

Decision 97-09-112 September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Philip Ortega,

Complainant,

vs.

Fresno MSA Limited Partnership, GTE Mobile
Communications, Comtech Mobile Telephone
Company,

Defendants.

ORIGINAL

Case 92-12-037
(Filed December 21, 1992)

DECISION APPROVING SETTLEMENT AGREEMENT

Summary

In this decision, we approve a settlement agreement between the active parties—defendant Fresno MSA Limited Partnership (Fresno) and complainants Philip Ortega and Richard Kashdan (Complainants)—which distributes and calculates roaming¹ overcharge refunds and reimburses Complainants' legal fees and expenses.

Background

Complainants filed this complaint on December 21, 1992, challenging Fresno's roamer rate tariff. The case was submitted on a stipulated factual statement and subsequently filed briefs.

On September 29, 1995, the Commission mailed Decision (D.) 95-09-116 which ruled that Fresno's application of its ambiguous roamer rate tariff was improper and subject to refund. One of the tariffs in question (Advise Letter (AL) 16) stated that

¹ "Roaming" refers to the use of a cellular company's facilities by a customer of another cellular carrier (home carrier) when outside of the home carrier's service area.

"Customers entering the Fresno, Visalia, Bakersfield, Kings County CGSAs [Cellular Geographic Service Areas] as roamers will be charged \$2.00 per day and \$0.65 for each minute of use."² The other pertinent tariff (AL 30) was to the same effect. Neither suggested whether roamers could be charged more than one access fee per day. Fresno, however, had charged roamers separate access charges for the Fresno Metro Area (which included the Kings County and Visalia CGSAs) and the Bakersfield Metro Area. Noting that ambiguous tariff provisions are applied strictly against utilities, the Commission ruled that the \$4.00 maximum per day charged by Fresno "for roamer access exceeded the rate lawfully in effect...." The decision, furthermore, ordered that (1) the overcharges between December 21, 1989, and June 16, 1992, be subject to refund;³ (2) Fresno calculate the overcharges plus interest from June 16, 1992; (3) Fresno file with the Commission Advisory and Compliance Division (CACD) a report containing (a) the calculated overcharges; (b) a description of methodology for deriving those charges; and (c) a plan for refunding the overcharges.

On October 27, 1995, Complainants moved for rehearing and reconsideration. Complainants claimed that an informal complaint to CACD made by Richard Kashdan in late December 1991 or January 1992 had tolled the three-year statute of limitations. Therefore, they claimed, the date the first faulty tariff was filed, July 21, 1989, should serve as the starting date for calculation of refunds.

On December 27, 1995 (after an extension of time granted by the Executive Director on November 28, 1995), Fresno complied with Ordering Paragraph 3 of D.95-09-116. The compliance report contained a detailed description of calculation methodology and suggested that the funds be remitted to the overcharged home

² Previous tariffs had included the disjunctive "or" between the CGSAs and could clearly be read as requiring separate access charges. (see D.95-09-116, Findings of Facts 4-5.)

³ The effective date of the refunds was based not on the effective date of the pertinent tariff (AL 16, filed July 21, 1989) but on the three-year statute of limitations (Public Utilities (PU) Code § 736 [complaints for damages under PU Code § 494]); since the complaint had been filed on December 21, 1992, it could only relate back three years. (C.92-12-037 at p. 7.)

carriers "with the suggestion that the refund be disposed of among their current cellular customers pursuant to the third paragraph" of PU Code § 453.5. The overcharges exclusive of interest totaled \$137,070.

Subsequently, the parties entered into settlement discussions pursuant to Rule 51.1(b) and, being the only parties to the action, waived notice of the settlement conference. On March 27, 1997, the parties filed a joint motion seeking Commission approval and adoption of the proposed settlement agreement⁴ pursuant to Rule 51.1 of the Commission's Rules of Practice and Procedure. The parties state that they have reached a reasonable compromise which (1) calculates and distributes the overcharge refunds; (2) disposes of the pending application for rehearing and closes Case (C.) 92-12-037; and (3) reimburses complainants' legal fees.

Terms of the Settlement Agreement

Under the agreement, the parties have agreed that the method of determining the refunds described in Fresno's compliance report filed with CACD on December 27, 1995 is "fair and reasonable." The total refund amounts to \$171,394 including interest through February 28, 1997. Complainants will receive \$5,400 in legal fees and expenses from the lump sum. The remainder will be distributed, with recomputed interest as of date of payment, to home carriers in proportion to their roaming charges: Los Angeles SMSA Limited Partnership (\$101,465.67, 59.2%); Sacramento Valley Limited Partnership (\$31,536.63, 18.4%); GTE Mobilnet of California Limited Partnership (\$22,624.10, 13.2%); Airtouch Cellular (San Diego) (\$8,741.13, 5.1%); and GTE Mobilnet of Santa Barbara Limited Partnership (\$7,027.18, 4.1%). These distributions will be conditioned on their distribution to the home carriers' current customers. Complainants, further, agree to withdraw the application for rehearing and release Fresno from liability.

⁴The proposed settlement agreement is appended to this opinion as Appendix A.

Discussion

"The Commission will not approve stipulations and settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest." (Rule of Practice and Procedure 51.1(e)). Furthermore, uncontested settlements must be: (1) unanimous; (2) "fairly reflective" of the affected interests; (3) consistent with law and Commission decisions; and (4) sufficiently informative to "permit [the Commission] to discharge [its] future regulatory obligations with respect to the parties and their interests." (D.92-12-019 at 7.)

First, since defendants GTE and Comtech were dismissed, there is unanimity amongst the active parties. Second, Complainants and Fresno fairly reflect the affected interests, as the customers and the utility, respectively. Third, we agree with the parties that the refund and methodology used to determine it are reasonable. The record clearly shows that determining the overcharges with exactitude would be impractical, excessively burdensome if not impossible, inefficient, and without sufficient public benefit. Therefore, sampling is proper under the circumstances. Fourth, the \$5,400 in legal fees reimbursed to Complainants appears reasonable.

The only remaining question is whether the distribution scheme is consistent with the law and in the public interest. Because Fresno is not in possession of end-user billing records, pro-rata distribution to home carriers is reasonable, efficient, and consistent with PU Code § 453.5, which generally requires pro-rata distribution of refunds in proportion to customer usage. A distribution scheme that would require home carriers to distribute to those who were actually overcharged would be costly and would create a disincentive to distribution. The expense would effectively eviscerate the refund. While imperfect, the settlement, in light of the whole record, reflects the difficulty and expense of tracking down the overcharged roamers. Under these circumstances, we have no trouble finding the settlement to be in the public interest.

The record clearly shows that determining the overcharges with exactitude would be impractical, excessively burdensome if not impossible, inefficient, and

without sufficient public benefit: 1) the agreements allowing roamer service are between Fresno and other cellular carriers; 2) Fresno has no end-user customer billing records; 3) because of the passage of time and a high turnover rate in cellular customers, the carriers with which Fresno has roaming contracts are unlikely to have records that would correlate telephone numbers with individual customer billing records; and 4) because the refunds to the majority of the home carriers are small in relation to the burden of making the refunds more precise. Therefore, a refund based on sampling is proper under the circumstances.

Finally, the Agreement is conditioned on "the Commission's issuance of a final decision and order...releasing Fresno from any and all Commission imposed liability arising out of or in any way connected with Fresno's roamer rate tariff during the period covered by C.92-12-037." Our order here releases Fresno from any further liability connected with the complaint, C.92-12-037. While the statute of limitations for the period covered by C.92-12-037 has now run and the question of liability appears to be moot, it is beyond our authority to provide a blanket release to Fresno as to claims unknown to the Commission.

Findings of Fact

1. On December 21, 1992, Philip Ortega filed a complaint challenging Fresno MSA Limited Partnership's roamer rate.
2. On September 29, 1995, the Commission issued D.95-09-116 ordering Fresno to calculate refunds, and file a report describing those calculations and a distribution plan.
3. On October 27, 1995, Complainants moved for rehearing.
4. On December 27, 1995, Fresno filed a compliance report which described how the refund was calculated and a distribution plan.
5. The parties convened a settlement conference and, being the only parties, waived notice under Rule 51.1(b).
6. Subsequently, the parties jointly moved for the Commission adoption of a proposed settlement agreement pursuant to Rule 51 of the Commission's Rules of Practice and Procedure.

7. No comments were filed against the agreement.
8. The agreement commands the sponsorship of all active parties.
9. The sponsoring parties are reflective of the affected interests.
10. No term in the agreement appears to contravene either statutory provisions or prior Commission decisions.
11. The agreement provides sufficient information to the Commission to permit it to discharge its future regulatory obligations.

Conclusions of Law

1. Complainants' motion for rehearing and reconsideration of D. 95-09-116 should be dismissed.
2. C.92-12-037 should be dismissed.
3. Rule 51.1(b) of the Commission's Rules of Practice and Procedure should be waived.
4. The settlement is reasonable in light of the whole record, consistent with law, and in the public interest.
5. The joint motion for adoption of the proposed settlement agreement should be granted.
6. It is beyond the Commission's power in a complaint case to release a party from liability in excess of that which may be granted in a final judgment.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement between Fresno MSA Limited Partnership (Fresno) and Philip Ortega and Richard Kashdan (Complainants) reached in Case 92-12-037, set forth in Appendix A to this decision, is adopted and approved.
2. Fresno shall distribute the roamer overcharge refunds to home carriers on the condition that each recipient distribute its refund amount to its current customers, as set forth in Appendix A, within 30 days following the effective date of this order.

3. Fresno shall distribute \$5,400 to Complainants in reimbursement of legal fees and expenses within 30 days following the effective date of this order.

4. Complainants' application for rehearing and reconsideration of Decision 95-09-116 (filed October 27, 1995) is dismissed.

5. Case 92-12-037 is closed.

This order is effective today.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

President P. Gregory Conlon,
being necessarily absent,
did not participate.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
PUBLIC UTILITIES COMMISSION

Philip Ortega,)
Complainant,)
vs.)
Fresno MSA Limited Partnership,)
GTE Mobile Communications,)
Comtech Mobile Telephone Company,)
Defendants.)

MAR 27 1997
SAN FRANCISCO OFFICE
Case No. 92-12-037

JOINT MOTION OF FRESNO MSA LIMITED PARTNERSHIP
(U-3005-C), PHILIP ORTEGA AND RICHARD KASHDAN
FOR APPROVAL OF SETTLEMENT AGREEMENT
FOR CASE NO. 92-12-037

In accordance with Article 13.5 of the Commission's Rules of Practice and Procedure ("the Rules"), defendant Fresno MSA Limited Partnership ("Fresno") and Complainants Philip Ortega and Richard Kashdan (together "Complainants") have reached a settlement in the above-entitled matter with respect to all claims that are subject to or could become subject to this case. Pursuant to rules 51.1 and 51.10 of Article 13.5, they hereby move the Commission for adoption and approval of their Settlement Agreement ("the Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit A and incorporated herein by reference.

I. PROCEDURAL BACKGROUND

The Complainants filed a complaint (C. 92-12-037) with the California Public Utilities Commission ("Commission") on December 21, 1992, challenging Fresno's roamer rate tariff and Fresno's limitation of liability rule. The case was submitted on

a September 30, 1993 on a stipulated factual statement and subsequently filed briefs.

On September 29, 1995, the Commission mailed D. 95-09-116, in which it held that Fresno had misapplied its roamer rate tariff and ordered a calculation of refunds for the period December 21, 1989 to June 16, 1992. That decision upheld Fresno's limitation of liability rule. On October 27, 1995, Complainants filed an application for rehearing and Fresno filed a response on November 13, 1995. On December 27, 1995, Fresno filed with the Commission Advisory and Compliance Division a calculation of the refund amount and a plan for making the refund.

Complainants and Fresno desired to resolve this case on a consensual basis and therefore agreed to compromise, settle and adjust all claims which could have been asserted in the case on the terms and conditions set forth below contained in the Agreement.

Prior to executing the Agreement, Complainants and Fresno convened a settlement pursuant to Rule 51.1(b). As the only parties to this proceedings, the parties waived notice of the settlement conference.

Complainants and Fresno have agreed to a settlement that each believes reaches a reasonable compromise (a) for calculation of the refunds and the distribution thereof required by D. 95-09-116, (b) resolution of the pending application for rehearing, and (c) a determination of legal fees to be reimbursed to complainants.

II. THE SETTLEMENT AGREEMENT

Under the Agreement, (a) Fresno will make a roamer refund in the amount of \$165,994.71, (including interest through February 28, 1997), which reflects a reduction for the legal fees reimbursement to be made to Complainants and which will be adjusted for additional interest accruing to the date of payment; (b) the roamer refund will be distributed to Los Angeles SMSA Limited Partnership (59.2%), Sacramento Valley Limited Partnership (18.4%), GTE Mobilnet of California Limited Partnership (13.2%), Airtouch Cellular (San Diego) (5.1%), and GTE Mobilnet of Santa Barbara Limited Partnership (4.1%) on the condition that each recipient distribute its refund amount to its current customers; (c) Complainants will recover from the refund amount the sum of \$5,400 in reimbursement of legal fees and expenses in pursuing the complaint; and (d) Complainants' application for rehearing will be deemed withdrawn by the Complainants.

III. GROUNDS FOR ADOPTION OF THE AGREEMENT

Rule 51.1(e) provides in pertinent part that "[t]he Commission will not approve stipulations or settlements . . . unless the stipulation or settlement is reasonable in light of the whole record, consistent with the law, and in the public interest."

The Commission has discussed application of Rule 51.1(e) in two key, frequently cited decisions. See Pacific Gas & Electric Co., D, 88-12-083, 30 Cal. P.U.C. 2d 189 (1988) (contested settlement) and San Diego Gas & Electric Company, D.

92-12-019, 46 Cal. P.U. C. 2d 538 (1992) - all party, uncontested settlement, which GTEM and CSD have taken into account in arriving at the settlement.

Complainants and Fresno believe that the Agreement is fundamentally fair, adequate and reasonable and satisfies the requirements of Rule 51.1(e). The Agreement recognizes the insurmountable difficulties and prohibitive costs inherent in calculating a refundable amount in late 1995 effecting only a small portion of Fresno's cellular calls made during a two and one-half year period ending more than three years earlier, while at the same time producing a reasonable approximation of covered roamer calls during the period. Since the agreements allowing roamer service are between Fresno and other cellular carriers, Fresno could only trace roamer charges by telephone numbers assigned to the cellular carriers. Fresno has no end-user customer billing records. Because of the passage of time and a high turnover rate in cellular customers, those other carriers are unlikely to have records that would correlate telephone numbers with individual customer billing records. The refund amount will be allocated to three cellular carriers in proportion to the amount of roamer billings to those carriers on the condition that the refund be credited back to their customers generally.

Accordingly, after arm's length negotiations, Complainants and Fresno have mutually concluded that it is reasonable to settle this case on the terms set forth in the

Agreement, end further litigation and allow the refund to be made.

IV. CONCLUSION

Complainants and Fresno by this motion request that the Commission adopt the Agreement for the reasons set forth above; and Complainants as an integral part of that motion, request that the pending application for rehearing be withdrawn.

Dated: March 26, 1997

Respectfully submitted,

PHILIP ORTEGA
RICHARD KASHDAN

By Philip Kashdan
Richard Kashdan
Attorney for Complainants

Dated: March 25, 1997

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SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into this 25th day of March 1997, by and between Fresno MSA Limited Partnership ("Fresno") Philip Ortega and Richard Kashdan (together "Complainants"). Fresno and Complainants are sometimes collectively referred to as "Parties" or referred to individually as a "Party".

RECITALS

A. Complainants filed a complaint (C. 92-12-037) with the California Public Utilities Commission ("Commission") on December 21, 1992, challenging Fresno's roamer rate tariff and Fresno's limitation of liability rule.

B. The Parties submitted the case on a September 30, 1993 stipulated factual statement and subsequently filed brief.

C. On September 29, 1995, the Commission mailed D. 95-09-116, in which it held that Fresno had misapplied its roamer rate tariff and ordered a calculation of refunds for the period December 21, 1989 to June 16, 1992. That decision upheld Fresno's limitation of liability rule.

D. On October 27, 1995, Complainants filed an application for rehearing and Fresno filed a response on November 13, 1995.

E. On December 27, 1995, Fresno filed with the Commission Advisory and Compliance Division a calculation of the refund amount and a plan for making the refund. To date, there has been no response to that filing.

F. On January 22, 1996, Complainants advised Fresno of their intent to seek reimbursement of legal fees and expenses on a common fund theory; and on February 6, 1996, Fresno responded concerning the applicability of that theory.

G. The Parties desire to resolve this proceeding on a consensual basis and bring it to a close. The Parties have agreed to compromise, settle and adjust all claims which have been or could have been asserted in this proceeding on the terms and conditions set forth below in this Agreement.

H. The Parties have convened a settlement conference by telephone, having waived notice thereof as the only parties to this proceeding.

NOW, THEREFORE, for and in consideration of the mutual terms, covenants and conditions herein contained, the Parties agree as follows:

1. Within five (5) business days after execution of the Agreement, the Parties will file a joint motion seeking approval of this Agreement by the Commission, under Article 13.5 of the Commission's Rules of Practice and Procedure. The Parties agree to use their best efforts and to cooperate to obtain the approval of this Agreement by the Commission.

2. No press releases or other statements regarding this Agreement or matters relating to this Agreement shall be issued by either Party.

3. The effectiveness of this Agreement is contingent on the Commission's issuance of a final decision and order (a) approving this Agreement on terms no less favorable to Fresno

than those set forth herein; (b) dismissing the Complainant's application for rehearing and closing C. 92-12-037; (c) subject to Fresno's compliance with section 4 below, releasing Fresno from any and all Commission imposed liability arising out of or in any way connected with Fresno's roamer rate tariff during the period covered by C. 92-12-037, and (c) approving the payment of fees and expenses of the Complainants as specified in section 5 below. If no decision approving the Agreement is issued, the Agreement shall become null and void, and the obligations hereunder shall terminate.

4. The Parties agree that (a) the method by which Fresno calculated the roamer refund in its December 27, 1995 filing with the Commission is fair and reasonable for this proceeding; (b) as of February 28, 1997, the total refund amount is \$171,394.71, which includes interest through February 28, 1997 (the "Base Refund"); (c) the Base Refund will be distributed to Los Angeles SMSA Limited Partnership (\$101,465.67), Sacramento Valley Limited Partnership (\$31,536.63), GTE Mobilnet of California Limited Partnership (\$22,624.10), Airtouch Cellular (San Diego) (\$8,741.13), and GTE Mobilnet of Santa Barbara Limited Partnership (\$7,027.18) on the condition that each recipient distribute its refund amount to its current customers. Each recipient's portion of the Base Refund will be adjusted proportionately to reflect the addition of interest pursuant to D. 95-09-116 to the date of payment by Fresno to the three recipients noted above and the deduction of the amount payable pursuant to section 5 below.

5. The Parties agree that Complainants should recover from the refund amount the sum of \$5,400 in reimbursement of legal fees and expenses in pursuing the complaint.

6. The Parties agree that Complainants' application for rehearing will be deemed withdrawn by Complainants, and Complainants will include in the motion to be filed pursuant to section 1 above a request that the Commission dismiss that application for rehearing.

7. Complainants and each of them releases and discharges Fresno from any and all claims, liabilities or obligations of every kind and nature, whether now known or unknown, suspected or unsuspected, which either ever had, now has, or might have against Fresno as of the date of this Agreement. Complainants and each of them acknowledge that there may exist claims or facts in addition to or different from those which are now known or believed by them to exist and represent that, by means of this release, it is their intention to fully settle and release all such claims, whether known or unknown; and each therefore expressly waives the protection of California Civil Code section 1542, which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

8. The positions taken herein, and the actions taken in furtherance of this Agreement, are in settlement of disputed

claims and are not intended to constitute admissions for any purposes other than as expressly provided in this Agreement.

9. Each Party to this Agreement represents that the person executing this Agreement on its behalf has been duly authorized by that Party to execute this Agreement on its behalf.

10. Each Party acknowledges that it has had the benefit and advice of independent legal counsel in connection with this Agreement and understands the meaning of each term of this Agreement and the consequences of signing this Agreement.

11. This Agreement contains the entire agreement between the Parties to this Agreement, and all previous understandings, agreements, and communications prior to the date hereof, whether express or implied, oral or written, relating to the subject matter of this Agreement are fully and completely extinguished and superseded by this Agreement. This Agreement shall not be altered, amended, modified, or otherwise changed except by a writing duly signed by all the Parties hereto.

12. This Agreement shall be governed by the laws of the State of California.

13. This Agreement may be executed in counterparts,
each of which shall constitute an original.

Dated: March 25, 1997.

FRESNO MSA LIMITED PARTNERSHIP
Defendant

By Robert J. Gloistein
Robert J. Gloistein
Its Attorney

PHILIP ORTEGA
RICHARD KASHDAN
Complainants

By Richard Kashdan 3/26/97
Richard Kashdan
Their Attorney