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Decision 97-12-046 December 3, 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 Brittan Communications International Corp. (BCI) to determine whether it has violated the laws, rules and regulations governing the manner in which California consumers are switched from one long distance carrier to another.

ORIGINAL

I.97-04-045
(Filed April 23, 1997)

Jose E. Guzman, Jr., Ky E. Kirby, and Marcy Greene
for Brittan Communications International
Corporation, respondent.
Monica McCrary, for Commission Consumer Services
Division.

INTERIM OPINION

Background

On April 23, 1997, the Commission issued an Order Instituting Investigation (OII) into the operations, practices, and conduct of respondent, Brittan Communications International Corporation (BCI) and whether California consumers are switched from one long distance carrier to another without their permission. In the investigation, the Commission sought to determine whether respondent's operating authority should be revoked or whether other action should be taken to ensure the cessation of unlawful conduct. The OII alleges that respondent's sweepstakes marketing methods violate Public Utilities (PU) Code § 2889.5 and 47 C.F.R. § 64.1150, state and federal law governing changes in a subscriber's long distance carrier.

The Commission's order was based upon the preliminary results of the Commission Consumer Services Division's (CSD) investigation. The report included letters from customers and CSD declarations complaining that long distance service

was switched without customer authority. The investigation report provided probable cause that the alleged violations existed and that there was substantial likelihood of public harm from the alleged violations. Therefore, in order to prevent further harm to the public pending the outcome of the formal proceeding, the Commission prohibited respondent from changing a customer's primary interexchange carrier (PIC freeze) or selling its customer base until this proceeding is completed. However, the Commission directed that a limited hearing be held to allow respondent the opportunity to address two issues: 1) whether there was probable cause to continue the preliminary injunction throughout the proceeding; and 2) whether respondent should post a bond to ensure compliance with the final order in the proceeding.

The limited hearing was held on May 13 and 14, 1997. Concurrent briefs were filed on May 28, 1997. After the hearing, the parties agreed to reopen the proceeding to admit into evidence one late-filed exhibit, Exhibit 28. The case was resubmitted for a decision on August 14, 1997.

At the limited hearing, BCI contended there was no need for the OII because it has "deliberately" complied with verification law since January 1, 1997 before the OII was issued, and since that time has used names solicited in sweepstakes marketing for telemarketing purposes only. Second, BCI also argued that there is unintended harm from the preliminary injunction.

Basis for the Preliminary Injunction

CSD called 11 witnesses who testified that their long distance service was switched without their authorization during 1996. Although most of these witnesses indicated they received a full refund, however, they also indicated that these refunds were not easily obtained, required written requests, numerous telephone calls to different carriers and escalating the request to supervisory personnel, and involved a period of 60 to 90 days before refunds were provided.

CSD investigators presented other details of the investigation. As of February 5, 1997, the Commission received 128 customer complaints, 116 of which alleged abusive marketing practices. By March 18, this total was 158 with 140 attributed to abusive

marketing practices. The majority of these complaints were filed after October 1996. The complaints alleged that customers were switched to BCI's service without their knowledge or authorization. Customers indicated their service was switched based upon their entry into a sweepstakes to win a car or a trip. Customers complained that their rates were two to three times higher with BCI than with their previous selected carrier. Customers had contacted numerous underlying carriers before being referred to BCI and were unable to contact BCI directly because BCI's telephone number did not appear on the customer bill. In some instances the entry forms were signed by minor children or friends not authorized to change telephone service and not named as a customer for this service. BCI's agents did not perform any verification of a subscriber's desire to switch to their service or attempt to determine whether the requesting individual was the customer of record authorized to affect the change of telephone service. Based upon statistics regarding customer complaints to BCI's underlying carriers, CSD estimates that a minimum of 25,000-28,715 such complaints have been made.

Due to the number and nature of complaints, CSD believes BCI should have realized that its sweepstakes marketing was seriously flawed. Customer complaints indicated that customers believed they were entering a sweepstakes to win a car, not changing their long distance carrier.

CSD interviewed 53 complainants who filed complaints with the Commission who substantiated their written complaints. In addition, nearly half of these complainants indicated they did not know the person who signed the entry form (letter of agency) which allegedly authorized a switch in their service.

CSD also found from customer's bills that BCI sometimes charges \$2.92 per month for "LD Network," apparently its monthly access fee. The charge is not prorated and is not supported in BCI's tariffs effective at the time the fee was charged.

Company Operations

BCI's president and chief executive officer, Jim G. Edwards, has worked in the communications and electronics industry since 1975. During this period he was

employed by Heartline Communications in 1993 as general manager and director of sales and marketing. In this job, his primary task was to clean up regulatory problems with the Texas and Louisiana Attorney Generals. At that time Heartline was using a box program that did not disclose a change in long-distance service. Edwards added this language and after this revision, the Attorney General of Louisiana accepted the box program. Edwards' next job also involved marketing by the box program. However, that program incurred no regulatory challenges.

In 1994 Edwards established BCI, a long-distance reseller with three divisions: Learning Systems, including software with English as a second language provided to schools and literacy programs; Brittany Service which performs office functions for other companies; and, Brittan Oil & Gas International. BCI is authorized to sell long distance services in 39 states and actively markets in approximately 26 states. BCI has approximately 740 employees, with 240 located at its principal office in Houston, Texas. BCI has 40 full-time and 65 part-time employees in California.

BCI targets residential customers, based on Bureau of Census information, with annual incomes of less than \$24,000 per year because it believes that these customers represent 40% of AT&T, MCI, and Sprint residential markets with a basic rate plan, the highest rates. Edwards believes other competitors do not market specifically to these customers; therefore, BCI offers special "promotions" such as the new car sweepstakes solicitation.¹

BCI also contributes 2% of its gross revenues to 40 literacy and child advocacy charities nationwide and 6-10 similar charities in California. BCI believes these contributions influence customers to subscribe to their service.

In 1995-96, BCI had only one basic rate plan of 29 cents per minute for interstate calls at any time of the day, compared with 15-31 cents by AT&T, 29 $\frac{3}{4}$ by MCI, and

¹ CSD reports in its Comments on the Proposed Decision that BCI admitted after the hearing in a subsequent data request that this information is in error and these customers were not targeted in California.

26 ¾ by Sprint. However, AT&T, MCI, and Sprint offered special discount rates based upon a customer's calling pattern.

Sweepstakes Marketing

BCI conducts advertising by the "box" and "clipboard" programs, radio, television and newspaper ads and billboards. BCI conducts box programs in all 26 states where it conducts marketing. In BCI's newspaper ad in San Diego at the end of 1996 it opposed slamming.

Edwards believes that sweepstakes marketing sends three messages: change your long distance service, win a free new car and give back to your community via BCI charity programs. The box program displays the picture of a new car on a cardboard box in grocery and other stores with entry forms and a slot in the box for completed forms. Under the picture is the solicitation: "WIN A NEW CAR." Below this wording, in print roughly one-third smaller is the declaration: "CHANGE YOUR LONG DISTANCE PHONE SERVICE AND ENTER TO WIN A FORD CONVERTIBLE." The entry forms have lines for a date, name, address, and telephone number with a declaration at the top that allegedly authorizes a change to BCI's long distance telephone service.

The clipboard program is one where BCI sets up a booth at public gatherings, such as flea markets, shopping malls, or festivals. Banners are displayed which state: "Change Your Long-Distance Service and Win a Free Car." The same entry forms as in the box program are provided by a BCI employee who makes a personal solicitation to members of the public.

Edwards testified that BCI ceased to use the entry forms from the box and clipboard programs for switching service effective January 1, 1997. Instead, the names obtained from these programs are used as lead sources for telemarketing. Edwards believes inaccurately completed sweepstakes forms are rejected by BCI's computer system. He denied that BCI changes service without written authorization.

Thrd-party Verification

Unsatisfied with existing verification methods, in late 1996 BCI developed its own verification system to comply with PU Code § 2889.5, effective January 1, 1997.

Edwards estimates that BCI has invested over ½ million dollars in developing their third-party verification system to be used in California. Prior to this change in the statute, the statute could be satisfied by a written authorization from the customer to change the service.

Robert W. Taylor, BCI's director of regulatory affairs and corporate counsel, and Lynn A. Evans, BCI's director of information services, described this system under a sealed record due to the proprietary nature of these details. BCI is using this system in Texas for residential changes in service, but the system is not yet operational in California. Edwards testified that BCI gave a full refund to California customers switched in error in 1997 without third-party verification.

Edwards testified that it does not benefit from customers who do not want its service. According to Edwards, BCI loses money when it has to return customers to another carrier and such acts and customer complaints damage its reputation in the industry and the morale of the company employees.

Edwards believes that "no-fault" PIC dispute contract terms are the standard requirement of local exchange carriers. Edwards does not agree that over 25,000 PIC disputes are recorded against BCI, as CSD's report indicates, because BCI has not had the opportunity to review its records.

BCI Complaint Procedures

Evans described BCI's procedures for customer billing and inquiries. The local exchange company bills from rates provided by BCI and the duration of calls supplied by underlying carriers to BCI. Evans testified that the day, evening or night designation on the customer bill is the format used by the billing agent, not one dictated by BCI.

Kevin M. Sullivan, BCI's call center director, explained that customer complaints are routed through its billing agent who has contracted with the local exchange company. The local company requires that the billing agent's telephone number appear on the customer bill. The billing agent transfers a customer to BCI when such a request is made. However, until March 15, 1997, USBI, BCI's billing agent, handled 40 percent of these calls because it took longer than 20 seconds to connect them with BCI. USBI

simply informed a complaining customer that their service was switched pursuant to a sweepstakes form. Prior to the same date, USBI determined how to interact with BCI customers. In 1997, after customer complaints about USBI's treatment, BCI decided to renegotiate its contract with USBI to transfer all customer complaints to BCI, which is the present policy.

BCI's policy in 1997 toward a customer who disputes a switch to BCI service is to answer all questions quickly and honestly, offer a dissatisfied customer a rerating of charges plus a \$10 switching fee. Since a carrier may not initiate PIC change orders for another carrier, BCI cancels the customer's service at BCI and instructs the customer to reconnect with their preferred carrier. The customer has the capability to make long distance calls until they select another carrier. If a customer is not satisfied with this offer, they are transferred to the quality assurance department where a full refund can be considered.

On cross-examination, Sullivan admitted that forty percent of customer complaints are regarding the switching of service. Eighty percent of these calls are from customers who do not remember authorizing a switch in service. The majority of them indicate they did not intend to switch their service. The quality assurance department handles roughly 90 percent of these customer calls, which translates to roughly 10 percent of all customer calls. Even though a customer may dispute the intent to switch service at the time it completed the sweepstakes entry form, BCI categorizes such a switch as "authorized."

Unintended Harm

Edwards believes the PIC freeze causes three different categories of harm: morale, competition, and financial. Edwards believes the company's contributions to charities boosts the morale of BCI employees and that these contributions are in jeopardy if BCI's business operations are hampered in California, as he believes they will be due to the injunction. Edwards estimates that all California employees would be laid off if the restriction continues, plus 74-79 employees in corporate offices.

Caroline Fischer, testified that BCI contributes to Court Appointed Special Advocate (CASA) Programs throughout the country. She is employed with this child advocacy program in San Francisco and aware of BCI contributions to such programs in San Diego, Los Angeles, and Houston.

Edwards testified that the company has had 62-63,000 customers PICed away by other long distance companies in a two-week period early this year compared to the normal 2,500-2,800 customers per month. This event plus the mandatory PIC freeze has allegedly caused a 66% loss of revenue in California, with a 27% overall loss since California is 40% of BCI's total business revenues.

Edwards expects BCI's loss to increase if it is unable to compete in one of the country's biggest markets. However, if the PIC freeze is lifted, Edwards believes the company will recover from the competitive PICs.

Edwards believes one factor was not considered when the PIC freeze was ordered. BCI has only one location in California where a customer may request its service, Los Angeles.

Probable Cause to Issue Preliminary Injunction

The Commission has previously imposed PIC freezes on carriers that were allegedly engaged in slamming. Investigation of Cherry Communications, I.95-10-007; Investigation of Communications TeleSystems International (CTI), I.96-02-043; and Investigation of Heartline Communications, Inc., I.96-04-024.

In CTI (1996) Decision (D.) 96-05-050, the Commission stated that a finding of probable cause to institute a preliminary injunction must be based upon specific articulable facts that, considered in the light of the totality of the circumstances, show some objective manifestation that the entity accused may be involved in unlawful activity. (At p. 8, citing People v. Souza (1994) 9 Cal. 4th 224, 231.) We also articulated two ways in which a respondent may challenge such an order. First, a respondent may show that probable cause for the order was lacking due to flaws in the evidence

presented. Second, respondents may show irreparable harm, or harm beyond that contemplated by the Commission when the prohibition was ordered.

At the limited hearing, CSD presented substantially the same information that it presented to the Commission at the time the order instituting investigation was issued in this proceeding. Then, as now, these facts constitute the specific articulable facts required to establish probable cause that BCI is engaged in unlawful behavior and that legal restraint is required to assure no further public harm pending the completion of this proceeding.

BCI challenges this probable cause with the facts and argument that the acts it committed in 1996, switching customers' and noncustomers' long distance service based upon a completed sweepstakes entry form, were lawful and, effective January 1, 1997, it is no longer engaged in these acts. Whether BCI engaged in unlawful acts in 1996 is the crucial matter in dispute and BCI only challenges the lawfulness of the acts, not whether they were committed. Thus, the facts forming the basis of the probable cause for this investigation and preliminary injunction remain unchallenged. The lawfulness of the acts will be determined in due course in this proceeding.

The argument that BCI has now changed its behavior does not exculpate it from sanctions for committing the acts or those of its agents should they be found unlawful.

Sufficiency of Evidence to Cancel or Modify the Preliminary Injunction

Essentially, BCI argues that there is no longer a need for restraints on its activities since it has instituted new policies effective January 1, 1997. In doing so, BCI asks the Commission to trust the company to retain these policies and commit no further acts which provide probable cause to believe further violations are occurring. We find this proposition troubling for a number of reasons.

BCI did not change its policies regarding sweepstakes marketing or customer complaints until nearly two years after significant numbers of customers complained. BCI's underlying carriers recorded in 1995 and 1996 increasing numbers of customer complaints from over 7% to 19%. (Exh. 15, p. 14, Table 4.) This data gave notice that

there was a serious problem, which took BCI two years to address. This period of response time is unreasonable.

At the limited hearing, BCI expressed its intent to continue to use marketing practices, the box and clipboard programs, which customers testified misled them and attracted unauthorized behavior of noncustomers and minors. The names derived from these solicitations will now be subject to verification and/or telemarketing. However, we are not told whether further solicitation will occur. CSD accurately points out that we have incurred problems with undefined telemarketing techniques. It is not reasonable to blindly trust such methods.

BCI's chief executive officer believes that providing a blank copy of a letter of agency to a customer satisfies the requirement of PU Code § 2889.5 to provide a "signed" copy of any document purporting to change long distance service. He also believes that BCI may engage in triple-purpose solicitation even though PU Code § 2889.5 clearly requires that the "sole purpose" must be to change long distance service. While the legality of these acts has yet to be determined, it is not reasonable to entrust the protection of the customer's right to select its own long distance carrier to a company with this caliber of judgment.

We cannot determine without further evidence whether BCI's thirty-party verification program meets the "independent" third-party verification requirements of PU Code § 2889.5 since it is located at the address of an affiliate (which BCI alleges is unrelated) and operated by the brother of the president of BCI.

We cannot agree with BCI's representation that it may run afoul of PU Code § 2889.5 by asking a customer to request its service directly from the local exchange carrier. We fail to understand how this violates the law.

Impact of the Preliminary Injunction

BCI raises numerous arguments related to its alleged weakened financial condition and potential loss of revenues because of the preliminary injunction. BCI alleges the preliminary injunction will, if the current decrease in revenue continues, cause it to close its business in California. BCI also argues that the stigma associated

with the PIC freeze will undoubtedly damage BCI for quite some time. We find these arguments untenable since a portion of these revenues may be derived from unlawful solicitations and unfair competition which we have probable cause to believe exist and/or existed. Should this occur, the cause will be BCI's actions, not those of the Commission. Since BCI relies largely on sweepstakes marketing for new customers, it is expected that when these programs cease, revenues may decline significantly. However, our restrictions do not prevent BCI from engaging in other types of marketing that do not involve BCI making carrier initiated PIC changes.

BCI alleges that the preliminary injunction has unintended effects because the Commission was not aware that BCI has only one location where the customer may specifically request BCI service. BCI believes the allegedly two-month time to acquire a CIC code in other locations is unreasonable and itself will cause an irreparable decline in business. This allegation is purely speculative and ignores other methods of marketing available to BCI.

Accordingly, we must conclude that BCI's showing in support of canceling or modifying the preliminary injunction is inadequate.

Bond Requirements

The fact that BCI is providing full refunds to nearly all complaining customers leads us to believe the posting of a bond will not be necessary to provide additional customers this relief should it be necessary. In addition, the amount of the bond is unascertainable.

Proposed Decision

A Proposed Interim Decision in this proceeding was filed and mailed to the parties for comment in accordance with PU Code § 311 and Rule 77.1 of the Commission's Rules of Practice and Procedure. The parties filed timely comments on this Interim Decision. While any reargument of positions has been rejected, we have made the minor changes and corrections suggested by the parties. We reject BCI's request to cancel the issuance of this decision because a settlement is pending. Minor changes and corrections suggested by the parties have been made.

Findings of Fact

1. BCI, respondent, was authorized to provide interLATA and intraLATA long distance telephone service in California by D.95-09-043 on September 7, 1995.

2. On April 23, 1997, the Commission issued an OII into the operations, practices and conduct of respondent to determine whether it switched customers to its service without their permission, warranting revocation of its authority to operate in this state, or other sanctions.

3. Investigation from 1995 to 1997 by the Commission CSD shows continuous customer complaints that their long distance service was switched without their authorization or their intent to authorize such a change. CSD estimates the total number of customer complaints and possible unlawful switches to be a minimum of 25,000 to 28,715.

4. Many customers complain that they are not acquainted with the person signing a purported authorization to change long distance service. Some customers complain that their service was switched upon the purported authorization of a minor child in their household.

5. Customers who complain of an unauthorized change in long distance service also complain that BCI's bill was substantially higher than those of their selected carrier.

6. Customers indicate that while refunds were provided upon their complaints of an unauthorized switch in service, these refunds were not easy to obtain and some took 60 to 90 days.

7. Based upon CSD's initial investigation, the Commission concluded that there was substantial likelihood of harm to the public because of alleged unlawful practices by BCI.

8. At the time the order instituting investigation was issued in this proceeding, the Commission concluded that probable cause existed to impose restrictions on BCI pending completion of this proceeding.

9. The Commission prohibited respondents from submitting PIC changes to local exchange carriers in California and transferring or selling customer subscription.

10. The Commission set a limited hearing on May 13, 1997 to permit respondents to address the restrictions and show cause why they should be modified or vacated pending completion of the proceeding.

11. At the limited hearing BCI presented evidence intended to show that the restrictions were not warranted and caused unintended and substantial harm to the company, its reputation and its employees.

12. BCI has engaged in sweepstakes marketing in California by means of the box and clipboard programs since it began operations in California in 1995.

13. CSD presented the testimony of ten customers who claimed that they had been switched to BCI's long distance service without their knowledge or intent or authorization.

14. CSD staff witnesses presented the results of its preliminary investigation of BCI which showed continually above average customer complaints regarding the unauthorized switch in service and subsequent higher rates and considerable effort and delay in obtaining refunds.

15. BCI's evidence shows that it changed its agents, policies or practices regarding the switching of service roughly two years after customers began to complain about unauthorized switching.

16. Without further investigation, BCI's evidence of imminent implementation of a third-party verification program fails to demonstrate that this program complies with state law.

17. BCI presented evidence intended to show a loss of revenues in California and the likelihood of greater losses.

18. BCI has failed to show that it is harmed in a manner not contemplated to result from allegations constituting probable cause to believe it engaged in unlawful activity.

19. BCI has failed to produce sufficient evidence to warrant the cancelling or modifying of restraints ordered on April 23, 1997.

Conclusions of Law

1. The investigation conducted by the Commission CSD provides sufficient specific facts that, considered in the light of the totality of the circumstances, provide some objective manifestation that BCI may be involved in unlawful activity.

2. The unauthorized switching of a customer's long distance carrier is a violation of public interest which outweighs the profit interest of a carrier and should be prevented pending a completion of this proceeding.

3. BCI has not met its burden to produce sufficient evidence to show that the Commission's preliminary injunction was unwarranted or should be modified or vacated.

4. BCI's ability to add new customers through means other than carrier-initiated PIC changes is unaffected by this decision.

5. BCI is liable for the acts of its agents.

INTERIM ORDER

IT IS ORDERED that the preliminary injunction established on April 23, 1997 in the order instituting investigation in this proceeding shall remain in effect pending a final order in this proceeding.

This order is effective today.

Dated December 3, 1997, at San Francisco, California.

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