

Decision 96-10-051, October 25, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of GTE Card Services Incorporated

ORIGINAL

for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Inter- and IntraLATA Telecommunications Services Within the State of California.

INTERIM OPINION

Summary

The petition of AT&T Communications of California, Inc. (AT&T-C) to modify Decision (D.) 95-08-028 in the matter of the application of GTE Card Services Incorporated (GTE-CSI) is denied. The motion of GTE-CSI for relief from certain restrictions imposed in D.95-08-028 is denied without prejudice.

Background

On August 11, 1995, the Commission issued D.95-08-028 in the matter of the application of GTE-CSI. The authority to operate as a nondominant interexchange carrier (NDIEC) granted there contemplated that GTE-CSI would be able to seek modification of a condition which restricted the exercise of GTE-CSI's authority to provide certain resale telecommunications services within California.

AT&T-C filed its petition to modify D.95-08-028 on May 24, 1996. GTE-CSI filed its response on June 24, 1996.

No evidentiary record was developed for D.95-08-028, which was decided on the application and the written pleadings.

AT&T-C's petition to modify D.95-08-028 included no affidavit establishing new facts and, although the facts of various filings may be officially noticed, such notice does not establish the truth of the contents of such filings. Accordingly, no relevant

1 The condition was one that GTE-CSI agreed to in exchange for AT&T-C and other interested parties agreeing to withdraw their protests.

disputed facts exist that require an evidentiary hearing with respect to AT&T-C's petition.

GTE-CSI has suggested that the Commission take the occasion of AT&T-C's petition to modify D.95-08-028, to do so, but in a way fundamentally at variance with the requested modification. While GTE-CSI was specifically invited to petition the Commission with respect to Ordering Paragraph 17, which is also the subject of AT&T-C's petition, its petition should be treated independently of the petition of AT&T-C. (See Rule 47(h).)

The assigned administrative law judge (ALJ) ruled that GTE-CSI's response should, accordingly, be deemed to be the petition contemplated by Ordering Paragraph 17 and should be supplemented accordingly. GTE-CSI filed its response, and AT&T-C filed a reply to that response. Thus, the Commission has before it two competing proposals to modify D.95-08-028, one of which (sponsored by AT&T-C) would expand the scope of the restrictions imposed by Ordering Paragraph 17 and the other (sponsored by GTE-CSI) would eliminate those restrictions.

AT&T-C's Petition to Modify

AT&T-C asks us to modify Ordering Paragraph 17 as follows (additions in italics):

Applicant shall not, in the exercise of the authority granted hereby, market prepaid calling cards, or any other services it may later be allowed to provide, through GTE California Incorporated (GTEC) nor shall it provide services other than prepaid cards, provided, however, that should the consent decrease in United States V. GTE Corporation (D.C. Cir. 1984) 603 F.Supp. 730 be dissolved or modified as it relates to GTEC (as a GTE operating company as defined therein) by the federal courts or the United States Department of Justice such that application would be permitted thereunder to market such cards or other services through GTEC, applicant may petition the Commission for relief from this restriction and for approval of its subsequent marketing plan, and for

relief from the restriction on the services it may provide.

AT&T-C argues that it was misled by GTE-CSI's original application into believing that GTE-CSI would restrict its operations solely to prepaid card services and would not engage in the general business of being an all-purpose toll provider under its switchless reseller authority. AT&T-C believes that we treated GTE-CSI differently from other NDIECs by restricting it to a specific market segment through Ordering Paragraph 17. This view is mistaken.

The plain meaning of Ordering Paragraph 17, which AT&T-C participated in developing, is that GTE-CSI would not resell card services through GTE. If the parties had intended the Commission to restrain GTE-CSI from selling any services through GTE, they could easily have found language as plain as that adopted to accomplish that end. If AT&T-C wished to propose restrictions on GTE-CSI as to the types of services offered, it should have done so at the time of the original application. It is not inconceivable that another record may have supported a different Ordering Paragraph 17 than was adopted, which granted a certificate of public convenience and necessity to GTE-CSI to operate as a reseller of the interLocal Access and Transport Area (LATA) and, to the extent authorized by D194-09-065, intralATA telecommunications services offered by communication common carriers in California. AT&T-C elected not to offer evidence to show why GTE-CSI's operating authority should have been restricted solely to card services other than that it was misled by an unwarranted assumption that the sole restriction not otherwise applicable to switchless resellers generally was the one contained in Ordering Paragraph 17, which AT&T-C endorsed.

GTE-CSI's Request for Relief

GTE-CSI correctly points out that Ordering Paragraph 17 contemplated a change in the restrictions imposed on its

operating authority, in the event that the consent decree mentioned there were no longer operative. GTE-CSI cites Section 601(a)(2) of the Telecommunications Act of 1996 (Telecom Act) to establish that the decree is now void and of no force and effect.

We suppose that something could be made of the fact that the decree was terminated by legislation rather than by judicial action or motion of the antitrust authorities, but we do not think that is an important distinction for the purposes for which Ordering Paragraph 17 was adopted. Ordering Paragraph 17 contemplated that the decree might lapse and, now that it has, it is unimportant exactly why it lapsed. What is important is that in lieu of litigating the application, GTE-CSI and the interested parties agreed that the Commission should revisit the relationship between GTE-CSI and GTEC when the decree was no longer in effect.

GTE-CSI cites Section 253(a) of the Telecom Act that prohibits us from imposing any requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. If we read that part of the statute so broadly as GTE-CSI suggests, we would be completely pre-empted from any regulation of any NDIEC whatsoever. That, however, is not what the Telecom Act commands. It merely prevents us from prohibiting GTE-CSI from providing any telecommunications service; it does not prevent us from imposing reasonable restrictions on GTE-CSI's providing of such services.

GTE-CSI now complains that it is being singled out for special treatment not generally applicable to NDIECs. That restriction was its choice, and it must now live with the consequences.

Finally, GTE-CSI finds itself "unable at this time to provide any specific details for marketing prepaid calling cards through GTEC" and does not think it should be required to do so. It need not provide any such details. But until it does, the

restrictions in Ordering Paragraph 17 of D.95-08-028 will remain in full force and effect.

Findings of Fact

1. On August 11, 1995, the Commission issued D.95-08-028 in the matter of the application of GTE-CSI. The authority to operate as an NDIEC granted there contemplated that GTE-CSI would be able to seek modification of a condition which restricted the exercise of GTE-CSI's authority to provide certain resale to telecommunications services within California.

2. The Telecom Act removed the restrictions of the consent decree referred to in Ordering Paragraph 17 of D.95-08-028.

3. AT&T-C filed its petition to modify D.95-08-028 on May 24, 1996. GTE-CSI filed its response on June 24, 1996. No evidentiary record was developed for D.95-08-028, which was decided on the application and the written pleadings. AT&T-C's petition to modify D.95-08-028 included no affidavit establishing new facts.

4. GTE-CSI is unable to provide any specific details for marketing prepaid calling cards through GTEC.

5. There are no disputed issues of material fact.

Conclusions of Law

1. No public hearing is necessary.  
2. The plain meaning of Ordering Paragraph 17 of D.95-08-028 is that GTE-CSI would not resell card services to GTEC. D.95-08-028 does not restrict the scope of GTE-CSI's authority to only card services.

3. Section 253(a) of the Telecom Act prohibits us from prohibiting GTE-CSI from providing any telecommunications service; it does not prevent us from imposing reasonable restrictions on GTE-CSI in the providing of such services.

4. D.95-08-028 should not be modified to make Ordering Paragraph 17 more restrictive.

Paragraph 17 should remain in force and effect until such time as GTE-CSI obtains approval from this Commission of its marketing plan.

6. The following order should be effective immediately.

I N T E R I M O R D E R

IT IS ORDERED that the petition of AT&T Communications of California, Inc. to modify Decision (D.) 95-08-028 is denied and the petition of GTE Card Services Incorporated for relief from the restriction imposed by Ordering Paragraph 17 of D.95-08-028 is denied without prejudice.

This order is effective today.

Dated October 25, 1996, at Sacramento, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners

for marketing prepaid calling cards through GTEC.

Commissioner Daniel W. Pessler, being necessarily absent, did not participate.

1. No public hearing is necessary.

2. The plain meaning of Ordering Paragraph 17 of D.95-08-028 is that GTE-CSI would not resell card services to GTEC.

D.95-08-028 does not restrict the scope of GTE-CSI's authority to only card services.

3. Section 253(a) of the Telecom Act prohibits us from prohibiting GTE-CSI from providing any telecommunications service; it does not prevent us from imposing reasonable restrictions on GTE-CSI in the providing of such services.

4. D.95-08-028 should not be modified to make Ordering Paragraph 17 more restrictive.