

Decision 96-07-035 July 19, 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

Communication TeleSystems

International and Edward S. Soren,

President of Communication

TeleSystems International 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 for

ORIGINAL

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

sanctioned GTS' actions at the press conference constituted
alleged that GTS' actions at the press conference constituted

INTERIM OPINION

processors. Specifically, Greenlining requested that Commission

Background

(1) publicly censure GTS for its conduct, and (2) allow
The Commission established this proceeding to address
allegations that Communications TeleSystems International (GTS)
had, without proper authorization, switched consumers'
presubscribed long distance telephone carriers to GTS. Other
issues, generally regarding misbilling, have also emerged in this
proceeding.

On May 24, 1996, the assigned Administrative Law Judge
(ALJ) granted the unopposed motion for intervention by the
Greenlining Institute and the Latino Issues Forum (Greenlining)

abbreviated schedule so the parties received the full comment

JUL 21 1996

These organizations stated that they represent a myriad of ethnic minority business and social organizations throughout the state. Evidence had been presented by CTS that it targets ethnic minorities in its marketing. CTS had also submitted evidence regarding specific problems it, and other carriers, had in serving the ethnic market.

In an attempt to publicize its role in this proceeding, and specifically to seek witnesses, either consumers or CTS employees, Greenlining held a press conference in San Diego, California, on May 23, 1996. A number of CTS employees and managers attended the press conference.

On May 29, 1996, at the previously scheduled hearings in this proceeding, Greenlining moved the Commission for an order sanctioning CTS' actions at the press conference. Greenlining alleged that CTS' actions at the press conference constituted witness intimidation and interference with the Commission's processes. Specifically, Greenlining requested that Commission: (1) publicly censure CTS for its conduct, and (2) allow any witnesses who may have been intimidated, and who subsequently come forward to testify at the hearings.

Pursuant to a ruling by the assigned ALJ, Greenlining and CTS presented testimony and legal argument on this matter at the hearing on May 29, 1996. On June 11, 1996, the assigned Administrative Law Judge mailed the Proposed Decision on this matter with a cover letter requesting, pursuant to Public Utilities Code § 311, that the parties stipulate to an abbreviated comment period for the Proposed Decision. CTS did not agree to the abbreviated schedule so the parties received the full comment

period allowed by the statute and Commission Rule of Practice and Procedure 77. CTS filed comments on the Proposed Decision alleging that it was factually incomplete and misleading, that it was "fundamentally ill-advised," and that it should be rejected. (CTS Comments at 2.)

Greenlining also filed comments on the Proposed Decision taking issue with the nature of the apology offered by Mr. Abbott at the June 7 hearing. Greenlining also filed Reply comments taking issue with CTS' legal and factual assertions.

This interim decision disposes of Greenlining's motion.

Statement of Facts

The testimony did not reveal any fundamental disagreement about the basic facts of this matter.

On Thursday, May 23, 1996, beginning at 11:00 a.m., Greenlining held a press conference regarding this proceeding at a hotel in downtown San Diego. The previous day, Greenlining had sent a press release to various members of the San Diego press inviting them to the press conference. CTS learned of the press conference on May 23, 1996, at approximately 9:30 a.m. by receiving a facsimile of the press release from a press member. The press release invited potential victims and former employees to come forward and, among other things, claim their refunds.

The news of the then-impending press conference spread rapidly throughout CTS' offices. By 10:30 a.m. a group of approximately 100 CTS employees had assembled on the sidewalk at the main entrance to the hotel. This group comprised approximately one-third of all CTS employees on duty at that time. Several representatives to the press conference were not present. He also

A group of CTS employees had previously participated in a demonstration at a local television station regarding the station's depiction of CTS. On the day of the press conference these employees apparently had readily available picket signs from their earlier demonstration.

CTS' employees were described as being dissatisfied with the way their employer was being portrayed in the San Diego press. The employees were also fearful that they would lose their jobs if the Commission's Safety and Enforcement Division were successful in obtaining a revocation of CTS' operating authority in California.

Two employees, one of whom identified himself as the vice president of public relations, entered the room where the press conference would be held and approached John Gamboa, Greenlining's executive director, who was in charge of the event. The two employees informed Mr. Gamboa of the demonstration outside the hotel, and of the employees' intent to attend the press conference, but refused to give Mr. Gamboa their business cards.

Subsequently, all the approximately 100 employees left the sidewalk and moved into the hotel conference room. The conference room at the hotel seated up to 48 people. CTS employees filled each chair, except two occupied by members of the press. CTS employees lined the walls around the room and CTS employees spilled out through the single doorway into the hall. The employees filled the doorway to the room.

No witness could confirm that any member of the public who wished to attend the press conference was actually impeded by the CTS employees filling the doorway. Mr. Gamboa did indicate that several groups which had indicated that they would send representatives to the press conference were not present. He also

noted a much lower than expected turnout at the community conference on electric restructuring, at which Commissioner Daniel Wm. Fessler spoke, that immediately followed the press conference.

As the press conference proceeded, Mr. Gamboa asked each of those present to identify themselves. Other than approximately six members of the press, all present were employees of CTS. The CTS employees included Eric Lipoff, chief regulatory counsel; Holly Mead, vice president; Raul Rena, vice president; and Lourdes Borrego, vice president. CTS' chief operating officer, Roger Abbot, and its president, Edward Soren, were not in the office on May 23, 1996. Thus, other than CTS' acting chief financial officer, all members of senior management who were in the office were present at the press conference.

Throughout the press conference, the CTS employees attempted to question Greenlining's speakers. To allow members of the press first access to Greenlining's speakers, Mr. Gamboa requested that only questions from the press be presented, but that CTS would be allowed to have one speaker address the press after Greenlining's speakers. Throughout questioning by the press, the entire group of CTS employees would react to questions and answers with chants, hoots, hollers, and other attempts to interrupt the speakers.

In its comments on the Proposed Decision, CTS states that it disputes Greenlining's characterization of the demeanor of its employees. CTS' own witness confirmed that about 100 CTS employees attended the event (Tr. at 625-26) that CTS management acquiesced in these employees leaving their work stations in the middle of the work day (Tr. at 627-28) that the employees were paid for their time away from their work stations (Tr. at 629) and that when the crowd disagreed with comments by the press...

In response to a question regarding whether any threatening comments were made, Mr. Gamboa testified that:

"When a hundred people come marching into the room and you have seen them in a demonstration with signs and everything; and these are employees who may lose their jobs, that's threatening. They don't have to raise a fist and shake it in my face for me to feel intimidated."

"It was an intimidating move - that's what it was meant to do and it was successful. (Tr. at 617.)"

Mr. Gamboa also stated that at times during the press conference he, and others present, felt in physical danger. (Tr. at 605.)

After giving Mrs. Penal the promised opportunity to address the press, Mr. Gamboa called hotel security and asked that the room be cleared. The CTS employees left and Greenlining completed the press conference with only the members of the press present.

Subsequently, Mrs. Abbott decided that the pay for the employees who had left their work stations and participated in the

conference speakers they would express that disagreement in unison (Tr. at 634). CTS further did not dispute that it was necessary for Greenlining, with the assistance of hotel security, to ask all CTS employees to leave to enable Greenlining to finish the press conference (CTS Comments at 80) ultimately, CTS witness admitted that in retrospect he wished the employees had not attended the press conference. (Tr. at 630) CTS' counsel similarly conceded that it was obvious that the presence of 100 employees was not necessary to make CTS' views known. (Tr. at 664) Thus, although using different terms, "expressing disagreement in unison" vs. "hoots and hollers" the two parties' views do not reflect a fundamental disagreement on basic facts.

press conferences would not be docked for the time away from their work. No evidence was presented of any witness or identified potential witness in this proceeding that was actually intimidated by CTS's actions at this press conference.

Legal Issues

During oral argument, CTS counsel stated: "When all is said and done, your Honor, I will not trivialize what occurred. I will not dress it up in First Amendment flags and say everybody has a right to their views and that this has no implications of any kind that touch on the processes of the Commission." (Tr. at 666)

Counsel then continued with a logical and well-stated argument which fairly considered all the facts presented and carefully aligned them with applicable law and policy, ultimately concluding that the Commission lacked a sufficient factual basis for finding actual witness intimidation. Counsel's argument was persuasive and its conclusions were reflected in the Proposed Decision.

In contrast to the effectively presented oral argument, in their comments on the Proposed Decision CTS extensively relied on the First Amendment in defense of their actions. CTS alleged that "First Amendment protections are plainly implicated by the Commission's actions." (CTS Comments at 9:) CTS argued that the Commission's censure order would have a "chilling effect" on CTS employees and others who appear before the Commission who may wish to speak out at opposing parties' press conferences. (Comments at 10.)

CTS offers Aebisher v. Ryan, 622 F.2d 651 (2d Cir. 1980), as being factually similar to this case. CTS Comments at 10. In Aebisher, two teachers were reprimanded by school officials for speaking to the press regarding an assault on one of the teachers by a student. The letters of reprimand were directed at the teachers' decision to speak to the press: "your decision to use a public forum to express your viewpoints had a negative impact in at least two significant areas." (Aebisher at 653, n.2.)

Unlike the teachers in Aebisher, CTS' management is not being censured for their decision to communicate with the press, but rather for allowing their employees to interfere with another party's right to hold a press conference. CTS is free to communicate with the public or the press in whatever manner it deems appropriate, so long as their communication does not interfere with another party's similar rights.

Thus, CTS' First Amendment analysis is unsound in that it assumes an unfettered right to communicate with the press irrespective of other parties' rights to do the same.

CTS' First Amendment analysis is also incomplete in that it ignores long-standing legal precedent, that recognizes "expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions." (Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065.

A United States District Court for the District of Columbia, succinctly outlined the limits of the First Amendment:

"We begin with the proposition, which cannot be seriously contested that freedom of speech is not absolute. Certain types of speech are not protected by the First Amendment,

including such matters as libelous statements, a false cry of fire in a crowded theater, fighting words, and obscenity. Other types of speech are given only limited First Amendment protection, e.g., commercial speech, and speech mixed with conduct.

More directly to the point, the First Amendment clearly does not protect speech which interferes with the fair and unhindered administration of justice. Thus, this constitutional provision does not protect contempt of court even if the contempt takes the form of speech, it does not protect the right to picket in front of a courthouse, it does not prevent the court from enjoining litigants and lawyers from communicating to the press, and fact-finding processes mandated by the highest courts for the proper administration of the law.

Interference with this process is prohibited. See Laker Airways v. Pan American Airways, 604 F. Supp. 280, 288 (1984) (notes omitted).

For this reason, the Commission, like courts, The Commission's decision to require that all parties not of this state and other regulatory agencies, requires that parties interfere with each other's publicity efforts as well as attempts to gather witnesses is well within the limitations on the First Amendment. To fairly present their cases, parties must have a full opportunity to gather all relevant facts and witnesses. This is also consistent with Commission Rule of Practice and Procedure (Rule) 1, which requires parties to maintain the respect due the Commission and its processes.

In conclusion, CTS' contentions based on the First Amendment are without merit. The First Amendment does not bestow on CTS employees the right to interfere with another party's press conference regarding a matter before the Commission. Furthermore, the CTS spokesperson would have easily diffused the entire situation.

the Commission may permissibly limit expression to ensure full and fair presentation of facts and witnesses.

A second legal issue is whether management can properly be held accountable for their employees' action. The CTS employees who disrupted the press conference did so after leaving their work stations in unison, during their regular work hours. Management did nothing to stop them. In fact, senior management accompanied them. The employees' pay was not docked for the time they were away from their workstations. For these reasons, it is fair to conclude that CTS management considered the employees' actions to be in furtherance of CTS's interest.

Discussion

The proper functioning of the Commission's investigatory and fact-finding processes mandates the highest regard for the parties' efforts to locate witnesses. Interference with this basic function of the Commission can have the effect of undermining

entire proceedings. For this reason, the Commission, like courts of this state and other regulatory agencies, requires that parties fully respect each other's efforts to gather witnesses and present evidence.

Accordingly, the Commission carefully reviews allegations of witness intimidation to ensure that the validity of its processes are maintained. As with all Commission decisions, such review requires that the Commission make decisions based on the

² The record does not reveal any failed attempts by senior management to control its employees. Therefore, it is likely that a simple admonition to the employees to sit quietly while Greelining made its presentation and to await the presentation of the CTS spokesperson would have easily diffused the entire situation.

facts presented to it. In this case, the Commission lacks sufficient evidence to find actual witness intimidation by CTS because no specific witness or potential witness has been identified as having been intimidated.

If the Commission had found facts sufficient to support a finding of actual witness intimidation, the Commission could have found CTS to be in contempt. Public Utilities Code § 2113. The Commission could then have ordered CTS managers or employees fined up to \$1,000 or imprisoned for up to 5 days or both. Code of Civil Procedure § 1218. No such sanctions will be ordered because the Commission lacks sufficient evidence.

CTS' management's behavior in this matter, however, has shown a clear disregard for the potential of witness interference and/or intimidation. Virtually all of CTS' senior management was present at the press conference. CTS' regulatory counsel, who is directly involved in this proceeding, was present and observed the overflowing conference room and the disruptive chants, hoots, and hollers of his co-workers, necessitating clearing the room to continue the press conference. The Commission expects a higher regard for other parties' publicity and witness gathering efforts than has been demonstrated by CTS management.

Given the above-stated facts, censure is appropriately directed at CTS' management because they knew or should have known that the actions of their employees were likely to intimidate or otherwise interfere with Greenlining's witness gathering efforts.

To clearly inform CTS that it has failed to accord the Commission processes the respect required by Commission Rule 11, the Commission will grant Greenlining's motion for public censure of CTS' management for its actions in this matter.

Greenlining also sought a formal apology for CTS's conduct. Such an apology was made by Mr. Abbott during his testimony on June 7, 1996.

Findings of Fact

1. Greenlining held a press conference regarding this proceeding on May 23, 1996, with the stated purpose of gathering additional witnesses. Approximately 100 CTS employees and managers attended the press conference.

2. The CTS employees overfilled the conference room and filled the doorway.

3. The CTS employees were paid for their time away from their workstations while they attended the press conference.

4. Virtually all CTS management, including its regulatory counsel, attended the press conference.

5. No evidence was presented which showed that any specific or potential witness was actually intimidated.

6. The potential for witness intimidation was or should have been apparent to CTS management, particularly those familiar with this proceeding.

Conclusions of Law

The Commission is responsible for ensuring that all its proceedings grant all parties a full and fair opportunity to gather all nonprivileged relevant information.

The First Amendment to the United States Constitution does not confer on CTS employees a right to interfere with Greenlining's witness gathering process.

The Commission will grant Greenlining's motion for public censure of CTS management for its actions in this matter.

3. The Commission may, consistent with the First Amendment, require that parties respect each others' publicity and witness gathering efforts.

INTERIM ORDER

IT IS ORDERED that Communications TeleSystems International's senior management is censured for ignoring the potentiality of witness intimidation and/or interference at The Greenlining Institute and The Latino Issues Forum press conference on May 23, 1996.

This order is effective today.

Dated July 17, 1996, at Sacramento, California.

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