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Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's)
 own motion into the operations,)
 practices, and conduct of)
 Communication TeleSystems Interna-)
 tional and Edward S. Soren, President)
 of Communication TeleSystems Interna-)
 tional 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 require-)
 ments for long distance carriers.)

ORIGINAL

I.96-02-043
(Filed February 23, 1996)

INTERIM OPINION

Background

On February 23, 1996, the California Public Utilities Commission (Commission) issued its Order Instituting Investigation and Order to Show Cause Why Communication TeleSystems International's Certificate of Public Convenience and Necessity Should Not Be Revoked (OII). The investigation was premised on allegations of unauthorized transfers of customers and other unlawful activity by Communications TeleSystems International (CTS). The Commission and the parties to the proceeding, established a detailed procedural schedule to resolve preliminary issues and bring the matter to full evidentiary hearings, which began on May 29, 1996.

On May 21, 1996, the Greenlining Institute and Latino Issues Forum (Greenlining), intervenors in this proceeding, filed

their Motion By Intervenors Greenlining Institute and Latino Issues To Require CTS To Post Bond Sufficient For Restitution to Slamming Victims (Greenlining Motion). In their motion, Greenlining stated that "Intervenors have little evidence and no assurances that (CTS) will not decide to flee the jurisdiction should its license be revoked or should it be ordered to pay significant restitution to those customers whom the PUC believes to have been unlawfully switched." (Greenlining Motion at 3.) Greenlining also estimated the fund needed to provide minimal restitution to customers unlawfully switched is between five and 16 million dollars. (Greenlining Motion, Gnaizda declaration at 2.)

CTS filed its opposition to the Greenlining Motion on May 24, 1996. While much of the specific contents of the opposition has been ~~been~~^o ordered held under seal by the Law and Motion Administrative Law Judge (ALJ), CTS' opposition can be summarized as stating that procuring the bond would impose drastic burdens on CTS and that such burdens cannot be justified based on the current evidentiary record.

Also on May 24, 1996, the Commission's Safety and Enforcement Division (S&E) filed its response in support of Greenlining's request. S&E stated the Commission has previously secured the funds of companies it regulates to ensure restitution to customers. S&E cited Sonic Communications dba SCI Communications, (Investigation (I.) 95-02-004) as an example) (Sonic).

On May 28, 1996, Greenlining filed its reply to CTS's opposition. Greenlining suggested that its initial estimate of amounts CTS may be ordered to pay were too low, citing Public Utilities (PU) Code Section 2107.

With the permission of the assigned ALJ, on June 3, 1996, CTS filed its sur-reply to Greenlining's reply. In addition to

several challenges to the legal analysis in Greenlining's reply, CTS stated that Greenlining's reply contained several factual errors.

Discussion

Providing California consumers with sufficient avenues for redress of wrongful conduct by telecommunications carriers is a critical component of the Commission's duty to regulate in the public interest. In the particular area of unauthorized transfer of customers, the Commission, despite its best efforts, has previously found itself unable to ensure full redress to California consumers. (Sonic, I.95-02-004 (filed February 8, 1995). Given this history, the Commission is eager to take all lawful steps to protect California consumers.

A. The Proper Measure of Redress to Consumers

The Commission's authority in the context of consumer redress for unauthorized transfer is limited by the Commission's constitutional and statutory powers. The Commission has no authority to order damages. (See, e.g., A.J.'s Communications v. Pacific Bell and GTE California, Decision (D.) 94-07-010 (July 8, 1994).)

In contrast, the Commission does have the authority to order reparations should it find sufficient evidence. Reparations are refunds of or adjustments to the utility charge for service. (In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers, D.94-09-065, mimeo. at 160 n. 36.)

In the Sonic case, the Commission found, based on the record, that Sonic's "high rates may have resulted in monthly charges to thousands of Californians two to three times higher than if the same intrastate long-distance calls had been billed at the rates of the subscribers' long-distance carriers of choice." (Sonic, 1995 Cal. PUC LEXIS 176, *4 (D.95-04-029).) The Commission

thus ordered Sonic to appear and show cause why the Commission should not, inter alia,

"(f)ind that reparations should compensate each of Sonic's intrastate long-distance subscribers for the difference between each subscribers monthly intrastate long-distance bill calculated at Sonic's rates and at the rates of the subscriber's carrier of choice, for every month that Sonic provided service prior to complying fully with the requirements of Public Utilities Code Section 2889.5." (Id. at *6.)

To ensure that funds would be available for reparations to these customers, the Commission had previously ordered the local exchange companies to hold certain funds otherwise due to Sonic. (Id. at *5.)

B. Reparations from CTS

In contrast to the case with Sonic, the evidence thus far elicited in this case does not support a finding that CTS' rates are substantially higher than other large carriers. A Pacific Bell witness has testified that transfer charges are reversed upon a complaint of unauthorized transfer. The customer is also returned to its carrier of choice. The Safety and Enforcement Division has alleged, however, several instances of misbilling which has had the effect of charging customers higher rates but these rates, unlike the rates at issue in Sonic, were contrary to tariffed rates. The scope of CTS' misbilling, as well as any refunds CTS may have issued, remains at issue in the proceeding.

In their Motion, Greenlining did not rely on reparations as their method of calculating the amount CTS

may owe its California customers. Greenlining, instead, based its calculations on a per customer penalty, apparently payable to the customer. (Greenlining Motion, Ganizda declaration, at 3.) Greenlining cited no authority for the Commission to impose such a penalty.

The Commission's residuary fine statute, PU Code Section 2107, provides that the Commission may levy fines of not less than \$500 nor more than \$20,000 per incidence of a utility failing to comply with a statutory requirement or a Commission order. While this could provide the basis for such a per-customer penalty, any amounts collected under this statutory authority are payable to the State Treasury to the credit of the General Fund. (PU Code Section 2104.)

In sum, Greenlining has failed to demonstrate that the record in this case could support a finding that substantial reparations would be due to California customers. Greenlining has provided no legal support for its method of calculating the amount potentially due to California consumers. Thus, there is no factual predicate, i.e., a potential obligation, for the Commission to require a bond in this case at this conjecture. For this reason, the issue of the Commission's authority to order a bond under these circumstances is moot.

C. The Commission's Residuary Fine Authority

Greenlining has, however, established the legal basis for a potential fine of between \$500 and \$20,000 per incident, PU Code Section 2107. In its reply, Greenling appears to suggest that PU Code Section 701 provides the basis for the Commission's authority to order a bond to ensure payment of a fine under this section. (Greenlining

Reply at 2.) Such a fine, however, would be payable to the State's General Fund.

PU Code Section 701 gives the Commission plenary authority to do all things necessary and convenient in the supervision of public utilities. Although not explicitly stated, this code section has been interpreted to be limited to actions which protect the public. (See, e.g., Investigation of Miraflores Water Co., 60 CPUC 462, 468 (1963) ("basic duty of the commission is to protect the interests of public utility customers")) No precedent has been cited which suggests that the Commission could rely on this section as providing the authority to take actions to ensure payment of a fine to the State's General Fund.

Given the precarious asserted legal basis for the Commission's authority to order a bond to protect a potential payment to the State General Fund, the Commission is unwilling to test the bounds of Section 701 in this case. For that reason, the Commission will not order CTS to provide a bond to ensure this potential payment.

D. Enhanced Financial Monitoring

Although the Commission declines to order a bond in this case, this action should not be taken to suggest that the Commission is satisfied with CTS' financial state, in light of the potential fines and other sanctions to which it may be subject. To keep the Commission fully informed of the financial state of CTS, CTS shall provide the following

additional financial reports during the pendency of this proceeding:¹

1. As soon as practicable, after the conclusion of a calendar month, but in any event no later than the end of the following month, CTS shall provide the Commission its consolidating income statement and balance sheet for that month. The first such monthly report shall be for April 1996.
2. CTS shall notify the Commission in writing prior to taking any action that will materially and detrimentally affect the financial ability of CTS to pay substantial fines or immediately upon learning of any such action to be taken by any other person or entity.
3. In its first monthly report to the Commission, CTS shall state, on a year-to-date basis, the amounts paid to its individual senior executives. Such amounts shall be segregated between set salary payments and payments made on a commission basis.

Findings of Fact

1. The evidence thus far elicited in this case does not support a finding that CTS' rates are substantially higher than other large carriers.

2. Greenlining did not rely on reparations as their method of calculating the amount CTS may owe its California customers but rather based its calculations on

¹The Commission's authority to order such reports is found in PU Code Section 581 and its authority over the books of accounts of a utility is found in PU Code Sections 791 to 796.

a per customer penalty, apparently payable to the customer.

3. CTS' potential for substantial fines, warrant enhanced monitoring of its financial state.

Conclusions of Law

1. The Commission has no authority to order damages.

2. The Commission has the authority to order reparations. Reparations are refunds of or adjustments to the utility charge for service.

3. Under its residuary fine authority, the Commission may impose a potential fine of between \$500 and \$20,000 per incident against CTS.

4. Although PU Code Section 701 gives the Commission plenary authority to do all things necessary and convenient in the supervision of public utilities, no citation has been provided to precedent allowing the Commission to rely on this section to order a bond to protect potential payments to the State General Fund.

INTERIM ORDER

Therefore IT IS ORDERED that:

1. The Motion by Intervenors Greenlining Institute and Latino Issues Forum to Require Communications TeleSystems International (CTS) to Post Bond Sufficient For Restitution to Slamming Victims is denied.

2. CTS shall provide the financial reports as set out above.

This order is effective today.

Dated _____, at San Francisco, California.