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Decision 97-10-028 October 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Telecomm West,

Complainant,

vs.

GTE California, Incorporated,

Defendant.

Case 96-07-020
(Filed July 12, 1996)

ORIGINAL

Richard L. Miller, for Telecomm West, complainant.
James H. McPhail, Attorney at Law, for GTE
California, Incorporated, defendant.

O P I N I O N

Statement of Facts

Background

By the early 1980 period, the difficulty of ensuring that the unregulated customer premises equipment (CPE) marketing endeavors of General Telephone Company of California (General) in an increasingly competitive telecommunications marketplace would not be subsidized by ratepayers, led the Commission in Decision (D.) 84-07-108 to order that General should form a separate corporate subsidiary for the marketing, installation, and maintenance of all unregulated CPE, thus substantially segregating its facilities and resources between the unregulated subsidiary and the regulated operations.

Pursuant to D.84-07-108, GTE California Incorporated (GTEC), formerly General, established a wholly-owned subsidiary, GTEL, to market, install, and maintain all unregulated CPE, and GTEC and GTEL were required to operate their respective telecommunications services independent of each other. Thereafter, by D.86-08-056, a

modification of D.84-07-108 by the Commission allowed GTEL personnel to sell GTEC's custom calling network service at GTEL's phone marts. And by D.89-11-064, a further modification of D.84-07-108 allowed GTEC to conduct a pilot program combining its network sales activity with GTEL's CPE sales activities for GTEC's 44 largest banking industry customers. GTEC was also ordered to implement the Federal Communications Commission (FCC) affiliate transactions rules (identified in FCC Docket 86-111 for intercompany affiliate billing purposes), and the GTE cost allocation manual for the separation of costs between regulated and nonregulated activities, as part of this pilot program. By D.91-02-031, D.84-07-108 was further modified to allow GTEC to add its state and governmental agency customers to the pilot program. In 1993, D.93-07-040 approved a settlement agreement which allowed GTEC to implement expansion of the pilot program to add GTEC's major accounts (referred to as "GTE-1").¹ However, the decision also noted that the underlying premise mandating structural separation of the unit marketing CPE was to avoid ratepayer subsidization of such marketing, and that while there are mutual benefits available from coordinated marketing, it was the potential risks to *both* customers and competitors that led the Commission to caution in allowing joint marketing. GTEC was required to continue compliance with the Customer Proprietary Network Information (CPNI) procedures which require GTEL to obtain customer approval before it is given access to GTEC's database containing CPNI. The restrictions on staff transfers, including transfers of Network Applications Specialists, to GTEL, was to be continued.

Earlier, the FCC, by FCC Docket 86-79, 2 FCC Rcd 143, 161 (¶ 128), adopted November 29, 1986, had preempted the states from requiring either the Bell Operating Companies or independent telephone companies to establish subsidiary entities for the sale of CPE. However, the Commission had determined that although GTEC could merge its CPE subsidiary back into GTEC under the FCC order, the Commission remained free to require *nonstructural* safeguards with respect to GTEC's

¹ GTEC major account customers are those customers whose monthly bills exceed \$5,000.

CPE activities as long as such safeguards were not more stringent than those developed by FCC for the Bell Operating Companies. Accordingly, by Advice Letter 7690, GTEC sought Commission approval of nonstructural safeguards to use following its intended merger and/or integration of GTEC and GTEL. By Resolution T-15770 adopted December 18, 1995, the Commission approved the nonstructural safeguards and GTEC was ordered to apply accounting safeguards of the California Cost Allocation Manual. GTEC agreed to implement the same safeguards applicable to the Bell Operating Companies, which permit multiline business customers to restrict access to their CPNI by Bell Operating Company employees involved in sales and marketing activities.

Thereafter, late in 1995 GTEC combined the GTEC marketing force with the GTEL nonregulated business marketing force, which provided the origin for the present complaint. Under the integrated setup, in the area of interest here, GTEC operates a Branch Contact Center at Thousand Oaks, California, servicing primarily medium and large accounts, approximately 7,000 in number. GTEC asserts that the Center can take calls for service through an 800 number service call from its major or medium account customers, and whether the customer desires to change an existing circuit or add a new circuit, or any other service, the Center will take the order directly. The Center also takes orders from business account managers in the integrated GTEC sales force, regardless of whether it is network or CPE services desired. Information regarding the desired service is entered upon a data gathering form, whether by the Branch Contact Center personnel or by the sales and marketing field personnel. The Branch Contact Center personnel are available 8:00 a.m. to 5:00 p.m.; the business account managers are in the field much of the time.

The Present Complaint

Richard L. Miller does business as Telecomm West (Telecomm) in Palmdale, California, providing independent telecommunications consulting and contractor services for business and medical groups in the area. Over the years, Miller has claimed service problems with GTEC, and not being satisfied with the efforts of our Consumer Affairs Branch in addressing them, has filed the present formal complaint.

The complaint centers specifically upon problems Miller had during early 1996, problems assertedly stemming from the late 1995 integration by GTEC of its GTEC and GTEL sales and service functions. There also are allegations that incompetent and/or inadequately trained service personnel were dispatched on installations in which Miller was involved on behalf of a client.

Miller alleges that GTEC is exploiting its monopoly position to use integration to gain a competitive advantage in the marketplace for its nonregulated services. He states that prior to late 1995, before GTEC integrated its sales-service organization, Telecomm was able to place its orders through a GTEC Vendor Order Preparation Center which was staffed with relatively competent and responsive order clerks, and apart from occasional trouble with very technical orders, these order clerks did a "pretty fair job." But after GTEC integrated its regulated and nonregulated sales functions, Miller asserts that these people no longer were allowed to take and process Telecomm's orders. Miller asserts that for the larger proprietary accounts, such as his customer, Telecomm is now forced to place its orders for GTEC tariffed regulated equipment and service through Account Managers who are the exclusive point of contact for these "major accounts." As these Account Managers are in the field selling nonregulated equipment much of the time, there is delay in getting to them to place an order. Miller asserts that not only are these managers the very people with whom Telecomm must compete in selling nonregulated equipment, these managers always ask for proprietary information as to the customer's internal network configuration, information that is not necessarily relevant to the specific service being requested. This allegedly gives these managers an opportunity to solicit a customer who already has an agreement with an existing vendor for other unregulated equipment sales. In addition to the delay inherent in this new process, Miller also feels that these orders appear to be taking a back seat to the nonregulated competitive services that seem to be the focus of these managers' interest.

Miller also states that outages for some customers are frequent, that cable splicers are dispatched to diagnose data circuit trouble instead of trained data technicians, and that the cadre of highly trained and experienced technicians seems to

have disappeared in the Lancaster area. Miller further charges that GTEC's failure to mark circuits adequately makes it impossible for Telecomm to connect customer services behind the main point of entry.

The complaint asks that GTEC be required to make available a trained order entry group able to enter voice and data service orders in timely manner from customer-designated agents; that this group have no affiliation with GTEC's nonregulated sales group until GTEC ceases to be the sole provider of local services; and that the group not be distanced from customer agent contact through extensive use of voice mail. The complaint asks that only experienced personnel be assigned to jobs affecting business telephone customers, and that if Account Managers in the nonregulated side of GTEC's combined sales organization are to have access to customer account information, then competing telecommunication providers should be provided similar access to customer records.

The GTEC Answer

In its answer GTEC denied that it offered inferior service, although it conceded it had identified and remedied shortcomings with respect to product knowledge and training. GTEC denied that it exploits its monopoly services to gain competitive advantage, asserting that it acts in accord with FCC rules that govern enhanced services. It denied that it has schemed to gain inside knowledge of customer activity, and that under FCC rules with business accounts having more than over 21 lines, it can request permission to use certain information obtained from its customer records. GTEC stated its Branch Organization (which replaced the Vendor Order Preparation Center) has an integrated sales team of Account Managers, and that certain orders must be placed with a specific point of contact (i.e., Account Manager). It stated that it tries to establish fair and competitive installation intervals to expedite customer requests, and does not favor customers who have ordered GTEL nonregulated enhanced services.

GTEC asks that the complaint be denied as failing to state facts sufficient to state a cause of action.

Hearing

A duly noticed public evidentiary hearing was held in Los Angeles before Administrative Law Judge John B. Weiss on November 25, 1996. Complainant Telecomm's case was presented by Miller. Defendant GTEC was represented by counsel who presented the utility's evidence through three witnesses: Charles J. Pippin, section manager for the Lancaster Branch Contact Center; Pamela Laster, branch contact support staff representative; and Rebecca McCurdy, area manager of custom operations, Lancaster Area. Upon receipt of GTEC's posthearing brief on January 6, 1997, the matter was submitted (Telecomm did not file a brief).

Discussion

With regard to the integrated sales-service (GTEC-GTEL) function issue raised by Miller's complaint, GTEC's witness Pippin testified that since the 1995 integration, medium and large customer accounts (major account customers) are now indeed assigned to specific Account Managers. These are field personnel receiving a salary plus a commission on sales of either GTEC's regulated or nonregulated equipment. However, *all orders* for sales or service of either are processed through a Branch Contact Center. The Center is responsible for orders placed either directly by a customer to the Center, or by the integrated sales personnel Account Managers. The Center is available through an 800 telephone number, 8:00 a.m. to 5:00 p.m., and accepts all orders whether it is network or CPE services. Pippin stated that it is the *choice of the customer* whether to order directly to the Center or to go through an Account Manager, and that should a customer desire to circumvent a particular Account Manager, the customer can call the Center. Pippin stated that if a Center representative lacked expertise or knowledge on a desired application, the representative might refer the order to a particular salesperson. Both the Center and the Account Managers use the same standard time intervals to determine date of installation. Pippin was unaware of any internal rules or policies that prohibit these Account Managers (who have access to the GTEC customer account records) from soliciting a customer that already has an

agreement with an existing vendor. Before the integration, the GTEL sales representative did not have access to customer records, and thus no inside track.

In contrast to Pippin's testimony on customer direct access without going through an Account Manager, Miller states that in January of 1996, he discussed an order he proposed to place with Data Service Specialist Eugene Chi at the Center; that Chi was knowledgeable and able to handle the technical aspects, but when Chi became aware that Miller's client was a major account of GTEC, Chi refused to take Miller's order, stating that as a major account was involved, the order could be placed only through Bill Leonard, the Account Manager assigned to Miller's client's account.

While Miller's complaint mentioned these names and the specific allegations, and the issue centers on the respective rolls of Chi and Leonard, neither GTEC employee (the only percipient witnesses other than Miller to the situation) was brought by GTEC to the hearing. When asked why, GTEC's attorney's response was that Chi had not been subpoenaed. Pippin stated he knew Leonard, but that he had not discussed these allegations of Miller with him and thus could not verify whether or not Leonard and Chi had represented to Miller that such major account orders had to be placed through the Account Managers. Pippin did not even know who Chi was, although he has been the Center Section Manager since August 1995. Accordingly, we will credit Miller's account of what transpired in January of 1996 when he tried to place a major account order directly through the Center. Pippin did not know of training or instructions given to Account Managers. However, when asked about GTEC's *policy* where medium or large accounts are flagged as a major account, Pippin testified as follows:

"A. Well, what are they ordered to do talks about good sense and common judgment. What it does is it indicates that the account is assigned to a particular salesperson. In many respects what they'll do is simply verify or check with a salesperson a particular request for activity by way of either the engineer or by way of the customer.

"Q. What would they check?

"A. They could check Are you aware of this order activity? They could check and say Are you involved in this activity? Are you knowledgeable about this particular inquiry? Especially from a data oriented engineer.

"Q. Why would he feel that the account manager would have to be aware of an order that had already been resolved from the technical perspective and been identified as ready to order?

"A. In many cases it's done simply to eliminate any redundancy. In many cases just as part of over communication to make sure we're all talking specifically about the needs of the customer."

There was evidence that when an order is taken directly by Center representatives, the order is entered by computer (to the COP System if CPE equipment, or the Solar System if network). As the Account Managers have access through the computer to each order on their assigned major accounts, Miller questions why a Center representative must also telephone the Account Manager personally. Pippin testified that the objective is to provide "superior service." However, Pippin also conceded that the level of service in instances where the Center representative is technically competent on the matter would not become superior by diverting the order to the Account Manager.

The view to the customer or his vendor representative of diversions of directly placed orders from the Center to an Account Manager can be taken as a thinly veiled method of getting a GTEC salesman out to the customer to pitch that customer nonregulated products of GTEC to compete with what the customer or his vendor has tried to order through the Center.

In D.93-07-040 wherein we approved a settlement that allowed implementation of significant expansion of GTEC's pilot program to include major accounts, we stated our concern:

"While it can readily be appreciated that there are mutual benefits available from coordinated marketing, it is exactly the potential risks to customers, *as well as competitors*, that has led to caution in allowing such joint marketing ventures."

We are disturbed that a senior manager in direct charge of the Center testifies that "I see little or no risk from my perspective" under the circumstances brought to light in this case. When policy and the practice of individual employees are divergent, corrective steps are called for. We believe that GTEC management will take internal steps to adjust practices not in line with policy so that it will not be necessary for the Commission to consider nonstructural safeguard requirements to insure a level playing field.

Competition must be fair to all parties involved under the circumstances brought to light in this case. In the belief that GTEC management will take internal steps to adjust its policies to level the playing field, now that this situation has been aired, we will place no requirement officially that it do so at this time. If GTEC management fails to correct this problem, we note that PU Code Section 709.2(c)(2) forbids "unfair use of customer contacts generated by the local exchange telephone corporation's provision of local service" and will not hesitate to take action against GTEC if future actions violate this statute.

Turning next to the June 1996 frame relay port issue raised by the complaint, the relevant evidence shows that an order was placed on June 4, 1996, with Pacific Bell for an additional frame relay port on an existing frame relay cloud. This necessitated from GTEC a software designation of the private virtual circuit to establish a network interface between the respective Pacific Bell and GTEC frame clouds. But Pacific Bell dropped the ball and it was not until June 25, 1996, that Pacific Bell's Marshall sent Carson of GTEC the request for a software routing number of the private virtual circuit to establish a network interface between the respective Pacific Bell and GTEC frame clouds. Because of the then-lost June 21 due date, Pacific Bell asked for expedited handling. The following day in a conference call of Marshall, Miller, and Carson, Carson stated she would process the order on June 27, 1996, and expedite.

On June 27, 1996, Account Manager Ron Evans visited both Miller and the High Desert Medical Group, Miller's customer, to inform each that unless such orders were placed through him directly, the order could not be expedited. Here is another example of an intervention by an Account Manager even though the order was given to Carson in the Center, and she had all the information required. The Frame Relay Data

Gathering Form, dated June 29, 1996, lists Evans as the Author and the priority as "Normal." The Network Service Request Form prepared by Carson shows a due date ("D/D") as "7/8/96," and the date the order was received as "6/25/96." Interestingly, this is beyond the ten-day interval testified to by Laster as applicable to orders passed from Pacific Bell. Neither Evans or Carson were brought to the hearing, leaving Miller as the only percipient witness. The clear conclusion is that these visits by an Account Manager, after a routine order has been placed through the Center, cannot help but have a chilling effect on a vendor's customer relationship.

As matters developed, Carson's Network Service Request Form's "urgent-exp." bore fruit, and the software routing number was transmitted through Marshall to Miller on July 2, 1996. Unfortunately, it did not test, forcing Miller to contact various GTEC service functions successively without help, until early on July 3, 1996, when an Enhanced Product Group Technician was able to program it as it related to the specific network interface. Thus, despite the problems, Miller did get the service in eight days—within the nine-day GTEC frame relay interval for intracompany, and ten days applicable to Pacific Bell. Clearly, no negative outcome resulted from this example.

We turn next to Telecomm's complaint with regard to difficulties in connecting customers behind the minimum point of entry² because the GTEC identification tags on the respective circuits are at times missing. GTEC's witness McCurdy testified that their technicians are required to tag all circuits, and do so with a wire attached tag. While GTEC has the means to identify a circuit at the demark even if the tag is missing, vendors and others do not and must get a GTEC technician to identify a circuit, causing these others delay and expense. However, the demark may contain as many as 500 circuits, and necessarily is open to vendors, hospital and medical group staff, and others, and GTEC cannot guarantee what happens once it tags and leaves. If a couple of tags come off, McCurdy stated GTEC does not charge a

² Also termed as the "demark" (local loop demarcation point), the spot where GTEC transitions to the customer or the vendor.

customer for a visit to replace them; only if an entire demark must be rehabilitated does GTEC charge the customer.

Finally, Telecomm complained of untrained GTEC personnel being sent on jobs. In support of his allegations, Miller stated that late the night of June 5, 1996, GTEC cable splicers working nearby caused an outage to a Miller client by carelessly cutting-over a cable. Reported early the next day to GTEC, the utility dispatched two cable splicers untrained in digital circuit equipment who could not make the repairs, followed by a technician also unable to effect the repair. It was not until after 6:00 p.m. June 7, 1996, that repair was completed. Miller also referenced an outage at 3:30 p.m. March 4, 1996 (after a GTEC splicing crew worked nearby) which was referred to GTEC's "Care Center." They in turn referred the problem to Special Services whose representative had to be talked through a Fortel System test procedure which revealed reversed lines outside the GTEC central office. After a series of referrals, GTEC dispatched cable splicers back to the outside manhole to correct their error of the day before. By 9:00 a.m. the following day, the trunks were back in service.

GTEC witness McCurdy conceded that in the first instance of which Miller complained, cable splicers had been sent out on the enhanced service circuit problem, but stated that this was because the supervisor believed that construction persons may have caused a problem on the cable, thus possibly involving a physical problem rather than the data portion of the circuit. After it was ascertained that it was not a physical problem, a data technician was dispatched with cable splicers to work through the night so that the problem was corrected within 24 hours of the complaint.³ It was her testimony that while there have been some personnel changes, their technicians have no less than 25 years seniority. They do have people receiving special service training to broaden their skills. While frame relay technology is new to GTEC, the connections are not. McCurdy testified that they try to have business customers' troubles cleared as quickly as possible, and that generally outages for business customers average between

³ If service is out for more than 24 hours, GTEC's policy is to give credit for service time out.

four and eight hours. It is GTEC's position that it strives for zero outages, but such is not always the case, and where problems are discovered, it fixes them in a timely manner, giving out-of-service credit where appropriate.

Conclusions

While Telecomm's complaint indicates that through use of coordinated marketing GTEC may be exploiting its monopoly services to gain competitive advantage for its nonregulated services, federal preemption prevents the states from requiring subsidiary entities for regulated and nonregulated services, and leaves the states free only to require nonstructural safeguards. While GTEC has an integrated sales organization of Account Managers to handle network service order activity or terminal or CPE service order activity, there are distinct advantages to its major account customers in provision of a single source for these services.

But GTEC also offers these major account customers or their customers' consultant vendors the option of an 800 number by which any service offered by GTEC can be placed directly through a sales associate in Branch Contact Centers, such as the Lancaster Center. A customer can thus avoid going through an Account Manager. The same data gathering form is used by either the Center or the Account Manager, the same standard delivery intervals apply, and either can expedite where the circumstances merit. In the instances cited in this complaint, it appears that some GTEC Center sales associates (such as Chi) possibly were not made sufficiently aware of the customer preference policy. These actions, however, show no evidence of a pattern and appear as the error of individual sales associates. The Commission will rely upon GTEC management to make these Center personnel aware of the customer preference policy. By prior Commission decisions, we authorize competition in providing local exchange

telecommunications service within the territories of Pacific Bell and GTEC.⁴ With the coming offer of such services we do not believe it productive or desirable to at this time establish additional nonstructural safeguards.

Beyond the Account Manager issue, there has been no showing that GTEC did anything inconsistent with its tariffs, or that GTEC has treated Telecomm in a discriminatory manner. Outages, while they inconvenience business operations, unfortunately do occur. But here, repairs appear to have been completed within a 24-hour period following notification to the utility. GTEC's liability for damages arising out of mistakes, omissions, interruptions, delays, errors, or defects in any of the services or facilities furnished by it is governed by the provisions of its filed Tariff, CPUC No. D&R, 8th Revised Sheet 57, Rule No. 26.

For the foregoing reasons, we conclude that the complaint fails to state a claim for which relief should be granted. Accordingly, the complaint should be dismissed.

Findings of Fact

1. GTEC is a telephone public utility within the jurisdiction of this Commission.
2. In the increasingly competitive and deregulated telecommunications industry, with many services no longer subject to regulation, and to be reasonably certain that the nonregulated sector would not be subsidized by GTEC's ratepayers, in 1984 GTEC was required to form a separate corporate subsidiary for the marketing, installation, and maintenance of all unregulated CPE.
3. In compliance, GTEC formed a separate subsidiary, GTEL, to market, install, and maintain unregulated CPE.
4. In 1986, the FCC preempted the states from requiring establishment of subsidiary entities for the sale of CPE.

⁴ By D.95-07-054, D.95-12-056, and D.96-03-020, the Commission authorized facilities-based competitive local carrier services January 1, 1996, and competitive local carrier resale services effective March 31, 1996, for carriers meeting specified criteria.

5. By successive modifications to its initial 1984 order, to alleviate customer confusion the Commission permitted GTEC to develop and follow a pilot program combining its regulated and nonregulated network sales activities applicable to banking, then state and governmental agencies, and finally to major accounts, all with nonstructural safeguards primarily designed to prevent cross-subsidization by ratepayers.

6. Telecomm is engaged in provision of consultant and contract services in the telecommunications field to business and medical groups.

7. Prior to late 1995, customers and consultant-vendors could place orders for GTEC services of a regulated nature directly through GTEC's Vendor Order Preparation Center.

8. After integration in late 1995 of GTEC's regulated and nonregulated network sales functions, Telecomm experienced difficulty in placing its orders through the new Branch Center directly, finding GTEC major account order placements being diverted or referred to GTEC Account Managers assigned to specific major accounts, and concluded that GTEC was using its monopoly position to gain a competitive advantage in the marketplace by using customer proprietary information to these managers in order to pitch customers already with agreements with consultant-vendors, thus "chilling" the customer-vendor relationship.

9. Telecomm provided some evidence tending to show that by this use of Account Managers, GTEC has at least the potential to undercut third party independent consultant-vendors in their client relationship.

10. GTEC purports to have a policy of customer preference whether orders are placed through sales associates in its Branch Centers or through Account Managers where the customer is a major account.

11. If followed, GTEC's stated customer preference policy of accepting orders through the Center or through Account Managers should alleviate questions whether or not GTEC is using its monopoly position for the purpose of gaining competitive advantage in the marketplace.

12. There was no evidence that GTEC provided discriminatory treatment to Telecomm.

13. GTEC cannot be held responsible for removal of circuit markers at the demark by vandals, customers, vendors, or building personnel.

14. The delays caused by outages, while regrettable, are not unusual in the normal course of telecommunications business, nor are all utility personnel equally skilled or competent, and here GTEC personnel, with varied degrees of skill and ability, appear to have responded to the best of their respective abilities, and to have repaired the complained-of outages within 24 hours.

15. GTEC has not been shown to have violated its tariffs.

Conclusions of Law

1. Public Utilities Code § 1702 provides that complaint may be made by setting forth any act or thing done or omitted to be done by a utility, in violation or claimed to be in violation, of any provision of law or any Commission order. While the present complaint suggests or infers such violations, the evidence adduced at hearing shows that GTEC has acted in compliance with FCC requirements, Commission orders, and its filed tariffs as it is required to do, and has committed no violations.

2. The complaint should be dismissed.

O R D E R

IT IS ORDERED that Case 96-07-020 is dismissed for failure to support a cause of action.

This order is effective today.

Dated October 9, 1997, at San Francisco, California.

HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

I dissent.

/s/ P. GREGORY CONLON
President

I dissent.

/s/ JESSIE J. KNIGHT, JR.
Commissioner