30, 1995. See Commission Rules of Practice and Procedure 8.13.

On November 8 and 9, 1995, the assigned Administrative Law Judge held a prehearing conference and a hearing on the limited issue of whether the PIC change prohibition should be lifted during the pendency of this proceeding. On December 6, 1995, the Commission issued Decision (D.) 95-12-019 in which it found that the public interest required maintaining the PIC change prohibition during this proceeding.

Commission Safety and Enforcement Division's Motion

On January 24, 1996, the Commission's Safety and Enforcement Division filed a pleading entitled "Motion By The Safety And Enforcement Division For An Order To Show Cause Why Cherry Communications, Inc. Should Not Be Held In Contempt For Failure To Comply With Ordering Paragraph 5 Of The Commission's Order Instituting Investigation No. 95-10-007" (S and E Motion). In the S and E Motion, the Safety and Enforcement Division alleges that after the PIC change prohibition became effective, Cherry nevertheless continued to submit PIC changes to local exchange carriers.

In support of its allegations, the Safety and Enforcement Division presented the declaration of Commission Investigator Fred Patterson. In his declaration, Mr. Patterson describes documents he received from Pacific Bell and GTE California. The Pacific Bell documents, copies of which are attached to Mr. Patterson's declaration, appear to show that Cherry continued to submit PIC changes to Pacific Bell up to, and including, November 15, 1995. GTE California also provided

Mr. Patterson documents which appear to show that Cherry continued to submit PIC changes up to December 19, 1995.

In response to a data request from the Safety and Enforcement Division, Mr. Patterson stated that Cherry admitted that it had switched 421 customers since October 29, 1995. Cherry attributed the post-October 29, 1995 switches to delays in processing by the local exchange carriers, errors by the local exchange carriers, and inadvertent errors by a data processor.

Cherry Response

On February 1, 1996, Cherry submitted its response to the S and E Motion. Cherry stated that it submitted 262 PIC changes to Pacific Bell during the time period October 30, 1995, to November 15, 1995, and 126 to GTE California. Cherry addresses these PIC changes in four categories. First, 151 of the 262 changes to Pacific Bell were submitted on October 30, 1995. Cherry mistakenly believed that Ordering Paragraph 5 did not become effective until October 31, 1995. Seventeen of GTE California's PIC changes fall in this category. Second, of the 262 PIC changes recorded by Pacific Bell, Cherry's records disagree with Pacific Bell's in 16 instances and with GTE California's in two. Specifically, Cherry's records show that these PIC changes were submitted before October 29, 1995. The third category of post-October 29, 1995, PIC changes are those that were automatically added due to a previously submitted PIC change. This accounts for 30 of Pacific's 262 late changes. Finally, Cherry attributes the remaining 64 Pacific and 107 GTE California PIC changes to error by a lone data-entry clerk. Cherry stated that it regretted that these changes occurred. Cherry also points out that it has substantially complied with the OII by eliminating 99 percent of its former volume of PIC changes.

Discussion

Section 701 of the Public Utilities Code gives the Commission broad authority over public utilities operating in California:

"The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Cherry is subject to the Commission's authority because Cherry is a certificated reseller of interexchange telephone services. See D.93-03-015. The Commission acted pursuant to Section 701 when it ordered Cherry to cease submitting PIC changes to local exchange carriers in I.95-10-007.

The sanctions for violation of the Commission orders are established in, inter alia, Public Utilities Code Sections 2107 and 2113. Should the Commission find that the facts merit such sanctions, the Commission has relied on these sections to issue substantial fines. See, e.g., D.94-11-018, and decisions cited therein.

The Safety and Enforcement Division has alleged serious and direct violations of an order of this Commission. When the Commission issues an order containing a specific, clearly articulated prohibition, we expect it to be followed to the letter. The evidence submitted by the Safety and Enforcement Division is sufficient to support a finding that good cause exists to believe that Cherry has violated portions of a Commission order. If proven, such conduct is adverse to the public interest.

For these reasons, we grant the Safety and Enforcement Division's motion and order Cherry to show cause why we should not impose any or all authorized sanctions for violation of a

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Commission order. Due to the gravity of these allegations, we desire that this matter be heard expeditiously. We are, therefore, setting the hearing on the limited issues discussed herein for Tuesday, February 27, 1996, at 9:00 a.m., in the Commission's San Francisco hearing rooms. Should need arise, the assigned Administrative Law Judge may reschedule this hearing.

Therefore, IT IS ORDERED that Cherry shall appear at the date and time set out above and show cause why the Commission should not impose any or all authorized sanctions for Cherry's violation of a Commission order by continuing to submit PIC change to local exchange carriers after October 30, 1995.

This order is effective today.

Dated February 7, 1996, at San Francisco, California.

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