

ORIGINAL

Decision 97-03-053

March 18, 1997

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.)
 _____)

1,96-02-043
 (Filed February 23, 1996)

ORDER DENYING REHEARING OF
DECISION 96-05-050

Prior to January 20, 1996 Communications TeleSystems (CTS) used telemarketing to sell its services and submitted primary interexchange carrier (PIC) changes for its customers to local exchange companies (LEC's). (D.96-05-050, Finding of Fact 2, at 15.) At this time, CTS had the highest PIC dispute rate of the major companies which transfer customers having a Spanish language preference. (Id. at 16.) CTS accepted authorization to transfer long distance service from any member of a household who purported to be an adult with authority to make a decision but not necessarily the subscriber. (Id. at 16.) Also, CTS' telephone verification process produced transcripts which did not reliably indicate a subscriber's intent (Id. at 16.)

On February 23, 1996 we opened an investigation which ordered CTS to stop transferring customers because there was probable cause to believe that CTS had violated §2889.5 of the Public Utilities Code which requires a carrier to first ascertain the intent of the subscriber before a PIC change can be made. We also issued an Order to Show Cause why CTS' Public Convenience and Necessity Certificate should not be revoked. We then held hearings on the Order to Show Cause in early April of 1996. Based on the evidence from these hearings, we issued the challenged decision in May finding that CTS violated §2889.5 by making PIC changes with authorization from people other than the subscriber. (*Id.* at 16.) Further, we found the public interest required the PIC switching prohibition on CTS to remain in place pending resolution of the proceedings. (*Id.* at 17.)

CTS and the California Association of Long Distance Companies (CALTEL) [together referred to as "Petitioners"] filed applications for rehearing and argued that (1) we did not meet the proper standard for the preliminary injunction, (2) intent is required for a violation of §2889.5 of the Public Utilities Code and such intent was not found in this case, and (3) we was preempted by the Federal Communications Commission (FCC) from enacting a PIC freeze.

I. Preliminary Injunction

We along with the Civil Courts have found that generally four conditions must be satisfied to issue a preliminary injunction. They are (1) likelihood of prevailing on the merits; (2) irreparable injury; (3) no substantial harm to other interested persons; and (4) not contrary to the public interest. MCI Telecom Corp. v. Pacific Bell, D.95-05-020 citing; Westcom Long Distance, Inc. v. Pacific Bell, D.94-04-082, (1994) 54 CPUC

2d 244; H-10 Water Taxi Co. v. Universal Marine Corp., (1978) 84 CPUC 375; Eastern Airlines, Inc. v. Civil Aeronautics Board, (2nd Cir. 1958) 261 F. 2d 830.¹

In the instant case we properly evaluated these condition, as follow:

1. Likelihood of success on the merits:

We considered success on the merits by finding a likelihood that CTS violated rules and regulations pertaining to long distance carriers. We found that CTS: (1) accepted authorization to transfer from people other than the subscriber (Id., Finding of Fact 6, at 16.); (2) CTS' telephone verification process cannot produce transcripts which are reliable indicators of customer intent (Id., Finding of Fact 7, at 16); and (3) CTS had the highest PIC dispute rate for similar carriers. (Id., Finding of Facts 3, at 16.)

These facts show a strong likelihood that the Consumer Services Division will prevail in showing that CTS violated §2889.5 which requires carriers to specifically establish the intent of the subscriber to change carriers.

2. Probability of irreparable injury absent stay.

We considered the irreparable injury that slamming causes to subscribers when it considered the evidence which showed CTS targeted non-English speakers with aggressive sales tactics. Also, such evidence showed CTS ascribed affirmative intent to execute a PIC change to responses such as "silence" and "I not yet--". Further, CTS used innocuous sounding statements to confuse the subscriber. (Id., at 6; referring to exh. 6.)

3. No substantial harm to CTS.

¹ In the MCI case the four prong standard was used when two parties were suing each other and we were not in our prosecutorial capacity. However, in H-10 Water Taxi, we were in our prosecutorial capacity and applied the rule from Eastern Airlines, Inc. v. Civil Aeronautics Board, (2nd Cir. 1958) 261 F. 2d 830. The Eastern court granted a stay of an order of an administrative agency when: (1) the petitioner is likely to prevail on the merits of its appeal; (2) the petitioner has shown that without a stay it will suffer irreparable injury; (3) there is no substantial harm to other interested persons; and (4) the public interest will not be harmed. (Citing Virginia Jobbers Ass'n v. Federal Power Comm'n (D.C. Cir. 1958) 259 F.2d 921, 925.) In the Eastern case a publicly regulated company was not entitled to stay an order of the Civil Aeronautics Board when the Board was operating in its prosecutorial capacity.

California consumers comprise only 7% of CTS' customer base. CTS has no problem meeting its revenue goal of \$200 million with the interim prohibition in place. CTS' goal of \$200 million is an increase of \$90 million from the previous year. (Id. at 10, referring to Tr. at 86-87.)

Thus, we considered the fact that the interim prohibition would not cause CTS substantial harm.

4. Public Interest will not be harmed.

We stated explicitly that "[t]he public interest requires that the prohibitions established in the OII remain in effect pending resolution of this docket." (Id., Conclusion of Law 9 at 17.)

We considered each element of the four prong test and met the legal standards required for a preliminary injunction. Thus, we did not commit legal error in issuing the Preliminary Injunction and the applications for rehearing should not be granted on these grounds.

II. Public Utilities Code §2889.5

In the instant case neither ourselves nor our enforcement staff is required to show that CTS' violation of Public Utilities Code §2889.5 was intentional.

Public Utilities Code §2889.5 reads in pertinent part:

"(a) No telephone corporation, or any person, firm or corporation representing a telephone corporation, shall make any change or authorize a different telephone corporation to make any change in the provider of any telephone service for which competition has been authorized of a telephone subscriber until all of the following steps have been completed:

(1) If a subscriber is solicited by telephone or by some other method, other than by contact in person, by a telephone corporation or its independent representative, other than an employee of the telephone corporation, the corporation or its representative shall do all of the following: ...

(B) Specifically establish whether the subscriber intends to make any change in his or her telephone corporation and explain any charges associated with that change, and verify the subscriber's decision through one of the following means:.... (Emphasis added.)

Statutes in California can be violated without intent being an explicit element of such violation.

"Unless the intent with which an act is done is specifically made a necessary element of the crime by the terms of the statute [then] it is not necessary to allege or prove that the act is performed with the intent of violating the law. On the contrary, when intent is not specifically made a necessary element of the crime, the intent to violate the law will be presumed from proof of the unlawful act." People v. Murphy, (1936)17 Cal App. 2d 575, 585., citing to People v. Harris, 29 Cal. 678.² (emphasis added)

CTS argues intent should be required because the statute allows for punitive damages. However, because Public Utilities Code §2889.5 does not mention intent of the carrier as a needed element, under Murphy, CTS' intent to violate Public Utilities Code §2889.5 will be presumed from proof of their slamming activities.

Additionally, when the language of the statute is clear, the plain meaning should be followed. Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal. 3d 152, 153. One should not add to nor alter clear words to accomplish a purpose that does not appear on the face of the statute. California Teachers Assn. v. San Diego Community

²Murphy and Harris are valid in light of Morissette v. United States, (1951) 342 U.S. 246.

College Dist., (1981) 28 Cal. 3d 692, 698. In the instant case, CTS cannot add to nor alter the words of Public Utilities Code §2889.5 which clearly do not call into question the intent of the telephone carrier. Moreover, Public Utilities Code §2889.5 does not address punitive damages or any type of remedy. Thus, CTS' rationale to require intent is misplaced.

III. Federal Preemption

The Federal Telecommunications Act of 1996 does not preempt us from enforcing Public Utilities Code §2889.5 through a PIC freeze.

47 U.S.C. §258 provides in pertinent part:

"(a) Prohibition - No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as we shall prescribe. Nothing in this section shall preclude any state commission from enforcing such procedures with respect to intrastate services."

The language of §258 clearly indicates that our enforcement action against a carrier for violations of state laws regarding a PIC change for an intrastate service are not preempted by the Federal Telecommunications Act of 1996.

Furthermore, 47 U.S.C. §253(b) reinforces this state authority when it states:

"State regulatory authority. Nothing in this section [§253] shall affect the ability of a State to impose, ... requirements necessary to ... protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

In the instant case, we imposed the requirement on CTS to freeze PIC changes because such a requirement is necessary to protect the public welfare of minority consumers (*Id.*, Conclusion of law 8, at 17). It is also needed to ensure the quality of telecommunication services as pertaining to carrier switches because CTS has allegedly used duplicitous sales tactics. Further, it is needed to protect the rights of consumers who are subscribers that never actually authorized CTS to switch them. Thus, the Act supports a state's effort to initiate a PIC freeze to protect the consumer.

Additionally, we recently obtained an interpretative ruling regarding the preemptive effect of federal telecommunications law on our enforcement action regarding PIC freezes.

In that letter the FCC noted that §258 of the Act contains no language expressly prohibiting states from taking action to address the PIC change practices of telecommunications carriers. (Letter from Mary Beth Richards, Deputy Chief, Common Carrier Bureau, *Federal Communications Comm'n*, to Mark Fogelman, Public Utilities Counsel IV, California Pub. Util.'s Comm'n (July 3, 1996) (on file with the *State of California Pub. Util.'s Comm'n*.) Also, the FCC's letter found our interim action of ordering of a PIC freeze to protect consumers from a pattern of unauthorized PIC changes was consistent with the 1996 Act and not preempted by the Act. *Id.*

Further, the FCC states it has not acted to displace complementary state efforts to protect consumers from unauthorized PIC changes. Additionally, the FCC found that state action regarding slamming appeared to be consistent with the FCC's own regulatory efforts for interstate telephone service, and declined to preempt any state law regarding the unauthorized conversion of a consumer's long distance service. (*Id.*, *citing to* LOA Order, 10 FCC RCD at 9582-83.

The case the FCC letter was directed towards was CPUC v. Heartline, D.96-12-031, (1996) Cal. PUC LEXIS 148 which involved a carrier that allegedly

switched over 10,000 consumers' PIC's during a 4 month period without consumers' authorization. Of these consumers more than one-half indicated a Spanish language preference. As a result of the extremely high level of slamming and resulting harm to thousands of customers, we instituted an interim PIC freeze on Heartline pending further order.

Similarly, CTS allegedly switched an average of over 1,600 consumers' PIC's per month for over a year without consumers' authorization. (D-96-05-050 at 12). Like Heartline, CTS also marketed its service primarily to customers of particular ethnic groups. (Id. at 4). As a result of CTS' high level of slamming and targeting non-English speakers, we instituted an interim PIC freeze along the same lines as in the Heartline case. Any FCC decision regarding preemption as relates to the PIC freeze in Heartline would also apply to CTS' case. Thus, the interim PIC freeze in the instant case is consistent with federal law.

Therefore, because CTS and CalTel have not demonstrated legal error, both petitioners' applications for rehearing are denied.

We have reviewed all the other allegations of the applications for Rehearing and believe that no other grounds rehearing are set forth. Having fully considered the issues raised, Communication TeleSystems International and the California Association of Long Distance Telephone Companies Applications for Rehearing are denied.

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WHEREFORE, IT IS ORDERED THAT Communication TeleSystems International and the California Association of Long Distance Telephone Companies Applications for Rehearing of D.96-05-050 are denied.

This order is effective today.

Dated March 18, 1997, at San Francisco, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners